

Hawk. Larimore, did you speak to me when you saw me, or endeavoured to stay me?

Lar. replied, That he was for that time so amazed, that he could not speak to me.

Hawk. My Lord, I think he is still in great Amazement.

Hawk. Was my House the first, or the only House you searched?

Lar. replied, No.

Hawk. If you saw me commit the Robbery in your House, why then did you search other Houses for the Goods which you saw me steal?

Lar. replied to this, That he had been robbed at several other times.

Hawk. Why did not you then rather send out Hue and Cries to apprehend my Person, than to search my House; and why did not you charge me with flat Felony before Sir *Richard Pigott*, of whom you had your Warrant, if you saw me rob you.

Lar. to these Questions made no direct Answer.

L. C. B. Mr. *Hawkins*, will you ask *Larimore* any more Questions?

Hawk. No, my Lord, not at present; but when I come to my Defence, I hope I shall be heard.

L. C. B. You shall be heard at large, and so shall they.

Hawk. I humbly thank your Honour.

Clerk. Ass. Larimore, who shall be next called?

Lar. Call *Henry Larimore* the younger.

Clerk. Crier, call *Henry Larimore* the younger: who answered, Here, Sir.

Marshal. Lay your Hand upon the Book, look upon the Prisoner.

Hawk. My Lord, may I be heard a Word?

L. C. B. Yes Sir, you may go on.

Hawk. I humbly thank your Honour.

Hawk. My Lord, is it usual to admit Persons that are not Baptized to give Evidence upon a Trial of Life and Death? for that Person which is now about to be sworn (I suppose) is not Baptized.

L. C. B. Sir, a Person that is not Baptized may be sworn, and give Evidences, in Cases of Felony.

Hawk. My Lord, I submit, but am not fully satisfied in it, and if occasion be I shall crave Counsel in that Point, it being Matter of Law, and not of Fact.

L. C. B. The Jury may consider of it.

Hawk. My Lord, I doubt not but they will weigh of what Validity the Oath and Evidence of such a Person is.

Mar. Larimore the younger, Lay your Hand upon the Book, look upon the Prisoner.

The Evidence that you shall give to the Court, between our Sovereign Lord the King and the Prisoner at the Bar, shall be the Truth, the whole Truth, and nothing but the Truth. So help you God. Kiss the Book.

Larimore Jun. My Lord, upon the 18th of September, I came home a little after my Father, and coming in the Yard, I saw this Mr. *Hawkins* (that is now at the Bar) run out of my Father's House, with a great Bunch of Keys in his Hand, and run down my Father's Yard, and hid him-

self in a Close with Beans and Weeds; and when I came into my Father's House, I asked him what Mr. *Hawkins* did there: He answer'd me, that he had done too much there, for he had robbed him.

L. C. B. What Day of the Week was it?

Lar. Jun. It was upon a Friday.

L. C. B. In what Year was it?

Lar. It was this last September, my Lord.

L. C. B. Will you ask him any Questions?

Hawk. Yes, my Lord, if I may be permitted.

L. C. B. You may proceed to your Questions.

Hawk. I humbly thank your Honour.

Hawk. Larimore, are you sure that I am the Person which you saw run out of your Father's House?

Lar. Yes, I am sure that you are the same Person that I then saw run down my Father's Yard.

Hawk. What time of the Day was it when you saw me?

Lar. It was an Hour and an half before the Sun was down.

Hawk. Was your Father within when you came there?

Lar. He was within when I came there, and I asked him as aforesaid.

Hawk. Did your Father say no more to you, than what you have related? and did not he enquire which way I ran, or went?

Lar. He said no more, but that you had robbed him.

Hawk. My Lord, and you of the Jury, Is it likely, that when the Father had seen me commit a Robbery in his House, and the Son coming in immediately upon it, that the Father would not ask of him which way I went?

Hawk. My Lord, I have done with him at present.

Lar. Sen. My Lord, pray let *Joan Beamsly* be called next.

Clerk. Crier, call *Joan Beamsly*.

Crier. Joan Beamsly. She answer'd, Here, Sir.

Joan Beamsly, Lay your Hand upon the Book, look upon the Prisoner, *The Evidence that you shall give shall be the Truth, &c.*

Joan Beamsley. May it please your Honour, my Lord, upon Friday the 18th of September last past, about an Hour and half before Sun-set, as I was going to Milking in the Street (near *Larimore's* House) I met *Henry Larimore* the younger, and being at that time much troubled with the Tooth-ach, I told him of it, desiring him to help me to some hot Water, for I believed that might give me Ease; *Larimore* reply'd, that if I would go with him to his Father's House, he would help me to some: So going both together, we saw this Mr. *Hawkins* (that is now the Prisoner at the Bar) run out of *Larimore's* House, with a great Bunch of Keys in his Hand, and run down *Larimore's* Yard into a Close of Beans and Weeds, and there hid himself; and when we came into *Larimore's* House, I there heard young *Larimore* ask his Father what Mr. *Hawkins* did there; *Larimore* told his Son that he had done too much there, for he had robbed him. [When my Lord Chief Baron *Hale* heard how these three Witnesses agreed in their Evidence, he said, Here is enough sworn (if believed) to hang twenty Men.]

Hawk.

Hawk. I doubt not but to clear my self, notwithstanding their Evidence, if I may be heard.

L. C. B. You shall be heard.

Hawk. I humbly thank your Honour.

L. C. B. Larimore, have you any more Witnesses?

Lar. Yes, if it may please your Honour, a great many more.

L. C. B. Who are they? call them.

Lar. Call *Richard Mayne*, Constable.

Clerk. Crier, call *Richard Mayne*, Constable; who answer'd, Here, Sir. And being sworn, said as followeth.

Mayne. My Lord, upon *Saturday* the 19th of *September* last past, came *Henry Larimore Sen.* to me, and giving me a Warrant from *Sir Richard Piggot* to search, commanded me (amongst others) to search *Mr. Hawkins* for some Money and Goods, which he had lost; and when I saw his Warrant, I went to *Tho. Beamsly*, Tithingman, and charged him, with three or four others, to assist me; and coming to *Mr. Hawkins's* House, he denying to open his Doors, I broke them open, and I went into his House, and *Henry Larimore Sen.* did find in a Basket this Gold Ring, and Five-shilling-piece of Silver (*Mr. Hawkins* himself being by whilst he found them) so we had him before *Sir John Croke*, who committed him to Prison, and so on *Sunday Morning* we brought him to *Aylesbury*. This also was sworn by *Dodsworth Croke*, Esq; *Tho. Beamsly*, and young *Larimore*.

L. C. B. said to me, Will you ask these Witnesses any Questions?

Hawk. Yes, my Lord, if I may be permitted.

L. C. B. You may go on to your Questions.

Hawk. I humbly thank your Honour.

Hawk. *Mayne* Constable, did *Larimore* desire you to search my House alone, and did he then tell you, that he saw me rob him the Day before?

Constable. *Larimore* did desire me to search several Houses, but did not say to me that he saw you rob him.

Hawk. Where is the Warrant upon which you broke upon my House? I desire to see it.

Const. Here it is.

Hawk. Was it *Larimore* himself that found the Ring and Five-shilling-piece?

Const. It was *Henry Larimore* the elder that found it.

Hawk. Was I in the same Room when he found them?

Const. You were in the same Room when he found them.

Hawk. This was proved false, by *Mr. Charles Wilcox* and *Nicholas Faulkner*, which Persons kept me in the Hall, whilst they pretended to find them in the Buttery.

Hawk. Constable, why did you compel me to go before *Sir John Croke*, which you knew was my Adversary?

Const. We did not force you before him.

Hawk. This I proved to be so, by *Michael Reed*, Gent. *Mr. Tho. Saunders*, *Mr. Wilcox*, *Mr. Goulder*, *Robert Casmore*, and many others that saw it.

Hawk. Constable, why did you advise the Jaylor, *Mr. Burch*, to load me well with Irons?

Const. I did not advise him to do so.

Hawk. Pray, my Lord, ask the Jaylor, *Mr. Burch*, what the Constable said to him when he brought me thither.

Clerk. *Mr. Burch*, inform the Court what the Constable said to you, when he brought *Mr. Hawkins* to you as a Prisoner.

Jaylor. My Lord, when the Constable delivered *Mr. Hawkins* to me on *Sunday Morning*, he said, that *Mr. Hawkins* was a notorious Pick-lock, and that he was confident he could pick every Lock about the Prison, and therefore he advised me to watch him narrowly, and load him well with Irons.

Thomas Beamsly being sworn, his Evidence being the same in Effect with the Constable's, for Brevity sake I omit; but I craved leave to ask him a Question or two, which being granted, were as followeth.

Hawk. Beamsly, Pray what Discourse had you with *Mr. Wilcox* upon the 19th of *September*, presently after my House was broken up, concerning the time when (as your Brother pretended to you) he lost the Ring and Five-shilling-piece of Silver?

Beamsly. He did not remember that he had any Discourse with *Mr. Wilcox* about that.

Hawk. Did you not say to *Mr. Wilcox*, that your Brother *Larimore* told you that he had lost the Stone Ring, and Five-shilling-piece of Silver, which (as he pretended was found in my House) before the difference began betwixt me and your Brother; and moreover that your Brother said he had an intent to search for the same a Month before?

Beamsly replied, that he did not remember any such Discourse.

Hawk. My Lord, may I be heard a Word or two?

L. C. B. You may go on.

Hawk. I humbly thank your Honour.

Hawk. My Lord, I suppose that I can prove these Particulars.

1. That *Larimore* told *Beamsly* that he had lost this Gold Ring and Five shilling-piece of Silver now in Question, before there was any difference between *Larimore* and my self, which began in *Michaelmas Term* 1667. This was proved by *Mr. Wilcox*.

2. And that *Larimore* confess'd upon his Oath before *Sir John Croke* (upon the 19th of *Sept.*) when I was committed, that he lost the said Ring and Piece of Silver about a Month before, which must be about *Aug. 19*. This was proved by *Mr. Brown*, *Faulkner*, and others.

3. I can prove that *Larimore* told *Sir Richard Piggot*, when he went for his Warrant to search, that he did suspect several Persons for robbing him of this Gold Ring and Five-shilling-piece, and that I was only one of the suspected Persons. This *Sir Richard Piggot* did acknowledge to be true.

But now he swears that he saw me steal the Gold Ring and Five-shilling-piece out of his House on *Friday* the 18th of *September*, an Hour and half before Sun-set, 1668.

Hawk. I pray, my Lord, and you that are of this Jury, take notice of this, and compare the times out of his own Mouth; but more of this when I come to make my Defence.

L. C. B. Larimore, have you any more Witnesses?

Lar.

Lar. Yes, my Lord.

L. C. B. Call them, who are they?

Lar. Call *Margaret Larimore*.

Clerk. Crier, call *Margaret Larimore*, the Wife of *Henry Larimore*.

Crier. *Margaret*, the Wife of *Henry Larimore*. She being sworn said, that, when she was a Servant to *Larimore*, which now is her Husband, she had seen Mr. *Hawkins*, at several unseasonable Hours in the Night (when her Master was in bed) lying lurking in and about her Master's House, Yard, Windows, and Doors, and said, that she believed he lay there for no good Intent.

Hawk. My Lord, may I ask this Woman a Question or two?

L. C. B. You may do so, if you please.

Hawk. I humbly thank your Honour, I'll promise you to be brief.

Hawk. At what time was it, *Margaret Larimore*, that you saw me lurking in your Master's Yard as you have said?

Marg. Lar. It was in the Night-time.

Hawk. But how long may it be since?

Here Larimore prompts his Wife, which I told my Lord, for which he checked him.

Marg. Lar. I can't tell, it might be about the time that my Master was robbed.

Hawk. Did you speak, or call to me, when you saw me there?

Marg. Lar. No, for I was affrighted at it. This same was also sworn by *Richard Mantill*, alias *Miles*, Son-in-Law to the said *Larimore*, and also by *William* his Son, which for brevity sake I omit farther to relate.

L. C. B. *Larimore*, have you any more?

Lar. Yes, my Lord, to prove that this Ring and Five-shilling-piece is mine.

L. C. B. Call them, who are they?

Lar. Esq; *Dodsworth*, Sir *John Croke's* eldest Son, and Mr. *Good*, Minister of *Long Crendon*, my Lord.

Clerk. Crier, call *Dodsworth Croke*, Esq; and *Edward Good* of *Long Crendon*, Clerk: both answer'd, Here, Sir. They both being sworn, Mr. *Dodsworth Croke* said as followeth, (taking the Ring in his Hand, turned it up and down, and looked very narrowly upon it within and without, and put it upon his Finger, and pulling it off several times in the Face of the Court and Country, he then inform'd my Lord) That he was confident, that this was *Larimore's* Ring; and for his Proof and Credit, tells the Court that he had pawned it to *Larimore*.

Mr. *Good* took the Five-shilling-piece into his Hand, and swore, that he being at *Buckingham* Sessions last, about some Trouble which I had put him to, he then wanting some Money, did pawn a Five-shilling-piece to this *Larimore* for other Money; and he desiring of him to take care that he had the same Piece again, *Larimore* told him that he put a Mark upon it: So seeing a Mark upon this Five-shilling-piece, he swore that he did verily believe that this was the same Five-shilling-piece which he had pawned to *Larimore* at the Sessions before.

L. C. B. said to me, Sir, if you will ask the Witnesses any Questions, you may.

Hawk. I humbly thank your Honour for that Freedom; but I do humbly conceive that the proving of the last point, viz. that the Ring and Five-shilling-piece was either *Larimore's* own

Goods, or pawn'd to him, is not much material to my Case; for I am free to confess (as much as I can have ground to believe) which is, that *Larimore* might have the Ring and Five-shilling-piece of Silver in his Possession; but the Charge against me is, that I stole them from him, which I do flatly deny, and do not doubt of clearing my self when I come to my Defence, if I may be heard.

L. C. B. Sir, you need not question but you shall be heard.

Hawk. I humbly thank your Honour, and crave leave to be heard a Word or two (if it be not unseasonable.)

L. C. B. You may go on.

Hawk. May it please your Honour, and the Jury, to take notice that Mr. *Good* swears he believes this to be the Five-shilling-piece that he pawned to *Larimore* last Sessions at *Buckingham*, but I desire to know if *Larimore* swears that this is that Piece which Mr. *Good* pawned then to him, for he best knows.

L. C. B. *Larimore*, what say you to that?

Lar. My Lord, I do swear that this is the same Five-shilling-piece which Mr. *Good* pawned to me, the last Sessions at *Buckingham*.

Hawk. Then, my Lord, and the Jury, be pleas'd to observe, That Sessions was held upon the 9th and 10th of July, 1668, but the Difference between me and *Larimore* (for Tithes) was begun in *Michaelmas-Term*, 1667, which is near nine Months before that Sessions; and notwithstanding *Larimore* did say to his Brother *Beamsly*, upon the 15th of September, that he had lost this very Ring and Five-shilling-piece of Silver before the Difference began, which is impossible, my Lord, as appears by the Oaths of *Larimore* and Mr. *Good*; for how could he be robbed of that Five-shilling-piece nine Months before he had it? And that he did say the very Words to his Brother *Beamsly* we have already proved, by the Testimony of Mr. *Wilcox*.

L. C. B. said, Mr. *Hawkins*, was this Suit for Tithes begun by you against this *Larimore* before the time that *Larimore* swears this Felony was committed?

Hawk. Yes, my Lord, for I began that Suit for Tithes in *Michaelmas-Term*, 1667, and *Larimore* swears that I robb'd him upon the 18th of September, 1668, which is, my Lord, about a Year after. My Lord, it is an easy way thus for the Fanaticks to pay Tithes; if they can but hang up the Clergy, they may cease all their future Pleading for Liberty of Conscience.

Now *Larimore* began to stumble, and shew his Malice in prosecuting me unjustly, by his multiplying of feigned Felonies, wherewith he did then endeavour to load me, of which I appeared innocent.

L. C. B. *Larimore*, have you any more?

Lar. Yes, my Lord, Pray call *John Chilton*.

Clerk. Crier, call *John Chilton*.

Crier. *John Chilton*: who answered, Here, Sir; and being sworn, my *L. C. B.* said to him, Come *Chilton*, what can you say to this Business?

John Chilton said, My Lord, I can say nothing but that I am paid for my Boots.

L. C. B. What Boots?

Chilt. My Lord, I am paid for my Boots.

L. C. B. Our Business is not now about Boots, but however, come and tell me what thou meanest by them?

Chilt.

Chil. My Lord, Mr. *Hawkins* brought me a pair of Tops, to put new Legs to them, which I did; and he coming by my Shop, told me he wanted his Boots; I reply'd, they were done: But I being then about to go out, did promise Mr. *Hawkins* to lay them in my Window, so that he might take them as he went home, which accordingly he did; and when I came home, I went to Mr. *Hawkins*, who at that time was at Sir *John Croke's* House, where he contented me for my Work before we parted: And this is all that I can say, my Lord.

L. C. B. What is this to the purpose? Can you say any more, *Chilton*? If you can, go on.

Chil. My Lord, Mr. *Hawkins* paid me honestly for the Boots: But as soon as he began to demand the Tithes of *Chilton*, and did sue for them, then they lay at me Night and Day to have me charge Mr. *Hawkins* with flat Felony, for stealing the said Boots out of my Shop; but I told them, that I laid them in my Shop-Window for him, and did bid him take them as he came back; and he paid me for my Work, and therefore I cannot say he stole them.

L. C. B. Who were they that desired you to charge Mr. *Hawkins* with the stealing of your Boots?

Chil. This *Larimore*, Mr. *Dodsworth Croke*, *Richard Mayne* the Constable, *Miles* and *John Sanders* (who is since dead, my Lord.)—*Larimore* here interrupted *Chilton*, and said, My Lord, I have five or six Witnesses that can prove that all this is false which *Chilton* hath sworn.

L. C. B. Call them, for I'll hear all, if I sit 'till Night.

Then *Larimore* call'd *Dodsworth Croke*, *William Croke*, *John Stop*, *Thomas Welch*, *Samuel Salter*, and *William Sanders*; all these being sworn, the Sum and Substance of their Evidence was to this Effect.

That they had heard *John Chilton* say that I had stolen a pair of Boots from him, to which *Chilton* (being then upon Oath) said, that Mr. *Hawkins* did no otherwise than what before I have sworn; and he further added, that he never said that I had stolen any thing from him, for he had no reason for it.

L. C. B. Did this *Larimore* desire you to charge this Mr. *Hawkins* with Felony? And when did he desire you to do so?

Chilton. My Lord, *Larimore*, and the rest that I have named, desired me to charge Mr. *Hawkins* with flat Felony, for stealing the said Boots, as soon as he demanded the Tithes of *Chilton*; and they would have forced me to fetch a Warrant from a Justice of Peace to search for them, and did further threaten me, in case I would not do it, that Sir *John Croke* would indict me at the Assizes, as one accessory to the stealing of my own Goods.

L. C. B. Was *Larimore* one of them?

Chilton. Yes, my Lord, and he said, that he would make me swear that Mr. *Hawkins* had stole my Boots, and for that End did serve me with a *Subpena* to be here.—Here *Larimore* the second time interrupted *Chilton*, and said, My Lord, this Fellow (pointing at *John Chilton*) is hired by Mr. *Hawkins* to swear this.

Chilton reply'd, No, my Lord, I am not hired by Mr. *Hawkins* to swear, but I might have

been hired, or borne out, if I would but swear that Mr. *Hawkins* stole my Boots, by one *Croxstone*.

L. C. B. How! what is that! hired, or borne out to swear? By whom, and how? Tell me the Story.

Chilton. My Lord, I am not hired to swear by Mr. *Hawkins*, but if I would swear that he stole my Boots out of my Shop, I might have been borne out in so doing. For *Tho. Croxstone*, of *Weston on the Green*, in the County of *Oxon*, told me upon *Monday* last, it being the 8th of *March* 1668, that if I would but swear what he would have me against Mr. *Hawkins* (*viz.* that he stole my Boots) he would bear me harmless; but I replied, that it went against my Conscience to do it. I added farther, that if I should be so wicked as to swear it, Mr. *Hawkins* can prove the contrary by Mr. *William Croke* and others; to which *Larimore* replied, that I need not fear what Mr. *Croke* knew in that case, for he is one of us, and will not justify any thing that may tend to our Prejudice. I farther told him that I durst not do it; for if I should, Mr. *Hawkins* might make me fly the Country, as *Smart* did *Wheeler*: To which *Croxstone* replied, that if I would swear it, he would bear me out against the said Mr. *Hawkins* as far as an Hundred Pound would go, and if that would not do, as far as Five Hundred Pound would go.

L. C. B. How! bear you out to swear! What *Croxstone* is this that would do so? This is not likely to be true.

Tho. Croxstone said, My Lord, I said no such thing.

L. C. B. I do not believe it to be true.

Chilton run in, and said, As I live and breathe, my Lord, *Croxstone* did say, if I would swear that Mr. *Hawkins* had stole my Boots, he would bear me out, as I said before, and if I made any doubt of it he would give me Bond to make good his Promise.

L. C. B. said, This is strange.

Croxstone. My Lord, I said I would bear him out in speaking the Truth, and no otherwise.

Hawk. My Lord, may I be heard?

L. C. B. Yes, you may go on.

Hawk. I thank your Honour. My Lord, pray let me ask Mr. *Croxstone* two or three Questions.

L. C. B. So you may, go on.

Hawk. Mr. *Croxstone*, do you confess that you did promise to bear out *Chilton* (as you said before) in swearing the Truth?

Croxstone. Yes, Sir, I did, and no otherwise.

Hawk. Was it not about the Boots?

Croxstone. Yes, Sir, it was so.

Hawk. Did not you desire *Chilton* to swear that I had stolen his Boots, after that he had told you I had paid him for them, and thereupon promise to bear him out against me, in 100 or 500 l.

Croxstone. I think you cannot prove it against me.

Hawk. I pray, my Lord, and you of this Jury, consider that this *Chilton* is one of *Larimore's* Witnesses, and swears for the King, yet he swears that he had given me Orders to take those Boots, and that I then paid him for Legging of them, and that he had repeated this to *Larimore* and *Croxstone* several times; and after all this, *Larimore* and *Croxstone*, with others, us'd their utmost

Endeavours to persuade *Chilton* to charge me with Felony for stealing them, and *Croxstone* promised him to bear him out in so doing, as far as 100 *l.* would go, and if that would not do, as far as 500 *l.* and give him Bond for his Security, &c. My Lord, if this amounts not to a Subordination, I am mistaken. But, my Lord, I have two Witnesses more to prove the same against Mr. *Croxstone*; and I pray that they may be heard.

L. C. B. Who are they?

Hawk. *Aim Scoly*, and *John*, the Son of Mr. *Tho. Sanders*. Both these being called, justified in Court what *Chilton* had sworn against Mr. *Croxstone*: Upon which my Lord Chief Baron said to *Croxstone*, Come, you did ill to solicit Persons to swear these things which you knew were false; and 'tis farther added, that this made not for the King, but rather for the Prisoner at the Bar. After all this, a rude Fellow (*Thomas Welch*) came in, and said, My Lord, I did hear *Chilton* say, that Mr. *Hawkins* had stole a pair of Boots from him.

L. C. B. What, more Boots still? Come, *Larimore*, have you any more?

Larimore said, Yes, my Lord, one Mr. *Boyce*; who being sworn, said, That at a certain time, he coming into a House at *Chilton*, found this Mr. *Hawkins*, now the Prisoner at the Bar, and one *James Noble* (which *Noble* was then drunk, and asleep upon a Bed) and I saw Mr. *Hawkins* have his Hand in *Noble's* Pocket, and the said *Noble* told me, that at that time he lost a Gold Ring and a piece of Gold out of his Pocket.

L. C. B. said to me, Sir, what say you to that?

Hawk. My Lord, I desire to know if there be any Bill or Indictment against me for it.

Clerk. There is none, my Lord, that I do know of.

Hawk. I desire, my Lord, that *Noble* may be sworn, if he be here.

Lar. He is not here, my Lord.

L. C. B. Why was not that *Noble* here himself to prosecute?

Lar. I could not find him, my Lord.

Hawk. I desire to know whether *Boyce* came hither of his own Accord, or if he be *Subpœna'd* to be here; (if so) by whom, and who bears his Charges?

Boyce. I was *Subpœna'd* by *Larimore*, and he bears my Charges, my Lord.

Hawk. How long was it since, Mr. *Boyce*, that you saw my Hand in *Noble's* Pocket, as you said before?

Boyce. It may be near two Years ago, my Lord.

Hawk. Did you see me pick (or take) out of the said *Noble's* Pocket, the said Ring, or piece of Gold, or any thing else?

Boyce. I saw your Hand in *Noble's* Pocket, but did not see you take any thing out of it.

Hawk. Did *Noble* ever tell you, that I had pick'd his Pocket of the said Ring, or piece of Gold, or any thing else?

Boyce. No; but said, he lost them at that time.

Hawk. But you say that *Noble* was drunk at that time, and if so, it's possible he might be mistaken.

Boyce. So he was drunk, and asleep likewise.

L. C. B. I think you were all drunk.

Hawk. *Boyce*, you might have done well, to have told Mr. *Noble* of this, when he told you that he had lost his Ring and piece of Gold; but can you say any thing touching *Larimore's* being robb'd, or do you know that I am the Person that robb'd him?

Boyce. No, not I, my Lord, I cannot charge him.

Hawk. But you say that *Larimore Subpœna'd* you to be here, and that he bears your Charges?

Boyce. Yes, my Lord, and so he does.

Hawk. Mr. *Boyce*, if this be all you can say for *Larimore*, you will hardly requite his Charges.

Hawk. My Lord, may I be heard, as to the Evidence of *Boyce*?

L. C. B. You may go on.

Hawk. I humbly thank your Honour.

Hawk. This *Boyce* swears, my Lord, that about two Years last past he saw my Hand in *Noble's* Pocket, and that *Noble* told him, he then lost a Gold Ring and a piece of Gold. My Lord, I think (with Submission to your Honour and the Court) I am not bound to answer to this Charge, because there is no Indictment exhibited against me for it, nor is *Noble* himself here to prosecute, or can *Boyce* swear that I pick'd *Noble's* Pocket, or that *Noble* ever told *Boyce* I did (as he himself swears.) But, my Lord, I observe in this the Malice of *Larimore's* Heart, as well as in that of the Boots; for *Boyce* swears that he can say nothing to *Larimore's* Bill of Robbery, and yet he forces him to come from *London* hither, to start a senseless Story about *Noble's* Ring and Gold, which is of near two Years standing. My Lord, if there had been any Truth in it, why was not *Noble* himself here to prosecute it? And why did he let it rest so long? I say again, my Lord, if it had been true that I had pick'd *Noble's* Pocket, and if *Larimore* had known it, I pray, my Lord, and you of the Jury, what had that concern'd *Larimore*? But, my Lord, I am as clear of pick-ing *Noble's* Pocket, as I am of stealing *Chilton's* Boots, and as clear of both these, as I am of robbing this Fellow *Larimore*, that now calls my Life in question: Nay, if he can fairly prove me guilty of one, I am willing to suffer as guilty of all.

My Lord, I am bold to appeal to your Honour whether it be a fair Prosecution in *Larimore*, to stir up *Chilton* falsely to charge me with Felony in stealing his Boots, when I had not only a Right in them, but also Leave from him to take them, and paid him for his Work, which *Larimore* himself knows. Nay, my Lord, if I had never paid *Chilton* for his Legs, the Tops being mine, by Law it had not been Felony, but a Trespass, because I had Leave from him to take them, and a Right in them, the Tops being mine. And again, my Lord, I appeal to your Honour, whether it be fair in *Larimore* for him to ride up and down City and Country, to bring a Multitude of Witnesses together that can say nothing to his Bill (as *Boyce* swears he cannot;) If this doth not discover Malice in a Prosecutor's Heart, I know not what doth; and if that appears to your Honour and the Jury, to be in him, how far that ought (as well by Law as Equity) to frustrate his Evidence, I am willing to leave to your Honour and the Jury, and so I have done as to *Boyce's* Evidence.

L. C. B.

L. C. B. Larimore, have you any more?

Larimore. Yes, my Lord, *John Cox*, and *Francis Lucy*. They being both sworn:

John Cox said, My Lord, I being in *Mr. Hawkins's* Company not long since, one asked him, how he thought to come off at the Assizes: *Mr. Hawkins* reply'd, he cared not much for this Plot (tho' he should be Convicted) for they could but burn him in the Hand for it, and that he could bite out.

Lucy being sworn, said, that he heard *Mr. Hawkins* confess, that he owed *Larimore* 15 s. but because he had dealt so unjustly with him, he would make it cost *Larimore* fifteen times 15 s. before he would pay him.

L. C. B. said, This makes little to the purpose.

Come, *Larimore*, Have you any more?

Lar. I think not, my Lord.

L. C. B. If you have any more Witnesses, call them, and they shall be heard, and do not say, when I am gone, that your Witnesses could not be heard.

Lar. My Lord, I confess they have been fully heard, and I have no more to say.

L. C. B. said to me, Sir, you have heard the Indictment against you, and the Evidence to prove it; you have heard the Charge, now say what you can for your own Defence, and you shall be heard.

Hawk. I humbly thank your Honour; and I hope, my Lord, because the Evidence is large, I shall have the more time allowed me to make my Defence; and if so, I doubt not but fully to open this Conspiracy.

L. C. B. Do not fear that; for as they have been heard at large, so shall you likewise (God forbid else.)

Hawk. I humbly thank your Honour, and do promise to be as brief as conveniently I can: And as I intend to offer nothing but the naked Truth, so I will say no more (if I am not misinform'd) than I can prove to be true. And, my Lord, because it may seem necessary for me to offer many Things by way of Defence, in answer to so great a Charge; to save time, I pray that it may not be expected by your Honour, or the Jury, that I should call Witnesses to prove every Particular: But when I offer such Things as are most material, if either your Honour, or the Jury, be not fully satisfied touching the Truth of such material Points, I do humbly pray, that I may be called upon to prove them; for when I am not called upon for Proof, I shall, under Favour, my Lord, take it for granted that I am believed. And for Method herein, if I may have leave, I do intend this.

1. In General; to shew how improbable it is, that I should be guilty of this Robbery, and also deliver some Hints to move the Court and Jury to question whether this Prosecutor (*Larimore*) was robbed at all, or no.

And 2dly, More particularly to examine the Evidence, as to Matter of Fact.

L. C. B. Go on, Sir, to your Defence.

Hawk. May it please your Honour, and you of this Jury, I begin with the first part of my Defence, which is to hint how unlikely it is, that I should be guilty of robbing this *Larimore*.

1. *Larimore* is generally known to be a notorious Anabaptist, and an Enemy to the Church of England, and a Hater of the Ministry in ge-

neral; but more particularly, he is most envious and malicious against myself, because I sued him for Tithes, and caused him to be indicted for not coming to Church, or Baptizing his Children: For which Reason his Malice against me hath appeared notorious several Ways, as, amongst others,

1. By dissuading all that owed me any Money, not to pay me.
2. By his inducing those to whom I owed Money, to Arrest and trouble me.
3. By dissuading those that I sued for Tithes, not to agree with me; he promising them, that *Sir John Croke* and himself would force me to run the Country ere-long.
4. By his continual tormenting, and vexing me with his false Arrests, and illegal Indictments.
5. By his constant Endeavour to dissuade my Friends from any ways relieving me, or mine, in my greatest Wants and Necessities, advising them to starve us.

My Lord, and this Jury, if your are not fully satisfied in any of these Particulars that I have alledged, I am ready to prove them; but if this be granted, they are no doubt sufficient Arguments to prove the Malice of his Heart. Again, I say, that it is no ways possible that *Larimore* was robbed at all; and of this Opinion are most of his Neighbours round about him, as may appear by this Certificate, which followeth.

WE do humbly Certify, That *Henry Larimore* of *Chilton*, in the County of *Bucks*, Labourer, is a notorious Anabaptist, an Enemy to the Church of England, and a perfect Hater of all Ministers of the same, but in particular, most Inveterate and Malicious against *Robert Hawkins*, Clerk, late Minister of the Church of *Chilton* aforesaid; for that he doth not only seek and design utterly to ruin the said *Mr. Hawkins* himself, but makes it his Business, and daily Practice, to instigate others to do the like, and for no other Cause, as he hath often confessed himself, but for that the said *Mr. Hawkins* hath caused him to be Indicted for not coming to Church, and sued him for Tithes: And we do verily believe, and are fully satisfied in our Consciences, that the said *Mr. Hawkins* is not at all guilty of the pretended Felony, in stealing the Ring, and piece of Silver, which the said *Larimore* hath charged him with, but that it is meer Contrivance inchoated, and set on foot by the said *Larimore*, *Sir John Croke*, and others, on purpose to revenge themselves. And we do also believe, that the said *Mr. Hawkins* is a very honest Man, and that he is a very able Minister, and a true and faithful Labourer in God's Word, and never heard that he was ever suspected in the least of Felony, 'till this Malicious Prosecution, which is by the said *Larimore*, and others, whom the said *Mr. Hawkins* sueth for Tithes,

Witness our Hands, March 8, 1668.

| | |
|--------------------------------|-----------------------------|
| <i>Michael Read</i> , Gent. | The Widow <i>Paverell</i> |
| <i>William Read</i> , Gent. | <i>Robert Sanders</i> |
| <i>Mrs. Bulstrode</i> , Widow. | <i>Christopher Flinton</i> |
| <i>Mr. John Bulstrode</i> | <i>John Mortimer</i> , sen. |
| <i>John Turner</i> | <i>Mr. John Daniel</i> |
| <i>Joseph Parsons</i> | <i>Mr. John Clarke</i> |
| <i>Nicholas Faulkner</i> | The Widow <i>Clare</i> |
| <i>Mr. William Bulstrode</i> | <i>William Landsdell</i> |
| <i>John Chilton</i> | <i>William Bouden</i> |

H h h h z

John

| | |
|------------------------|--------------------|
| John Newman | John Golder |
| Thomas Coles | John Newton |
| The Widow Newman | William Collet |
| Robert Barlow | John Beckley |
| Theophilus Sanders | Richard Kemp |
| John Sanders | The Widow Acreman |
| John Mortimore, jun. | Robert Flint |
| Mr. Henry Golder | William Beckly |
| Mr. Thomas Sanders | Robert Hicks |
| Mr. Henry Lovell | John Barney |
| Mrs. Lovell, Widow. | Robert Steele |
| Owen Gibson | Stephen Toms |
| Mr. Tho. Sanders, sen. | Robert Willet |
| Robert Casmore | William Neighbour |
| Edward Farvice | Will. Chittle |
| Thomas Green | Henry Parker |
| Edward Barker | William Ash |
| John Grace | John Golder, jun. |
| John Freeman | William Golder |
| Richard Carr | William Tipping |
| John Carr | Richard Goodwyn |
| John Acreman | John Bosley |
| Thomas Whyte | Moses Collings |
| Thomas Ludet | Roger Carr |
| The Widow Meades | John Cato |
| Richard Toms | William Hayward |
| Joseph Nero | Edward Hollyman |
| Richard Low | Abraham Quelch |
| John Cullledge | John Pymm |
| Richard Waude | John Carter |
| Theophilus Hinton | William Toms |
| Edward Clarke | Robert Budd |
| Jeffery Hart | William King |
| Richard Budd | Cadwalider Crawton |
| John Budd | William Ash |
| Thomas Higgs | Thomas Whyte, sen. |
| Roger Gye | Thomas Whyte, jun. |
| Robert Coxhead | David Turner |
| William Hitchcock | Jonathan Hand |
| John Powel | John Young |
| Luke Turner | John Bedford |
| Richard Badger | John Norcutt. |

By this Certificate, which you see subscribed with above an Hundred Names, wherein many others (for brevity sake) are omitted, altho' I made no use of it upon my Trial; yet the World may see what an Opinion *Larimore's* Neighbours had concerning him, and his (pretended) Robbery; which Certificate I have for that Purpose here inserted.

2. It is not likely that *Larimore* was robb'd, because he did not declare it to his Neighbours immediately, which doubtless he would have done, had any such thing befallen him.

3. Nor is he certain (as to the time,) when he was Robbed.

For 1. He told his Brother *Beamsly*, that he had lost the Ring and Five-shilling-piece (in Question) before there was any difference between him and I: As may appear by this Certificate, under Mr. *Wilcox's* own Hand, which is as followeth.

TH E S E are to Certify all whom it may concern, that Thomas *Beamsly* of Chilton, *Titchingman*, told me, Charles *Wilcox*, of Long *Credon* (upon September 19, in the 20th Year of his Majesty's Reign, An. Dom. 1668) That the Five-shilling-piece of Silver, and the Stone-ring, which *Larimore* pretended he found in Mr. *Hawkins's* House, were both lost before there was any difference

between the said *Larimore* and the said Mr. *Hawkins*; and he further added, that his Brother *Larimore* told him, that he had an intent to search for the same Ring and Five-shilling-piece, above a Month before he did. This I can, and will depose, whensoever I shall be thereunto required.

Witness my Hand
Octob. 1, 1668.

Charles *Wilcox*.

By this Certificate, it appears (by *Larimore's* own Confession to his Brother *Beamsly*) that he had lost this Ring, and Five-shilling-piece, before there was any difference between him and I; and seeing I began my Suit for Tithes in *Michaelmas* Term, 1667, against him and others, as it is well known to the Inhabitants of *Chilton*, (and also may appear by the Records of the Exchequer.)

This is the first time, that *Larimore* said he had lost the Ring, and Five-shilling-piece.

And that this is false, must needs appear, by what Mr. *Good* and *Larimore* have already sworn in open Court, viz. that Mr. *Good* pawned the Five-shilling-piece to *Larimore* at *Buckingham* Sessions last, (which Sessions were held upon the 9th and 10th of *July*, 1668.) which is near nine Months after the difference began.

And moreover, *Larimore* confessed upon his Examination before Sir *John Croke*, when I was Committed, (which was upon the 19th of *September*, 1668) that he had lost the Ring and Five-shilling-piece a Month before, which must (consequently) be about the 19th of *August*, 1668. And if so, how is it possible that he could have lost them before the difference began betwixt us, which was above ten Months before?

3. He now swears in open Court, that he saw me steal the said Gold Ring, and Five-shilling-piece of Silver, out of his House, upon *Friday* the 18th of *Sept.* 1668, (precisely) an Hour and half before Sun-set; all which times being compared together, can no ways be possible; for which, I dare appeal to all that hear it. Nor is it likely, in case he could prove that he was robb'd (which I am confident, he never can) that I am the Person that robbed him; as may appear upon these considerations, amongst others.

1. Is it likely that I should commit a Robbery in my own Parish, (in the day time) where all that saw me must needs know me, and at the House of such a Person as this *Larimore* is, that had solemnly swore (but a little before) that he would take away my Life, as may appear, by what his Son said to *Anne Scholy*?

2. Is it probable, that if I were Guilty, I would not have made my Escape, having twenty four Hours time, and four or five Hours notice after they first attempted to search my House? Or that in all that time, I could find no better place, to conceal a Ring, and Five-shilling-piece, than in a little Basket with two or three Eggs, (which all that time was hanging upon a Pin.)

Again, if *Larimore* saw me rob him upon the 18th Day of *Sept.* 1668, (as he swears he did) why did he not then secure me? He swears I ran away, why did not he send out Hue and Cries, to discover, and apprehend me? But the said *Larimore* was so far from doing it, that he

never

never declared it to any of his Neighbours, nor to the Constable, when he commanded him to search, as may appear as well by the Search it self, (in that they searched other Houses before they searched mine) as by the Constable's Oath, who swears, that *Larimore* said not any thing to him, that he had seen me rob him, nor did the said *Larimore* declare it to Sir *John Croke*, for if he had, Sir *John* (no doubt) would have inserted it in the *Mittimus*, which he hath not done; Nor did he declare it to Sir *Richard Pigott*, from whom he fetch'd his Warrant to search, as may appear by the Contents of it. Whereupon, my Lord Chief Baron *Hale* calling to the Constable for the Warrant, (which being deliver'd) the Judge (himself) immediately espied, that the said Warrant bore date a Day before the Robbery was committed; which when my Lord observed, he asked *Larimore* if he fetch'd this Warrant to search for this Ring and Five-shilling-piece; to which *Larimore* replied, he did; and then my Lord asked *Larimore* upon what Day he was Robbed, he replied, upon *Friday*, the 18th of *September*, 1668.

L. C. B. How comes it then to pass, *Larimore*, that the Warrant bears date the 17th Day, and you swear, that the Prisoner at the Bar did not Rob you till the 18th Day? This is likely to be true.

Larimore to this replied, that he was robbed at several other times.

Hawk. (My Lord) may I be heard a word?

L. C. B. You may go on.

Hawk. I humbly thank your Honour. And I hope the Jury will take notice how *Larimore* hath ensnared himself, by the date of the Warrant, which my Lord first discovered. And whereas *Larimore* replies, that he was Robbed at several other times, he may have credit, (but by those only that can believe all that he hath said and sworn;) For he saith that he was robbed before he and I differed, which must be before *October*, 1667, and he told Sir *John Croke* likewise (when I was committed) that he was robbed of the foresaid Goods but a Month before, which must needs be about the 19th of *August*, 1668, but now he swears in Court, that he saw me steal these Goods on *Friday*, the 18th of *September* 1668, which must needs be impossible, that I should rob him at three several times of the same Ring and Five-shilling-piece; and besides this, it is improbable, that he should be robbed before, *October* 1667, and again in *Aug.* 1668, because he never declared any of these Robberies to any Person, before the 16th of *Sept.* 1668, upon which Day, he and Sir *John Croke* concluded upon this Conspiracy, as hereafter we shall make appear; And moreover *Larimore* (himself) confessed even now, that he fetch'd this Warrant to search for this very Ring and Five-shilling-piece (which now he denies.) By this, all may see, how notoriously he contradicts himself.

L. C. B. said to *Larimore*, Thou art very cunning, to be provided with a Warrant, a day before you was robbed. It seems you knew upon the 17th day, that you should be robbed on the 18th day, and also, that this Person (now at the Bar) should Rob you. Surely, you can Divine. Here the People began to cry out shame on *Larimore*.

L. C. B. said to me, Sir, but if you were in-

nocent of this Robbery, why did you refuse to open your Doors, or to have your House Search'd?

Hawk. My Lord, I had several Reasons, that moved me so to do.

1. In General, most of those Persons, that were present, were my inveterate Enemies, and several of them had threatned to ruin me, and my Family; and therefore, I had reason to suspect, that they came to injure me, either in my Possession, or Goods; For the first, Sir *John Croke*, and *Larimore*, had often threatned to pull down my House, and for that end, had hired several Persons to make a Forcible Entry upon it, and particularly, they had lately hired *Jaires* the Son of *Leonard Styres* of *Thame*, (in the County of *Oxon*) by a Ladder to climb up, and run down my Chimney, and open my Doors, when we were all Abroad: And about the same time they also contracted with one *Christopher Tyler* of *Chilton* for the same purpose. And 2. I feared the seizing of my Goods by the said Persons, because they had then a Writ of *Levary* (or Execution) to seize them, which *Larimore's* Son had a few days before in part executed, and he was then present; And if these reasons are not sufficient, I have more to justify my act, in refusing to have them search my House, which was all (my Lord) I ever denied, for I then declared my self willing that Mr. *Sanders* the other Constable, (he being then at the next Door) might charge whom he pleased, and search as narrowly as he could.

L. C. B. said, Mr. *Hawkins*, can you prove what you have said?

Hawk. Yes, my Lord; which Particular shall I prove?

L. C. B. Prove that about the Ladder, if you can.

Hawk. I pray, my Lord, call *John Acreman*: He being called, did fully justify what I said concerning their intended Forcible Entry, and added farther, that he did help to set up the Ladder for that purpose, being called by Sir *John Croke's* own Sons, they and *Larimore* standing by all that time to watch. And touching the second Particular, concerning the seizing of my Goods, Mr. Sheriff himself can justify, that they had then in their Hands such a Writ: (my Lord) he is in Court, if your Honour please to call him.

And for the 3d particular, that I shewed my self willing that Mr. *Sanders* should search, I can prove (my Lord) by these Witnesses following, viz. *Michael Reed*, Gent. Mr. *Thomas Sanders*, Mr. *Henry Golder*, *Robert Casemore*, Mr. *Charles Wilcox*, and several others that were present. My Lord Chief Baron hearing these Reasons fully proved, commended my Discretion, in not opening my Doors; and he added further, that he should have done as much himself, saying it was a foul business; and the Judge (then looking towards Sir *John Croke* with an angry Countenance,) said to me, Sir, is this Sir *John Croke* concerned in this business?

Hawk. If it may please your Honour (my Lord) with permission, I suppose that Sir *John Croke* is deeply concerned in this Conspiracy, and I doubt not but to make it appear to the World, (if I may be heard.)

L. C. B. You need not fear that, for you shall have time; go on.

Hawk.

Hawk. I humbly thank your Honour; and I crave leave to call two Witnesses, viz. Mr. *Charles Wilcox*, and Mr. *Samuel Brown*; both these being called, Mr. *Wilcox* said, If it may please your Honour, my Lord, upon *Friday* the 18th of *September*, 1668, I was at *Larimore's* House in *Chilton*, (from Noon till it was near Night) with *Larimore*, a driving of some bargain about Tiles, and other things; and, my Lord, Mr. *Hawkins* was not at *Larimore's* House all that Afternoon, nor did I hear any thing at all then, that *Larimore*, was robb'd, which (my Lord) I must needs have done, if he had been robbed that Afternoon, for I was there.

L. C. B. At what time came you to *Larimore's* House, Mr. *Wilcox*? take heed what you say.

Wilcox, Before Noon, my Lord.

L. C. B. Mr. *Wilcox*, how long did you stay there?

Mr. Wilcox. Until it was near Night, my Lord.

L. C. B. Was *Larimore* with you all that time?

Mr. Wilcox. Yes, my Lord, for we were about to bargain for some Tiles, and other things.

L. C. B. Are you sure that it was upon the 18th of *September* that you was at *Larimore's* House?

Mr. Wilcox I am sure, my Lord, that it was upon the 18th of *September* that I was there, and the Day before Mr. *Hawkins's* House was broke open.

L. C. B. What Day of the Week was it upon?

Mr. Wilcox, It was upon a *Friday*, my Lord, and Mr. *Hawkins's* House was broken open on the next Day, it being *Saturday*.

Lar. It was upon *Thursday*, my Lord, that Mr. *Wilcox* was at my House, it was not upon that Day that my House was robb'd, but the Day before.

Sir Ralph Perney replied, No, no, *Larimore*, it could not be on the *Thursday*, that Mr. *Wilcox* and you were together at your House, for that was the 17th Day of *September*, and that was the Day you was busied in fetching your Warrant from *Sir Richard Pigott*.

L. C. B. It is well observed, Sir, and so he was, and therefore it could not be on the *Thursday* that Mr. *Wilcox* was with him at his House.

Sir Richard Pigott replied, I am sure (my Lord) that *Larimore*, and that Fellow the Constable, were both at my House upon the 17th of *September*, as my Warrant testifieth.

L. C. B. At what time was it, Mr. *Wilcox*, when you came that Day from *Larimore's* House?

Mr. Wilcox. It was about Sunset, my Lord, for it was dark, by that time I got to my House at *Crendon*.

L. C. B. How far is it from your House at *Crendon*, to *Larimore's* House?

Mr. Wilcox. It is about a Mile and half, my Lord.

L. C. B. Were not the ways bad at that time?

Mr. Wilcox. No, my Lord, the ways were very good.

L. C. B. Did not you stop, or stay, or meet with some body by the way that might hinder you?

Mr. Wilcox. No, my Lord, I went a good pace, it being near Night, my Lord, I was afraid of being benighted, and yet it was dark by that time I got home.

L. C. B. You that are of the Jury, do you know this Mr. *Wilcox*, of what credit is he?

Jury. We have known him a long time, and we know no harm by him.

L. C. B. He looks with an honest Face, and you *Larimore*, do you know what that honest Man, Mr. *Wilcox*, says? do you know him; and did you ever see him at your House?

Lar. Yes, my Lord, I know him well.

L. C. B. *Larimore*, do not you remember that he was at your House on *Friday* the 18th of *September*, 1668?

Larimore replied, No, my Lord, sure it was not upon that Day that I was robbed.

My *L. C. B.* *Hale* replied, *Larimore*, No, in my Conscience thou say'st well, for it seems you were not robbed upon the same Day, that you have sworn you saw the Prisoner at the Bar commit this Robbery.

Hawk. My Lord, or upon any other Day, (as I do verily believe.) And here many of the People cried out, that they believed as much.

L. C. B. If that Man Mr. *Wilcox* speaks true, then all is false that *Larimore*, his Son and Sister, hath sworn, &c.

Come Mr. *Hawkins*, said my Lord Chief Baron, have you any more to say?

Hawk. I have one Witness more, that I desire may be called, viz. Mr. *Samuel Brown*.

L. C. B. Yes, yes, call him; come Mr. *Brown*, what can you say?

Mr. Brown said, My Lord, I can say something, but I dare not speak.

L. C. B. Why dare you not? Come, speak the Truth, and spare not, and say no more.

Mr. Brown said, I dare not speak, for *Sir John Croke* and this *Larimore* have threatned me, that if I came down to this Assizes, to testify what I heard about this Plot, *Sir John Croke* said, he would fling me in the Goal, and load me with Action upon Action of 1000*l.* and ruin me and my Family.

When the Judge and the Justices heard Mr. *Brown* relate this, every Eye began to be fixt upon *Sir John Croke*, and the People asked which was that *Sir John Croke*? Then my Lord Chief Baron *Hale* commanded the Clerk of the Assizes to give Mr. *Brown* a Writ of Privilege, to protect him home again; which being immediately done in Court, my *L. C. B.* said, Come Mr. *Brown*, let us now hear what you can say to this business.

Mr. Brown said; If it may please your Honour, (my Lord) upon *Wednesday*, the 16th of *September* last past, (early in the Morning) as I lay in my Bed at *Sir John Croke's* House in *Chilton*, hearing a great Noise, (I being then intrusted by *Sir John Lentall* as Keeper to *Sir John Croke*, which is a Prisoner at the King's Bench,) I fearing that they were contriving some way for him to escape, I started suddenly out of Bed, (having nothing on but my Shirt,) and stood at the Dining-Room Door behind the Hangings, and then, my Lord, I heard this *Larimore* tell *Sir John Croke* that he had undone him, by causing him to contend with the Parson. *Sir John Croke* asked him why? *Larimore* replied, because this *Hawkins* will undo me, for he hath entered

entered me into most Courts of *England*, and summoned me into the Crown-Office and Chancery, and I cannot maintain so many Suits: Sir *John Croke* replied, Is that all? Come, Brother *Larimore*, be contented, we will have one Trick more for *Hawkins* yet, which shall do his Work. *Larimore* replied, Sir *John*, you have put me upon too many Tricks already, more than I can manage, and the Parson is too hard for us still. Sir *John* replied, [If thou wilt but Act, I will hatch enough to hang *Hawkins*.] *Larimore* replied, but how shall we bring this to pass? Sir *John Croke* made Answer, [Can't not thou convey some Gold or Silver into Mr. *Hawkins* his House, and have a Warrant ready to search his House, and then our Work is done.] *Larimore* replied, Sir, if we could but bring this to pass, it might do well, but I know not how. Sir *John Croke* said to *Larimore*, Do you but go to Sir *Richard Pigott*, and inform him, that you have lost some Money and Goods, and desire his Warrant to search for them, (which Sir *Richard* neither can nor will deny you) and then take *Dick Mayne* the Constable, (who is one of us, and will do whatever we desire him,) and go and search Mr. *Hawkins*'s House, and there you will find these things; and then charge him with flat Felony, and force him before me, and no other Justice, and I'll send him to Goal without Bail, [And we will hang him at the next Affizes.] Come, (said Sir *John Croke*) Brother *Larimore* let us go and drink our Morning's Draught, and we will consult more about this Business. And so, my Lord, I heard no more for that time. But —

L. C. B. That was enough, and too much too, but however, Mr. *Brown*, go on.

Mr. *Brown*. So upon *Saturday* next, (being the 19th of *Sept.* 1668.) I having been abroad (and towards Night) coming up the Town, I was informed that Mr. *Hawkins* (as *Larimore* pretended) had robbed him: I then began to think more seriously upon what I had heard pass the *Wednesday* before, between Sir *John Croke* and this *Larimore*, and coming to Sir *John*'s House, I saw a Paper lying upon the Hall-Table full of Writing, and *Larimore* with the Constable, and several others, had brought Mr. *Hawkins* before Sir *John Croke*, who committing Mr. *Hawkins* for Robbing *Larimore*, as he pretended, took up the said Paper and read it to the Constable, and said, that it was Mr. *Hawkins*'s *Mittimus*, which said *Mittimus* was written before Mr. *Hawkins* came to Sir *John Croke*, as all that were there can justify. And on *Sunday* Morning I went to an Alehouse, where they had kept Mr. *Hawkins* all Night, and there I saw Mr. *Hawkins* go to the Goal, and then my Heart began to tremble, and yet I durst not discover any thing of what I had heard; but coming home, I said to Sir *John Croke*, Sir, What, they have carried the poor Parson to the Goal? Sir *John Croke* replied, [Yes, let him go, and the Devil go with him, and more shall follow after;] have I not often told you, that if my Brother *Larimore* and I did but lay our Heads together, none are able to stand against us? I replied, Yes, Sir *John*, I have often heard you say so, but I never believed it until now.

L. C. B. Mr. *Brown*, is all this true which you have related?

Mr. *Brown*. Yes, my Lord, all that I have said is true, and there sits Sir *John Croke* (pointing to him with his Finger) who knows, that every Word that I have said is true.

L. C. B. If but ever a Word that Mr. *Brown* says be true, it is as foul a Conspiracy as ever was heard of.

About this time Sir *John Croke* stole away from the Bench, without taking his Leave of my Lord Chief Baron, or any of the Justices.

My *L. C. B.* said, Is this Sir *John Croke* a Gentleman, and contrives such Plots as this? I never in all my Days heard of the like: But I think once in this Place, I met with one something like it, but this far exceeds that, if this be true that Mr. *Brown* hath said.

But you of this Jury, there is an honest Man, (said my Lord, pointing to Mr. *Wilcox*) he overthrows all; if that be true which he said, then all that is false which *Larimore*, his Son, and Sister hath sworn.

Larimore said, My Lord, what I have sworn, as to Mr. *Hawkins*, is true.

My *L. C. B.* reply'd, Come, *Larimore*, thou art a very Villain.

Larimore said, I wish that the Ground may open, and swallow me, if any thing that I have sworn against Mr. *Hawkins* is false.

L. C. B. replied, Come, come, *Larimore*, thou art a very Villain; nay, I think thou art a Devil.

Hawk. I hope your Honour, and this Jury, are by this time fully convinc'd, that Sir *John Croke* is concerned in this Plot; for, my Lord, he hath appeared all along to be the Grand Contriver of it, as appears by Mr. *Brown*'s Testimony, and by what he said to *Larimore* before me and others. See their Charge in those Words,

L. C. B. Hale replied, I am fully satisfied, and so (I think) are all that heard it; And he said to the Justices, Gentlemen, where is this Sir *John Croke*? They reply'd, He is gone.

L. C. B. Is Sir *John Croke* gone? he said, Gentlemen, I must not forget to acquaint you (for I thought that Sir *John Croke* had been here still) that this Sir *John Croke* sent me this Morning two Sugar-Loaves for a Present, praying me to excuse his Absence Yesterday. I did not then know, so well as now, what he meant by them, but to save his Credit, I sent his Sugar-Loaves back again. Mr. *Harvey*, did you not send Sir *John* his Sugar-Loaves back again?

Clerk of the Affize. Yes, my Lord, they were sent back again.

L. C. B. I cannot think that Sir *John Croke* believes that the King's Justices come into the Country to take Bribes, I rather think, that some other Person (having a Design to put a Trick upon him) sent them in his Name. And so taking the Letter out of his Bosom, shewing it to the Justices, said, Gentlemen, do you know this Hand? To which some of them replied, they believed it might be Sir *John Croke*'s own Hand; which Letter being compared with his *Mittimus* (for he had no Clerk) and some other of his Writings there, it plainly appeared to be his own Hand. So my *L. C. B.* seeing that, (putting up the Letter again into his Bosom) said, he intended to carry that to *London*; and he added farther, that he would relate the Foul-

ness of the Business, as he found Occasions fit for it.

L. C. B. said, Mr. *Hawkins*, have you any more?

Hawk. My Lord, I hope that the Jury, and your Lordship is fully satisfied as to my Innocency, if so, my Lord; but if not, I humbly desire to know wherein I have not given full Satisfaction, and if any thing else shall be alledged against me, I humbly crave Time and Leave to answer it; for, my Lord, I am confident, I can give a fuller Satisfaction, if what I have said already be too short.

L. C. B. You of the Jury, what do you think? the Prisoner at the Bar desires to know whether you are satisfied as to the Indictment; if not, you may do well to declare wherein you are not satisfied.

Jury. It is a very plain Case, my Lord.

L. C. B. And I think so too, but it is a very foul one.

L. C. B. said to me, Sir, have you any more?

Hawk. My Lord, I humbly thank your Honour and the Court, for that great Patience, and Liberty I have had, and intend to say no more, but with *Quintilian* I conclude, *Innocentia melior est quam Eloquentia*, Innocence is better than Eloquence.

My Lord Chief Baron Hale's Directions to the Jury were to this Effect.

L. C. B. said, You that are of the Jury, the Prisoner at the Bar stands indicted for Robbing this *Larimore*, and you have heard at large both the Prosecutor's Evidence to prove him Guilty (which if you do believe) I never heard a fuller. And *2dly*, You have also heard the Prisoner's Defence, wherein (as I think) he hath as fully answered the same Charge. I shall, First, repeat the Evidence against him, which consists of two Branches; the first is the Prosecutor's Proof of this Indictment; and secondly, his charging him with other Crimes of the like Nature, as the stealing of *Chilton's* Boots, and the picking of *Noble's* Pocket.

1. For to prove him guilty of Robbing him, he observes this Method:

First, He himself swears that he saw the Prisoner at the Bar commit the Robbery.

Secondly, His Son and Sister swears that they saw him run out of the House at the same time.

Thirdly, He brings in four or five Persons that swear the Gold Ring, and the Five-Shilling Piece, was found in the House of him that is now the Prisoner at the Bar.

Fourthly and *Lastly*, He proves by two Witnesses, that the Gold Ring and the Five-Shilling Piece was pawned to him.

And for the First of these, *Larimore* swears that upon *Friday* the 18th of *September* last past, he lockt his Doors, between Twelve and One of the Clock at Noon, and went out, (leaving no body at home) to pluck Hemp, about two Furlongs from his House, where he stay'd with the rest of his Family till within an Hour and a half of Sunset; at which time, he coming home, found his Doors open, and ran up into his Chamber, and there through the Chinks of the Lost-boards, he swears that he saw the Prisoner,

now at the Bar, ransacking, and rifling of a Box, in the which was at that time a Holland Apron, and a Purse, in which Purse was two Gold Rings, two Pieces of Gold, and nineteen Shillings in Silver, all which said Rings, Gold, and Silver, with the said Apron, he swears that he did see the Prisoner now at the Bar turn out of the said Purse, take, and Feloniously carry away, except one Piece or two of the Silver, and shews the very Purse out of which he saw him take them. If you compare the Evidence with the Indictment, you may see the Policy of the Prosecutor, For, he would gladly seem a moderate Prosecutor, by Indicting him for Felony only, as the stealing of Rings and Money, &c. But by his Evidence, he would as gladly charge him with Burglary also, for he swears, he broke open or pick'd the Locks of his Doors, and Box, which by Law is the same.

And Secondly, To corroborate this his Evidence, he brings in two Witnesses more, *viz.* his Son, and Sister *Beamsly*, and they swear that they did, at the same time, see the Prisoner that is now at the Bar, run out of *Larimore's* House, with a great bunch of Keys in his Hand, and he hid himself amongst Beans and Weeds: And note the Keys, to intimate that, by the help of those, he pick'd *Larimore's* Locks.

Thirdly, He brings in his Son, *Dodsworth*, *Croke*, the Constable, and Tithing-man, which all swear that they found this Gold Ring and Five-Shilling Piece of Silver in a Basket hanging upon a Pin, in the House of the Prisoner at the Bar, with a few Eggs, which the Prisoner at the Bar the Day before had stolen from him.

And Fourthly and Lastly, He brings in one of Sir *John Croke's* Sons, and Mr. *Good*, who swear, that the one pawn'd the Ring, the other the Five-Shilling Piece to *Larimore*.

Thus *Larimore* swears he saw the Prisoner rob him, his Son and Sister swear that they saw him run out of the House, the same time four more swear, that they found the Ring and Five-Shilling Piece in his House upon search; And Lastly, two swear that the Ring and Five-Shilling Piece was pawned to him. If all this be true, he must needs be guilty, and if so, altho' I have a great Respect for his Calling, yet that shall no ways excuse him, but rather aggravate his Crime.

And thus much touching the Indictment.

And Secondly, He seems to charge him with other Acts of the like Nature; as.

1. He brings in one *Chilton* to swear that the Prisoner at the Bar did steal a pair of Boots from him, and four or five Persons swear, that they did hear *Chilton* say he did.

2. He brings in one *Boyce* from *London*, a Person, I think, of no great Credit, he swears, that he saw the Prisoner at the Bar, about two Years ago, have his Hand in the Pocket of one *James Noble*, and that *Noble* said, that he lost a Gold Ring, and Piece of Gold at the same time. This, (if true) would render the Prisoner now at the Bar obnoxious to any Jury. Thus far the Evidence against the Prisoner at the Bar.

Now we come to the Prisoner's Defence, which because it is so full, I shall be the briefer in it. The Parts of his Defence were two, as himself observed.

1. He shews how too improbable it is.

And 2. How impossible that he should be guilty of this Charge.

First, That it is not likely that *Larimore* was robbed at all, because he did not declare it to any of his Neighbours, as soon as he saw the Robbery committed; again, he varies as to the time when it was done, for that he told his Brother *Beamshy*, that he had lost the Ring and Five-Shilling Piece, before there was any Difference between him and the Prisoner at the Bar, as appears by Mr. *Wilcox*, and that Difference began in *Michaelmas* Term, 1667: And before Sir *John Croke* he confessed that he had lost this a Month before the Prisoner (*viz.* Mr. *Hawkins*) was committed, which must be about the 19th of *August*, 1668. And in Court he swears that he saw the Prisoner at the Bar rob him of the same Gold Ring, and Five-Shilling Piece of Silver, upon *Friday* the 18th of *September* 1668, an Hour and half before Sunset; all this cannot be true; and for the Warrant, that bears Date a Day before the Robbery was committed: Whereupon the Judge said to *Larimore*, Come, thou art a cunning Fellow, for thou went'st to Sir *Richard Pigott* for a Warrant on the 17th Day, and was not robb'd until the 18th Day; *Larimore*, thou knewest, it seems, upon the 17th Day, that thou should'st be robbed on the 18th Day, that the Prisoner now at the Bar should rob thee: Surely, thou can'st Divine, if all this be true. Again, it is likely, that when the Prisoner at the Bar was charged with flat Felony at his own Doors, the Conttable likewise threatning to break open his House to search, if he had been guilty, his Wife and himself having the Opportunity of going abroad after they had so Charged him, while they were gone to consult with Sir *John Croke*, as the Prisoner at the Bar sufficiently proved they did, by the Testimony of several Witnesses, (as Mr. *Read*, Mr. *Sanders*, and others) that in all that Time he would not have made his Escape, or at least found a more convenient Place to convey a Ring, and Five-Shilling Piece, than to let it remain all that time in a little Basket with a few Eggs, hanging on a Pin? Again, Who came first into the Room where this Egg-Basket hung? why *Larimore*; and who took down the Basket? *Larimore*; who turn'd out the Eggs? *Larimore*; and who had the dressing of the Eggs? *Larimore*. He is a special Cook; you Gentlemen of the Jury, it is an easy thing for *Larimore* to juggle a Ring and Five-Shilling Piece into a Basket, he being the first that came into the Room; as he put up his Hand to take down the Basket, he might with ease enough convey such things as those were into it. All this, and many more, are probable Circumstances to move you and me to believe, that it is not possible that the Prisoner at the Bar is guilty of this Robbery; but that I must leave to you to consider of.

Again, The Prisoner at the Bar proves the whole Business to be but a meer Contrivance of Sir *John Croke's* and this *Larimore's*, on purpose to ruin him, as is fully made manifest by the Testimony of Mr. *Brown*, who justifies, that upon *Wednesday* the 16th of *September* last past, and but two Days before this pretended Robbery, he heard Sir *John Croke* advise this *Larimore* to fetch a Warrant to search the House of the Prisoner at the Bar, and then to convey Gold and Silver

into it; which having done, charge him with flat Felony, and bring him before the said Sir *John Croke*, and no other Justice, he then promising to the said *Larimore* to commit him to the Goal without Bail, and hang him at the next Assizes, which is now: And, as I take it, they do aim at it. You of this Jury, if you do believe what Mr. *Brown* saith, it is as foul a Conspiracy as ever was heard of: And I am apt to think it may be probable, because that Sir *John Croke* and *Larimore* did threaten to cast this Mr. *Brown* into Prison, and so ruin him, if he came down and testified his Knowledge about this Business, which thing is of a very ill Consequence. Again, it seems likely that Mr. *Brown* may be credited, if you compare their Actions with the Times; for upon *Tuesday* Sir *John* Arrested the Prisoner upon a feign'd Action of an 100*l.* Upon *Wednesday* the Flot was concluded upon by Sir *John Croke* and *Larimore*, as may appear by Mr. *Brown's* Testimony. On *Thursday* they procured of Sir *Richard Pigott* the Warrant to search. On *Friday*, *Larimore* pretends that he was robbed (tho' in Truth there appears no such thing.) Upon *Saturday* the Prisoner's House was broke open, and he apprehended; and upon *Sunday* he was carried to the Goal: It was a good Week's Work. But there is an honest Man, said my Lord Chief Baron (pointing at Mr. *Wilcox*) he knocks down all; for he justifies, that he came to *Larimore's* House upon *Friday* the 18th of *September* last past (it being the same Day that he swears he saw the Prisoner at the Bar robbing him, and an Hour and half before Sunset) and there continued till it was near Night; and he further saith, that *Larimore* was with him all that Afternoon. And he said, that *Larimore* was not robbed that Afternoon, nor was Mr. *Hawkins* there at that time. If this that Mr. *Wilcox* saith be true, then all that *Larimore*, his Son, and Sister hath sworn must need be false.

And as touching the Boots, *Chilton* swears that he had legg'd a pair of Boots for the Prisoner at the Bar, and laid them in his Shop-window, for him to take along with him as he went by, which he did, and paid him for his Work; and yet this *Larimore*, Sir *John Croke*, *Croxstone*, and others, did use their utmost Endeavours, to stir up this *Chilton* to indict the Prisoner at the Bar for stealing of them (*Croxstone* promising him to bear him out in it.) This can argue nothing else but Malice in those Persons? And for that which *Boyce* swears, is a Story that can argue nothing else; for neither is *Noble* here to prosecute, nor can *Boyce* swear that the Prisoner at the Bar did pick his Pocket, or that *Noble* ever said he did.

Thus I have repeated the Evidence to prove him Guilty, and have not I think omitted any thing in it that is material. Which if you do believe, he must needs be Guilty. And also the Prisoner's Defence, which I think is sufficient. It is a plain Case, and I suppose you need not go from the Bar, but that I leave to you.

And so the Jury not stirring from the Bar, which the Clerk observing, he called the Jury, who severally answered to their Names; which being done, the Clerk of the Arraignments asked whether they were all agreed upon their Verdict.

Jury. Yes, we are all agreed.

Clerk. Who shall speak for you?

I i i

Jury.

Jury. Our Fore-man.
Clerk. Robert Hawkins, Hold up thy Hand. Which I did.
Jury, look upon the Prisoner at the Bar, How say you? Is he Guilty of the Felony whereof he stands indicted, or Not Guilty?
Fore-man of the Jury said, Not Guilty my Lord.
L. C. B. Hale said to the Jury, You have found like Honest Men: I do believe, that he is Not Guilty. And he said to *Larimore*, Thou art a very Villain.
Faylor said, Is Mr. *Hawkins*, my Lord, discharged of his Imprisonment?
L. C. B. replied, Yes, yes, he is discharged, paying his Fees.

Hawk. May it please your Honour, my Lord, I am poor; and this, with other Troubles, which they have unjustly occasion'd, hath cost me a great deal of Money already.
L. C. B. I cannot help that, nor can I give away other Mens Rights; if they will not remit their Fees, you must pay them.
Hawk. I humbly thank your Honour, and shall observe your Lordship's Commands.
 And so the Court arose, there being no other Business but my Trial the whole Morning, which lasted from Eight until One. So as soon as my Trial was over, Sir *John Croke*, *Larimore*, and the rest of that Crew, fled privately out of *Ailesbury*, and durst not stay.




LXX. *The Trial of WILLIAM PENN and WILLIAM MEAD, at the Old-Baily, for a Tumultuous Assembly, the 1st, 3d, 4th, and 5th of September, 1670. 22 Car. II. Wrote by themselves.*

P R E S E N T

| | | | |
|--------------------------------|---|---|----------------------------------|
| Sam. Starling, <i>Mayor.</i> | } | { | Richard Ford, <i>Alderman.</i> |
| Tho. Howel, <i>Recorder,</i> | | | Joseph Shelden, <i>Alderman.</i> |
| Tho. Bludworth, <i>Alderm.</i> | | | John Smith, |
| William Peak, <i>Alderm.</i> | | | James Edwards, |
| John Robinson, <i>Alderm.</i> | | | Richard Browne. |

} *Sheriffs.*

Cryer.

 Yes! *Thomas Veer*, — *Busbel*, *John Hammond*, *Charles Milson*, *Gregory Walklet*, *John Brightman*, *William Plumsted*, *Henry Henley*, *Thomas Damask*, *Henry Michel*, *William Lever*, *John Baily*.

The Form of the O A T H.

“ You shall well and truly Try, and true Deliverance make betwixt our Sovereign Lord the King, and the Prisoners at the Bar, according to your Evidence. *So help you God.*”

The Indictment sets forth, That *William Penn*, Gent. and *William Mead*, late of *London*, Linnen-Draper, with divers other Persons to the Jurors unknown, to the Number of 300, the 14th Day of *August* in the 22d Year of the King, about Eleven of the Clock in the Forenoon, the same Day, with Force and Arms, &c. in the Parish of *St. Bennet Grace-Church* in *Bridgeward*, *London*, in the Street called *Grace-Church Street*, unlawfully and tumultuously did Assemble and Congregate themselves together, to the Disturbance of the Peace of the said Lord the King: And the aforesaid *William Penn* and *William Mead*, together with other Persons to the

Jurors aforesaid unknown, then and there so Assembled and Congregated together; the aforesaid *William Penn*, by Agreement between him and *William Mead* before made, and by Abetment of the aforesaid *William Mead*, then and there, in the open Street, did take upon himself to Preach and Speak, and then and there did Preach and Speak unto the aforesaid *William Mead*, and other Persons there, in the Street aforesaid, being Assembled and Congregated together, by Reason whereof a great Concourse and Tumult of People in the Street aforesaid, then and there, a long time did remain and continue, in contempt of the said Lord the King, and of his Law, to the great Disturbance of his Peace; to the great Terror and Disturbance of many of his Liege People and Subjects, to the ill Example of all others in the like Case Offenders, and against the Peace of the said Lord the King, his Crown and Dignity.

What say you, *William Penn* and *William Mead*, are you Guilty, as you stand Indicted, in Manner and Form, as aforesaid, or Not Guilty.

Pen. It is impossible, that we should be able to remember the Indictment *verbatim*, and therefore we desire a Copy of it, as is customary in the like Occasions.

Recorder. You must first plead to the Indictment, before you can have a Copy of it.

Pen. I am unacquainted with the Formality of the Law, and therefore, before I shall answer directly, I request two Things of the Court. First, that no Advantage may be taken against me, nor I deprived of any Benefit, which I might otherwise have received. Secondly, that you will promise me a fair hearing, and liberty of making my Defence.

Court. No Advantage shall be taken against you; you shall have Liberty; you shall be heard.

Pen. Then I plead Not Guilty in Manner and Form.

Clerk. What sayest thou, *William Mead*, art thou Guilty in Manner and Form, as thou standest indicted, or Not Guilty?

Mead. I shall desire the same Liberty as is promised *William Penn*.

Court. You shall have it.

Mead. Then I plead Not Guilty in Manner and Form.

The Court adjourn'd until the Afternoon.

Crier. O Yes, &c.

Clerk. Bring *William Penn* and *William Mead* to the Bar.

Obser. The said Prisoners were brought, but were set aside, and other Business prosecuted. Where we cannot choose but observe, that it was the constant and unkind Practices of the Court to the Prisoners to make them wait upon the Trials of Felons and Murderers, thereby designing, in all probability, both to affront and tire them.

After five Hours Attendance, the Court broke up and adjourned to the third Instant.

The third of September, 1670, the Court sat.

Crier. O Yes, &c.

Clerk. Bring *William Penn* and *William Mead* to the Bar.

Mayor. Sirrah, who bid you put off their Hats? Put on their Hats again.

Obser. Whereupon one of the Officers putting the Prisoners Hats upon their Heads (pursuant to the Order of the Court) brought them to the Bar.

Record. Do you know where you are?

Pen. Yes.

Record. Do not you know it is the King's Court?

Pen. I know it to be a Court, and I suppose it to be the King's Court.

Record. Do you not know there is Respect due to the Court?

Pen. Yes.

Record. Why do you not pay it then?

Pen. I do so.

Record. Why do you not pull off your Hat then?

Pen. Because I do not believe that to be any Respect.

Record. Well, the Court sets forty Marks a piece upon your Heads, as a Fine for your Contempt of the Court.

Pen. I desire it might be observed, that we came into the Court with our Hats off (that is, taken off) and if they have been put on since, it was by Order from the Bench; and therefore not we, but the Bench should be fined.

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Mead. I have a Question to ask the Recorder, Am I fined also?

Record. Yes.

Mead. I desire the Jury, and all People to take notice of this Injustice of the Recorder; who spake to me to pull off my Hat? and yet hath he put a Fine upon my Head. O fear the Lord, and dread his Power, and yield to the Guidance of his Holy Spirit, for he is not far from every one of you.

The Jury sworn again.

Obser. *J. Robinson*, Lieutenant of the Tower, disingenuously objected against—*Bushel*, as if he had not kiss'd the Book, and therefore would have him sworn again; tho' indeed it was on purpose to have made use of his Tenderness of Conscience in avoiding reiterated Oaths, to have put him by his being a Jury-man, apprehending him to be a Person not fit to answer their Arbitrary Ends.

The Clerk read the Indictment, as aforesaid.

Clerk. Crier, Call *James Cook* into the Court, give him his Oath.

Clerk. *James Cook*, lay your Hand upon the Book.

The Evidence you shall give to the Court, betwixt our Sovereign the King, and the Prisoners at the Bar, shall be the Truth, and the whole Truth, and nothing but the Truth. So help you God.

Cook. I was sent for, from the Exchange, to go and disperse a Meeting in Gracechurch-Street, where I saw Mr. *Penn* speaking to the People, but I could not hear what he said, because of the Noise: I endeavoured to make way to take him, but I could not get to him for the Crowd of People; upon which Capt. *Mead* came to me, about the Kennel of the Street, and desired me to let him go on; for when he had done, he would bring Mr. *Penn* to me.

Court. What Number do you think might be there?

Cook. About three or four Hundred People.

Court. Call *Richard Read*, give him his Oath.

Read being sworn was ask'd, What do you know concerning the Prisoners at the Bar?

Read. My Lord, I went to Gracechurch-Street, where I found a great Crowd of People, and I heard Mr. *Penn* preach to them; and I saw Capt. *Mead* speaking to Lieutenant *Cook*, but what he said, I could not tell.

Mead. What did *William Penn* say?

Read. There was such a great Noise, that I could not tell what he said.

Mead. Jury, observe this Evidence, He saith he heard him Preach, and yet saith, he doth not know what he said.

Jury, take notice, he swears now a clean contrary thing to what he swore before the Mayor when we were committed: For now he swears that he saw me in Gracechurch-Street, and yet swore before the Mayor, when I was committed, that he did not see me there. I appeal to the Mayor himself, if this be not true. But no Answer was given.

Court. What Number do you think might be there?

Read. About four or five hundred.

Pen. I desire to know of him what Day it was?

Read. The 14th Day of *August*.

Pen. Did he speak to me, or let me know he was there; for I am very sure I never saw him.

Cler. Crier, call——into the Court.

Court. Give him his Oath.

—My Lord, I saw a great Number of People, and Mr. *Penn* I suppose was speaking; I saw him make a Motion with his Hands, and heard some Noise, but could not understand what he said. But for Capt. *Mead*, I did not see him there.

Rec. What say you, Mr. *Mead*, were you there?

Mead. It is a Maxim in your own Law, *Nemo tenetur accusare seipsum*, which if it be not true Latin, I am sure it is true English, *That no Man is bound to accuse himself*: And why dost thou offer to insnare me with such a Question? Doth not this shew thy Malice? Is this like unto a Judge, that ought to be Counsel for the Prisoner at the Bar?

Rec. Sir, hold your Tongue, I did not go about to insnare you.

Pen. I desire we may come more close to the Point, and that Silence be commanded in the Court.

Crier. O yes, All manner of Persons keep Silence upon Pain of Imprisonment— Silence in the Court.

Pen. We confess our selves to be so far from recanting, or declining to vindicate the Assembling of our selves to Preach, Pray, or Worship the Eternal, Holy, Just God, that we declare to all the World, that we do believe it to be our indispensable Duty, to meet incessantly upon so good an Account; nor shall all the Powers upon Earth be able to divert us from reverencing and adoring our God who made us.

Brown. You are not here for worshipping God, but for breaking the Law; you do your selves a great deal of Wrong in going on in that Discourse.

Pen. I affirm I have broken no Law, nor am I Guilty of the Indictment that is laid to my Charge; and to the End the Bench, the Jury, and my self, with these that hear us, may have a more direct Understanding of this Procedure, I desire you would let me know by what Law it is you prosecute me, and upon what Law you ground my Indictment.

Rec. Upon the Common-Law.

Pen. Where is that Common-Law?

Rec. You must not think that I am able to run up so many Years, and over so many adjudged Cases, which we call Common-Law, to answer your Curiosity.

Pen. This Answer I am sure is very short of my Question, for if it be Common, it should not be so hard to produce.

Rec. Sir, will you plead to your Indictment?

Pen. Shall I plead to an Indictment that hath no Foundation in Law? If it contain that Law you say I have broken, why should you decline to produce that Law, since it will be impossible for the Jury to determine, or agree to bring in their Verdict, who have not the Law produced, by which they should measure the Truth of this Indictment, and the Guilt, or contrary of my Fact?

Rec. You are a saucy Fellow, speak to the Indictment.

Pen. I say, it is my place to speak to Matter of Law; I am arraign'd a Prisoner; my Liberty, which is next to Life it self, is now concern'd: You are many Mouths and Ears against me, and if I must not be allowed to make the best

Obser. At this time several upon the Bench urged hard upon the Prisoner to bear him down.

of my Case, it is hard. I say again, unless you shew me, and the People, the Law you ground your Indictment upon, I shall take it for granted your Proceedings are meerly Arbitrary.

Rec. The Question is, whether you are Guilty of this Indictment?

Pen. The Question is not whether I am Guilty of this Indictment, but whether this Indictment be legal. It is too general and imperfect an Answer, to say it is the Common-Law, unless we knew both where, and what it is: For where there is no Law, there is no Transgression; and that Law which is not in being, is so far from being Common, that it is no Law at all.

Rec. You are an impertinent Fellow, will you teach the Court what Law is? It's *Lex non scripta*, that which many have studied thirty or forty Years to know, and would you have me to tell you in a Moment?

Pen. Certainly, if the Common Law be so hard to be understood, it's far from being very Common; but if the Lord *Coke* in his *Institutes* be of any Consideration, he tells us, That Common-Law is Common Right, and that Common Right is the Great Charter-Privileges: Confirmed 9 *Hen.* 3. 29. 25 *Edw.* 1. 1. 2 *Edw.* 3. 8. *Coke Instit.* 2. p. 56.

Rec. Sir, you are a troublesome Fellow, and it is not for the Honour of the Court to suffer you to go on.

Pen. I have asked but one Question, and you have not answer'd me; tho' the Rights and Privileges of every *Englishman* be concern'd in it.

Rec. If I should suffer you to ask Questions till to Morrow Morning, you would be never the wiser.

Pen. That is according as the Answers are.

Rec. Sir, we must not stand to hear you talk all Night.

Pen. I design no Affront to the Court, but to be heard in my just Plea: And I must plainly tell you, that if you will deny me Oyer of that Law, which you suggest I have broken, you do at once deny me an acknowledged Right, and evidence to the whole World your Resolution to sacrifice the Privileges of *Englishmen* to your sinister and Arbitrary Designs.

Rec. Take him away. My Lord, if you take not some Course with this pestilent Fellow, to stop his Mouth, we shall not be able to do any thing to Night.

Mayor. Take him away, take him away, turn him into the Bale-dock.

Pen. These are but so many vain Exclamations; Is this Justice or true Judgment? Must I therefore be taken away because I plead for the Fundamental Laws of *England*? However, this I leave upon your Consciences, who are of the Jury (and my sole Judges) that if these Ancient Fundamental Laws, which relate to Liberty and Property, (and are not limited to particular Persuasions in Matters of Religion) must not be indispensably maintained and observed, Who can say he hath Right to the Coat upon his Back? Certainly our Liberties are openly to be invaded,

ded, our Wives to be ravished, our Children slaved, our Families ruined, and our Estates led away in Triumph, by every sturdy Beggar and malicious Informer, as their Trophies, but our (pretended) Forfeits for Conscience sake. The Lord of Heaven and Earth will be Judge between us in this Matter.

Rec. Be silent there.

Pen. I am not to be silent in a Case wherein I am so much concerned, and not only my self, but many ten thousand Families besides.

Obser. They having rudely baled him into the Bale-dock, William Mead they left in Court, who spake as followeth.

Mead. You Men of the Jury, here I do now stand, to answer to an Indictment against me, which is a Bundle of Stuff, full of Lies and Falshoods; for therein I am accused, that I met *Vi & armis, illicite & tumultuose*: Time was when I had Freedom to use a carnal Weapon, and then I thought I feared no Man; but now I fear the Living God, and dare not make use thereof nor hurt any Man; nor do I know I demeaned my self as a tumultuous Person: I say, I am a peaceable Man, therefore it is a very proper Question what *William Penn* demanded in this Case, An Oyer of the Law, on which our Indictment is grounded.

Rec. I have made Answer to that already.

Mead, turning his Face to the Jury, saith, You Men of the Jury, who are my Judges, if the Recorder will not tell you what makes a Riot, a Rout, or an unlawful Assembly, *Coke*, he that once they called the Lord *Coke*, tells us what makes a Riot, a Rout, and an unlawful Assembly — A Riot is when three, or more, are met together to beat a Man, or to enter forcibly into another Man's Land, to cut down his Grass, his Wood, or break down his Pales.

Obser. Here the Recorder interrupted him, and said, I thank you, Sir, that you will tell me what the Law is; scornfully pulling off his Hat.

Mead. Thou may'st put on thy Hat, I have never a Fee for thee now.

Brown. He talks at random, one while an Independent, another while some other Religion, and now a Quaker, and next a Papist.

Mead. *Turpe est doctori cum culpa redarguit ipsum.*

May. You deserve to have your Tongue cut out.

Rec. If you discourse on this Manner, I shall take Occasion against you.

Mead. Thou didst promise me, I should have fair Liberty to be heard; Why may I not have the Privilege of an *Englishman*? I am an *Englishman*, and you might be ashamed of this dealing.

Rec. I look upon you to be an Enemy to the Laws of *England*, which ought to be observed and kept, nor are you worthy of such Privileges, as others have.

Mead. The Lord is Judge between me and thee in this Matter.

Obser. Upon which they took him away into the Bale-dock, and the Recorder proceeded to give the Jury their Charge, as followeth.

Rec. You have heard what the Indictment is, It is for preaching to the People, and drawing a tumultuous Company after them, and *Mr. Penn* was speaking; if they should not be disturbed, you see they will go on; there are three

or four Witnesses that have proved this, that he did preach there; that *Mr. Mead* did allow of it: after this, you have heard by substantial Witnesses what is said against them: Now we are upon the Matter of Fact, which you are to keep to, and observe, as what hath been fully sworn, at your Peril.

Obser. The Prisoners were put out of the Court into the Bale-dock, and the Charge given to the Jury in their Absence, at which *W. P.* with a very raised Voice, it being a considerable distance from the Bench, spake.

Pen. I appeal to the Jury, who are my Judges, and this great Assembly, whether the Proceedings of the Court are not most Arbitrary, and void of all Law, in offering to give the Jury their Charge in the Absence of the Prisoners; I say, it is directly opposite to, and destructive of the undoubted Right of every *English* Prisoner, as *Coke* in the 2 *Instit.* 29. on the Chap. of *Magna Charta*, speaks.

Obser. The Recorder being thus unexpectedly lash'd for his extra-judicial Procedure, said, with an enraged Smile,

Rec. Why, ye are present, you do hear, do you not?

Pen. No thanks to the Court, that commanded me into the Bale-dock; and you of the Jury, take notice, that I have not been heard, neither can you legally depart the Court, before I have been fully heard, having at least ten or twelve material Points to offer, in order to invalidate their Indictment.

Rec. Pull that Fellow down, pull him down.

Mead. Are these according to the Rights and Privileges of *Englishmen*, that we should not be heard, but turned into the Bale-dock, for making our Defence, and the Jury to have their Charge given them in our Absence? I say these are barbarous and unjust Proceedings.

Rec. Take them away into the Hole: To hear them talk all Night, as they would, that I think doth not become the Honour of the Court; and I think you (*i. e.* the Jury) your selves would be tired out, and not have Patience to hear them.

Obser. The Jury were commanded up to agree upon their Verdict, the Prisoners remaining in the stinking Hole. After an Hour and half's time eight came down agreed, but four remained above; the Court sent an Officer for them, and they accordingly came down. The Bench used many unworthy Threats to the four that dissented; and the Recorder, addressing himself to *Busbel*, said, Sir, You are the Cause of this Disturbance, and manifestly shew your self an Abettor of Faction; I shall set a Mark upon you, Sir.

J. Robinson, *Mr. Busbel.* I have known you near this fourteen Years; you have thrust your self upon this Jury, because you think there is some Service for you: I tell you, you deserve to be indicted more, than any Man that hath been brought to the Bar this Day.

Busbel. No, Sir *John*, there were threescore before me, and I would willingly have got off, but could not.

Bloodw. I said, when I saw *Mr. Busbel*, what I see is come to pass, for I knew he would never yield. *Mr. Busbel*, we know what you are.

May. Sirrah, you are an impudent Fellow, I will put a Mark upon you.

Obser. *They used much menacing Language, and behaved themselves very imperiously to the Jury, as Persons not more void of Justice than sober Education: After this barbarous Usage, they sent them to consider of bringing in their Verdict, and after some considerable time they returned to the Court. Silence was call'd for, and the Jury call'd by their Names.*

Cler. Are you agreed upon your Verdict?

Jury. Yes.

Cler. Who shall speak for you?

Jury. Our Foreman.

Cler. Look upon the Prisoners at the Bar; how say you? Is *William Penn* Guilty of the Matter whereof he stands indicted in Manner and Form, or Not guilty?

Foreman. Guilty of Speaking in *Gracechurch-street*.

Court. Is that all?

Foreman. That is all I have in Commission.

Rec. You had as good say nothing.

May. Was it not an unlawful Assembly? you mean he was speaking to a Tumult of People there?

Foreman. My Lord, This is all I had in Commission.

Obser. *Here some of the Jury seemed to buckle to the Questions of the Court; upon which, Busbel, Hammond, and some others, opposed themselves, and said, they allowed of no such Word, as an unlawful Assembly in their Verdict; at which the Recorder, Mayor, Robinson and Bloodworth took great occasion to vilify them with most opprobrious Language; and this Verdict not serving their Turns, the Recorder express'd himself thus:*

Rec. The Law of England will not allow you to part till you have given in your Verdict.

Jury. We have given in our Verdict, and we can give in no other.

Rec. Gentlemen, you have not given in your Verdict, and you had as good say nothing; therefore go and consider it once more, that we may make an end of this troublesome Business.

Jury. We desire we may have Pen, Ink and Paper.

Obser. *The Court adjourn'd for half an Hour; which being expired, the Court returns, and the Jury not long after.*

The Prisoners were brought to the Bar, and the Jury's Names call'd over.

Cler. Are you agreed of your Verdict?

Jury. Yes.

Cler. Who shall speak for you?

Jury. Our Foreman.

Cler. What say you? look upon the Prisoners: Is *William Penn* Guilty in Manner and Form, as he stands indicted, or Not guilty?

Foreman. Here is our Verdict; holding forth a piece of Paper to the Clerk of the Peace, which follows;

WE the Jurors, hereafter named, do find *William Penn* to be Guilty of Speaking or Preaching to an Assembly, met together in *Gracechurch-street*, the 14th of August last, 1670. And that *William Mead* is Not guilty of the said Indictment.

| | |
|----------------------------|-------------------------|
| Forem. <i>Thomas Veer,</i> | <i>Charles Milson,</i> |
| <i>Edward Busbel,</i> | <i>Gregory Walklet,</i> |
| <i>John Hammond,</i> | <i>John Baily,</i> |
| <i>Henry Henley,</i> | <i>Williams Lever,</i> |

Henry Michel, James Dnmask,
John Brightman, Wil. Plumsted.

Obser. *This both Mayor and Recorder resented at so high a rate, that they exceeded the Bounds of all Reason and Civility.*

May. What, will you be led by such a silly Fellow as *Busbel*? an impudent canting Fellow? I warrant you, you shall come no more upon Juries in haste: You are a Foreman indeed, addressing himself to the Foreman, I thought you had understood your Place better.

Rec. Gentlemen, you shall not be dismiss till we have a Verdict, that the Court will accept; and you shall be lock'd up, without Meat, Drink, Fire, and Tobacco; you shall not think thus to abuse the Court; we will have a Verdict, by the help of God, or you shall starve for it.

Pen. My Jury, who are my Judges, ought not to be thus menaced; their Verdict should be free, and not compelled; the Bench ought to wait upon them, but not forestal them. I do desire that Justice may be done me, and that the Arbitrary Resolves of the Bench may not be made the Measure of my Jury's Verdict.

Rec. Stop that prating Fellow's Mouth, or put him out of the Court.

May. You have heard that he preach'd, that he gathered a Company of tumultuous People, and that they do not only disobey the Martial Power, but Civil also.

Pen. It is a great Mistake; we did not make the Tumult, but they that interrupted us: The Jury cannot be so ignorant, as to think, that we met there, with a Design to disturb the Civil Peace, since (1st) we were by Force of Arms kept out of our lawful House, and met as near it in the Street, as their Soldiers would give us leave; and (2dly) because it was no new thing (nor with the Circumstances express'd in the Indictment) but what was usual and customary with us; 'tis very well known that we are a peaceable People, and cannot offer Violence to any Man.

Obser. *The Court being ready to break up, and willing to huddle the Prisoners to their Goal, and the Jury to their Chamber, Penn spoke as follows.*

Pen. The Agreement of Twelve Men is a Verdict in Law, and such a one being given by the Jury, I require the Clerk of the Peace to record it, as he will answer it at his Peril. And if the Jury bring in another Verdict contradictory to this, I affirm they are perjurd Men in Law: And looking upon the Jury, said, You are *Englishmen*, mind your Privilege, give not away your Right.

Busb. &c. Nor will we ever do it.

Obser. *One of the Jury-men pleaded Indisposition of Body, and therefore desired to be dismiss.*

May. You are as strong as any of them; starve them; and hold your Principles.

Rec. Gentlemen, You must be contented with your hard Fate, let your Patience overcome it; for the Court is resolved to have a Verdict, and that before you can be dismiss.

Jury. We are agreed, we are agreed, we are agreed.

Obser. *The Court swore several Persons, to keep the Jury all Night without Meat, Drink, Fire, or any other Accommodation; they had not so much as a Chamber-pot, tho' desired.*

Cry. O Yes, &c.

Obser. The Court adjourns till Seven of the Clock next Morning (being the 4th Instant, vulgarly call'd Sunday) at which time the Prisoners were brought to the Bar: The Court sat, and the Jury called to bring in their Verdict.

Cry. O Yes, &c. — Silence in the Court, upon pain of Imprisonment.

The Jury's Names called over.

Cler. Are you agreed upon your Verdict?

Jury. Yes.

Cler. Who shall speak for you?

Jury. Our Fore-man.

Cler. What say you? Look upon the Prisoners at the Bar; is *William Penn* Guilty of the Matter whereof he stands indicted, in Manner and Form as aforesaid, or Not guilty?

Fore-m. *William Penn* is guilty of Speaking in *Gracechurch-street*.

May. To an unlawful Assembly?

Busb. No, my Lord, we give no other Verdict than what we gave last Night; we have no other Verdict to give.

May. You are a factious Fellow, I'll take a Course with you.

Blood. I knew Mr. *Busbel* would not yield.

Busb. Sir *Thomas*, I have done according to my Conscience.

May. That Conscience of yours would cut my Throat.

Busb. No, my Lord, it never shall.

May. But I will cut yours so soon as I can.

Rec. He has inspired the Jury; he has the Spirit of Divination, methinks I feel him; I will have a positive Verdict, or you shall starve for it.

Penn. I desire to ask the Recorder one Question, Do you allow of the Verdict given of *William Mead*?

Rec. It cannot be a Verdict, because you were indicted for a Conspiracy, and one being found Not guilty, and not the other, it could not be a Verdict.

Penn. If Not guilty be not a Verdict, then you make of the Jury and *Magna Charta* but a meer Nose of Wax.

Mead. How! is Not guilty no Verdict?

Rec. No, 'tis no Verdict.

Penn. I affirm, that the Consent of a Jury is a Verdict in Law; and if *William Mead* be Not guilty, it consequently follows, that I am clear, since you have indicted us of a Conspiracy, and I could not possibly conspire alone.

Obser. There were many Passages, that could not be taken, which pass between the Jury and the Court. The Jury went up again, having received a fresh Charge from the Bench, if possible to extort an unjust Verdict.

Cry. O Yes, &c. Silence in the Court.

Cour. Call over the Jury. Which was done.

Cler. What say you? Is *William Penn* Guilty of the Matter whereof he stands indicted, in Manner and Form aforesaid, or Not guilty?

Fore-m. Guilty of speaking in *Gracechurch-street*.

Rec. What is this to the Purpose? I say, I will have a Verdict. And speaking to *Edw. Busbel*, said, You are a factious Fellow; I will set a Mark upon you; and whilst I have any thing to do in the City, I will have an Eye upon you.

May. Have you no more Wit than to be led by such a pitiful Fellow? I will cut his Nose.

Penn. It is intolerable that my Jury should be thus menaced: Is this according to the Fundamental Laws? Are not they my proper Judges by the great Charter of *England*? What hope is there of ever having Justice done, when Juries are threatned, and their Verdicts rejected? I am concerned to speak, and grieved to see such Arbitrary Proceedings. Did not the Lieutenant of the *Tower* render one of them worse than a Felon? And do you not plainly seem to condemn such for factious Fellows, who answer not your Ends? Unhappy are those Juries, who are threatned to be fined, and starved, and ruined, if they give not in Verdicts contrary to their Consciences.

Rec. My Lord, you must take a Course with that same Fellow.

May. Stop his Mouth; Jaylor, bring Fetters, and stake him to the Ground.

Penn. Do your Pleasure, I matter not your Fetters.

Rec. Till now I never understood the Reason of the Policy and Prudence of the *Spaniards*, in suffering the Inquisition among them: And certainly it will never be well with us, till something like unto the *Spanish* Inquisition be in *England*.

Obser. The Jury being required to go together to find another Verdict, and stedfastly refusing it (saying they could give no other Verdict than what was already given) the Recorder in great Passion was running off the Bench, with these Words in his Mouth, I protest I will sit here no longer to hear these Things; at which the Mayor calling, Stay, stay, he returned, and directed himself unto the Jury, and spoke as followeth:

Rec. Gentlemen, we shall not be at this trade always with you; you will find the next Sessions of Parliament there will be a Law made, that those that will not conform shall not have the Protection of the Law. Mr. *Lee*, draw up another Verdict, that they may bring it in Special.

Lee. I cannot tell how to do it.

Jur. We ought not to be return'd, having all agreed, and set our Hands to the Verdict.

Rec. Your Verdict is nothing, you play upon the Court; I say you shall go together, and bring in another Verdict, or you shall starve; and I will have you carted about the City, as in *Edward* the Third's time.

Fore-m. We have given in our Verdict, and all agreed to it; and if we give in another, it will be a Force upon us to save our Lives.

May. Take them up.

Offic. My Lord, they will not go up.

Obser. The Mayor spoke to the Sheriff, and he came off of his Seat, and said,

Sher. Come, Gentlemen, you must go up; you see I am commanded to make you go.

Obser. Upon which the Jury went up; and several sworn to keep them without any Accommodation, as aforesaid, till they brought in their Verdict.

Cry. O yes, &c. The Court adjourns till to Morrow Morning, at seven of the Clock.

Obser. The Prisoners were remanded to *New-gate*, where they remained till next Morning, and then were brought unto the Court, which being sat, they proceeded as followeth.

Cry. O yes, &c. Silence in the Court, upon pain of Imprisonment.

Cler. Set *William Penn* and *William Mead* to the Bar. Gentlemen of the Jury, answer to your

your Names; *Tho. Veer, Edw. Busbel, John Hammond, Henry Henly, Henry Mitchell, John Brightman, Charles Milson, Gregory Walklet, John Baily, William Leaver, James Damask, William Plumstead.* Are you all agreed of your Verdict?

Jur. Yes.

Cler. Who shall speak for you?

Jur. Our Foreman.

Cler. Look upon the Prisoners. What say you? Is *William Penn* Guilty of the Matter whereof he stands indicted, in Manner and Form, &c. or Not guilty?

Foreman. Here is our Verdict in Writing, and our Hands subscribed.

Obser. *The Clerk took the Paper, but was stopt by the Recorder from reading of it; and he commanded to ask for a positive Verdict.*

Foreman. That is our Verdict; we have subscribed to it.

Cler. How say you? is *William Penn* Guilty, &c. or Not Guilty?

Foreman. Not guilty.

Cler. How say you? is *William Mead* Guilty, &c. or Not guilty.

Foreman. Not guilty.

Cler. Then hearken to your Verdict; you say that *William Penn* is Not guilty in Manner and Form as he stands indicted; you say that *William Mead* is Not guilty in Manner and Form as he stands indicted, and so you say all?

Jur. Yes, we do so.

Obser. *The Bench being unsatisfied with the Verdict, commanded that every Person should distinctly answer to their Names, and give in their Verdict, which they unanimously did, in saying, Not Guilty, to the great Satisfaction of the Assembly.*

Rec. I am sorry, Gentlemen, you have followed your own Judgments and Opinions, rather than the good and wholesome Advice, which was given you; God keep my Life out of your Hands; but for this * the Court Fines you forty Marks a Man; and Imprisonment till paid. At which *Penn* stept up towards the Bench, and said:

Penn. I demand my Liberty, being freed by the *Jury*.

May. No, you are in for your Fines.

Penn. Fines, for what?

May. For Contempt of the Court.

Penn. I ask, if it be according to the Fundamental Laws of *England*, that any *English-Man* should be Fined or Amerced, but by the Judgment of his Peers or *Jury*; since it expressly contradicts the fourteenth and twenty-ninth Chap. of the great Charter of *England*, which say, No Free-man ought to be amerced, but by the Oath of good and Lawful Men of the Vicinage.

Rec. Take him away, take him away, take him out of the Court.

Penn. I can never urge the Fundamental Laws of *England*, but you cry, Take him away, take him away. But it is no wonder, *Since the Spanish Inquisition hath so great a place in the Recorder's Heart.* God Almighty, who is just, will judge you all for these things.

Obser. *They baled the Prisoners into the Baledock, and from thence sent them to Newgate, for Non-payment of their Fines; and so were their *Jury*. But the *Jury* were afterwards discharged upon an Habeas Corpus, returnable in the Common-Pleas, where their Commitment was adjudged illegal.* *Vaugh. Rep.* 135—158.



LXXI. *Proceedings in the CASE of ANTHONY Earl of SHAFTSBURY, † at the King's-Bench, the 27th and 29th of June, 1677. Trin. 29 Car. II.*

THIS Day the Earl of *Shaftsbury* was brought to the Bar upon the Return of an *Alias Hab. Corp.* directed to the Constable of the Tower of *London*; the Effect of the Return was, that *Anthony Earl of Shaftsbury*, in the Writ mentioned, was Committed to the Tower of *London*, 16 Feb. Anno Dom. 1676, by Virtue of an Order from the Lords Spiritual and Temporal then in Parliament assembled: the Tenor of which Order followeth *in hæc verba.*

Ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the Constable of His Majesty's Tower of London, his Deputy, or Deputies, shall receive the Bodies of James Earl of Salisbury, Anthony Earl of Shaftsbury, and

Philip Lord Wharton, Members of this House, and keep them in safe Custody, within the said Tower, during His Majesty's Pleasure, and the Pleasure of this House; for High Contempts committed against this House: And this shall be a sufficient Warrant on that Behalf.

To the Constable of the Tower, &c.

J. Browne Cler. Parl.

The Earl of *Shaftsbury's* Council prayed that the Return might be Filed, and it was so, and Friday following appointed for debating the Sufficiency of the Return, and in the mean time directions were given to his Council to attend the Judges and Attorney-General, with their Exceptions to the Return, and my Lord was re-

* See *Yelv.* 23. *Hardr.* 409. *Kelyng* 51, 58. *Noy.* 48. *Throgmorton's Case*, Trial V. Vol. I. p. 78.

† He with others had been committed to the Tower by the House of Lords during the King's Pleasure, or the Pleasure of the House, for moving a Question in Parliament about the Legality of a Prerogation. *Burn. Hist. own times*, Vol. I. p. 401. See his Character, *ibid.* 96.

manded 'till that Day; and it was said, that tho' the Return was filed, the Court could remand or Commit him to the *Marshalsea* at their Election.

On *Friday* the Earl was brought into Court again, and his Council argued the Insufficiency of the Return.

Williams said, That the Cause was of great Consequence, in regard that the King was touched in his Prerogative; the Subject was touched in his Liberty, and this Court in its Jurisdiction.

1st. The Cause of Commitment which is returned, is not sufficient, for the general Allegations of high Contempts is too uncertain, for the Court cannot judge of the Contempt, if it doth not appear in what Act it consists.

2^d. It is not known where the Contempts were committed, and in favour of Liberty, it shall be intended they were committed out of the House of Peers.

3^{dly}. The time is uncertain, so that, peradventure, it was before the last Act of General Pardon.

4^{thly}. It does not appear whether the Commitment were on a Conviction or Accusation only.

It cannot be denied, but that the Return of such a Commitment, by any other Court, would be too general and uncertain, *More. 893. Ast-wish* was Bailed on a Return, *quod commissus fuit per mandatum. N. Milit. Dni. Custod. Magn. Sigil. Anglie virtute cuiusdem contemptus in curia facti*, and in that Book, that divers other Persons were bailed on such general Returns, and the Cases have been lately affirmed in *Bushel's* Case, reported by the late Lord Chief Justice *Vaughan*, where it is expressly said that such Commitment and Return being too general and uncertain, the Court can't believe in an implicit manner, that in truth the Commitment was for Causes particular and sufficient.

Vaughan's Reports, 140. Accord. 2 Inst. 52. 53. & 55. and the 1 Rolls. 218. and though the Commitment of the Jurors was for acquitting *Penn* and *Mead, contra plenam & manifestam evidenciam*: It was resolved to be too general, for the Evidence ought to appear as certainly to the Judge of the Return, as it appears before the Judge authorized to commit. *Rush. Case. 137.*

Now this Commitment being by the House of Peers will make no difference; for in all Cases where a Matter comes in Judgment before this Court, let the question be of what nature it will, the Court is obliged to declare the Law, and that without distinction, whether the question began in Parliament or no. In the Case of *Geo. Binion* in *C. B.* there was a long Debate, *Whether an Original Writ might be Filed against a Member of Parliament, during the time of Privilege*; and it was urged, *that it being during the Session of Parliament, the termination of the Question did belong to the Parliament*: But it was resolved that an Original might be filed; and *Bridgman*, then Chief Justice, said, that the Court was obliged to declare the Law in all Cases that came in Judgment before them. *H. 4. Ed. 4. Rut. 4. 7. 10. in Scacc. In Debt by River versus Cousin*, the Defendant pleads that he was Servant of a Member of Parliament, *& Ideo Capi seu arestari non debet*, and the Plaintiff prays Judgment, and afterwards by Advice of all the

Judges the Judgment was entered. *Videtur Baronibus, quod tale habetur Privilegium, quod Magnates, &c. Et eorum familiares capi seu arestari non debent, sed nullum habetur Privilegium, quod non debent Implacitari, ideo respondeat ouster.* So in *Triviniard's* Case, a question of Privilege was determined in this Court. *Dyer 60. in 14 Ed. 3. in the Case of Sir John and Sir Jeoffry Stanton*, which was cited in the Case of the Earl of *Clarendon*, and is entred in the Lords Journal.

An Action for Waste depended between them in the Common-Pleas, and the Court was divided, and the Record was Certified into the House of Lords, and they gave direction that the Judgment should be Entred for the Plaintiff; afterwards on a Writ of Error brought in this Court that Judgment was Reversed, notwithstanding the Objection, that is was given by Order of the House of Lords; for the Court was obliged to proceed according to the Law in a matter that was before them in point of Judgment. Not long since the Earl of *Bristol* Exhibited an Accusation against the Earl of *Clarendon* to the House of Lords, and it contained divers matters, whereof some did arise out of Parliament, and it was referred to the Judges to consider whether that Procedure was Parliamentary; and the 4th of *July 1663*, it was resolved by the Judges, that the Lords ought not to proceed only upon an Impeachment by the Commons, when the matters arise out of the House.

The Construction of all Acts of Parliament are given to the Courts of *Westminster*, and accordingly they are Judges of the Validity of Acts of Parliament, they have searched the Rolls of Parliament, *Hub. 109. Lord Hunsdon's Case*, they have determined, whether the Journal be a Record, *Hub. 110.* When a point comes before them in Judgment, they are not foreclosed by any Act of the Lords, but ought to Judge according to the Law, by which the Realm is governed, and not by the Lords: If it appears that an Act of Parliament be made by the King and Lords without the Commons, that Act is *Felo-de-se*, and the Courts of *Westminster* ought to judge it void, *4 H. 7. 18. Hub. 111.* and accordingly they ought to do, if this Return contain in it that which is fatal to itself. It hath been a question often resolved in this Court when a Writ of Error in Parliament, shall be a *Supersedeas*, and this Court hath determined what shall be said to be a Session of Parliament, *1 Rolls. 29.* and if the Law were otherwise there would be a failure of Justice. If the Parliament were dissolved, there would be no question but the Prisoner should be discharged on a *Habeas Corpus*, and yet then the Court must examine the Cause of Commitment, and by Consequence a matter Parliamentary, and the Court may now have Cognizance of the matter, as clearly as when the Parliament is dissolved. The Party would be without remedy for his Liberty, if he could not find it here, for it is not sufficient for him to procure the Lords to determine their Pleasure for his Imprisonment, for before his Enlargement he must have the Pleasure of the King to be determined, and that ought to be in this Court, and therefore the Prisoner ought first to resort hither.

Let us suppose (for it does not appear in the Return, and the Court ought not to enquire of any

matter out of it,) that the supposed Contempt was a thing done out of the House; it would be hard for this Court to remand him: Suppose he were removed to a Foreign Prison, during the Pleasure of the Lords: No doubt, but that would have been an Illegal Commitment against *Magna Charta* and the Petition; there the Commitment would have been expressly Illegal, and it may be this Commitment may be no less; for if it had been expressly shewn, and if he be remanded, he is Committed by this Court, who are to answer for his Imprisonment.

But 2. The limitation of the Imprisonment during the Pleasures of the King and the House is Illegal and uncertain; for since it ought to determine in two Courts, it can have no certain Period, a Commitment until he shall be Discharged by King's Bench and Common Pleas is Illegal; for the Prisoner can't apply himself in such a manner as to obtain his Discharge. If a Man be committed to further order, *Coke* saith, he isailable presently, for that Imports 'till he shall be delivered in good course of Law, and if this Commitment have not that Sense, it is Illegal, for the Pleasure of the King is that, which shall be determined according to Law in his Courts, as where the Stat. of *Westminster*, 1 *Chap.* 15. declares that he is not repleviable, who is taken by Command of the King, this does not extend to an Extra-judicial Command, but in his Courts of Justice, to which all matters of Judicature are delegated and distributed. 2 *Inst.* 186. and 187.

Wallop, to the same purpose, cited *Busbell's* Case, *Vaughan*, 137. that the Return for high Contempts was not sufficient, and the Court that made the Commitment in this Case makes no difference in the Case, for otherwise one may be Imprisoned by the House of Peers Unjustly, for a matter relievable here, and yet shall be without any manner of relief, by such a Return; for on Supposition that this Court ought not to meddle where the Person is Committed by the Peers, any Person at any Time and for any Cause may be subject to a perpetual Imprisonment at the Pleasure of the Lords.

And the Law is otherwise, for the House of Lords is the Supreme Court, yet their Jurisdiction is limited by the Common and Statute-Law, and their Excises are examinable in this Court, for there is a great difference between the Errors and Excise in and of a Court between an Erroneous Proceeding with Jurisdiction, which is void and a meer Nullity, 4. *H.* 7. 18. 6. in the Parliament the King would have one attainted of Treason, and lose his Lands, and the Lords assented, but nothing was said of the Commons, wherefore all the Justices held clearly that it was no Act, and he was restored to his Land, and without doubt in the same Case if the Party had been Imprisoned, the Justices might have made the like Resolution that he ought to have been discharged.

It is a Solecism that a Man shall be Imprisoned by a limited Jurisdiction, and it shall not be examinable, whether the Cause were within the Jurisdiction or not. If the Lords without the Commons should grant a Tax, and one that refused to pay it should be Imprisoned, the Tax is void; but by a general Commitment the Party shall be remedylet if so be the Lords should award a *Capias* for Treason or Felony.

By these Instances it appears that their Jurisdiction was restrained by the Common Law, and it is also restrained by divers Acts of Parliament, 1 *Hen.* 4. *Chap.* 14. no Appeals shall be made, or any ways pursued, or where a Statute is made a Power is Implicitly given to this Court, by the Fundamental Institution, which makes the Judges Expositors of Act of Parliament; and peradventure if all this Case appeared upon the Return, this might be a Case in which they were restrained by the Stat. 4. *Hen.* 8. *Chap.* 8. That all the Suits, Usements, and Condemnations, &c. many time from henceforth, at any time to be put or had upon any Members for any Bill speaking or reasoning of any matters concerning the Parliament to be Communed or Treated of, shall be utterly void and of no effect; now it does not appear, but this is a Correction and Punishment imposed upon the Earl, contrary to the Statute. There is no question now made of the Power of the Lords, but it is only urged that it is necessary for them to declare by Virtue of what Power they proceed, otherwise the Liberty of every *English* Man shall be subject to the Lords, whereof they may deprive any of them against an Act of Parliament, but no usage can justify such a proceeding. *Elsemere's* Case of the *Post Nati.* 19. The Duke of *Sussex* was Impeached by the Commons of High-Treason, and Misdemeanors, the Lords were in doubt whether they should proceed upon such a general Impeachment to imprison the Duke, and the Advice of the Judges being demanded, and their Resolution given in the Negative, the Lords were satisfied. This Case is mentioned with design to shew the respect given to the Judges, and that the Judges have determined the highest matters in Parliament. At a Conference held between the Lords and the Commons, 3d *April*, 4 *Car.* concerning the Right and Privilege of the Subject, it was declared and agreed, that no Freeman ought to be Committed or restrained by Commitment of the King or Privy-Council, or any other (in which the House of Peers is included) unless some Cause of Commitment, Restraint, or Detainor be set forth, for which by Law he ought to be Committed, &c.

Now if the King, who is the Head of the Parliament, nor the Privy-Council, which is a Court of State, to which Secrecy is so necessary, may not Imprison without shewing Cause, *a fortiori*, the Lords in Parliament can't, which are a Court of Law as well as a Court of State, and therefore ought not to proceed in an Illegal manner. 'Tis true in 1 *Rolls.* 192. *Rushworth's* Case, *Coke* is of Opinion that the Privy Council may Commit without shewing Cause, but in his more Mature Age he was of another Opinion, and accordingly the Law is declared in the Petition of Right.

Smith argued to the same Purpose, and said, A Judge cannot make a Judgment unless the Fact appears to him, and on an *Habeas Corpus*, the Judge can only take notice of the Fact returned; it is lawful for any Subject that finds himself agrieved by any Sentence or Judgment to Petition the King in an humble manner for redress, and where the Subject is restrained of his Liberty, the proper place for him to apply himself unto is this Court, which hath the Supreme Power as to this purpose, over all Courts, and

on an *Habeas Corpus* issuing hence, the King ought to have an Account of his Subject, *Rolls. Hab. Corp.* 64. *Witherly's Case*; and though the Commitment be by the Lords, yet if it be Illegal, this Court is obliged to discharge the Prisoner, as well as if he had been Illegally Imprisoned by any other Court; the House of Peers is a high Court, but the *King's-Bench* hath ever been Intrusted with the Liberty of the Subject, and if it were otherwise in case of Imprisonment by the Peers, the Power of the King was less absolute than the Power of the Lords.

It does not appear but that this Commitment was for Breach of the Privilege, but nevertheless if it were, this Court might give relief, as appears in *Sir George Bigmore's Case* before cited, and *Mich.* 12. *Ed.* 4. *Rut.* 20. for the Court which has Power to judge what is Privilege, has also Power to judge what is Contempt of Privilege; if the Judges may judge of an Act of Parliament, *a fortiori*, they may judge of an Order of the Lords, 20 *Ed.* *Butcher's Case*, where he in Reversion brought an Action of Waste, and died before Judgment, and his Heirs brought an Action for the same Waste, and the King and the Lords determined that it did lie, and commanded the Judges to give Judgment accordingly for the time to come; but by *Ryley.* 39. it appears that it is only an order of the King and the Lords, and that was the Cause the Judges conceived that they were not bound by it, but 39. 3. 13. and ever since have judged the contrary if it be admitted. For that for Breach of Privilege may Commit, yet it ought to appear on the Commitment that that was the Cause, for otherwise they may be called a Breach, which is only a refusal to answer to a matter whereof the House of Lords is restrained to hold Plea by the Stat. of the 1st of *Hen.* 4. and for a Contempt committed out of the House they cannot Commit, for the Word Appeal in the Statute extends to all Misdemeanors, as it was resolved by the Judges in the *Earl of Clarendon's Case*, *July*, 1663. If the Imprisonment be not lawful, the Court cannot remand him to his wrongful Imprisonment, for that would be an Act of Injustice, to Imprison him, *De novo*, *Vaughan.* 156. It does not appear whether the Contempt was a Voluntary Act, or an Opinion, or an Inadvertency, and he has now suffered five Months Imprisonment already; false Imprisonment is not only where the Commitment is unjust, but where the Imprisonment is too long. 2 *Inst.* 53. In this Case if this Court cannot give Remedy, peradventure the Imprisonment shall be perpetual; for the King, as the Law is now taken, may Adjourn the Parliament for 10 or 20 Years.

But all this is said on Supposition that this Session has continuance, I conceive that by the King's giving his Royal Assent to several Laws which have been Enacted, the Session is determined, and then their Order for the Imprisonment is also determined, *Brook Parliament.* 86. Every Session in which the King Signs Bills is a Day of itself, a Session of itself, 1 *Car.* 1. 7. A Special Act is made, that the giving the Royal Assent to several Bills, shall not determine the Session. ('Tis true, 'tis there said to be made for the avoiding all Doubts.) In the Stat. 16. *Car.* 1. there is a Proviso to the same purpose, and also 12. *Car.* 2. 1. and 22 and 23 *Car.* 2. 2. 1. 11. *Ro.* 2. *No.* 12.

By the Opinion of *Coke*, 4. *Inst.* 27. the Royal Assent does not determine; but the Authority on which he relies, don't warrant his Opinion; for first in the Parliament, *Roll.* 1. *H.* 7. it appears that the Royal Assent was given to the Act, for the reversal of the Attainder of the Members of Parliament, the same Day it was given to the other Bills; and the same Year the same Parliament Assembled again, and then 'tis Probable, that the Members which had been attainted were present, and not before. 8. *R.* 2. *No.* 13. is only a Judgment in Case of Treason, by Virtue of a Power reserved to them on the Statute, 25 *Ed.* 3. *Rot.* Parliament. 7 *H.* 4. *No.* 29. is not an Act of Parliament, 14 *Ed.* 3. *N.* 789. The Act is first entred on the Roll, but on Condition the King will grant their other Petitions, the Inference my Lord *Cook* makes, that the Act for the Attainder of *Queen Catherine*, 33 *H.* 8. was passed before the determination of the Session, yet it was on a Judgment given against her by the Commissions of *Oyer* and *Terminer*, and the subsequent Act is only an Act of Confirmation; but *Cook* ought to be excused, for all his Notes and Papers were taken from him, so that this Book did not receive his last Hand, but 'tis observable he was one of the Members of the Parliament, 1 *Car.* 1. when the special Act before mentioned was made; and no Instance can be given where an Act was passed, and afterwards the Parliament did proceed in that Session, only where there was a precedent Agreement between the King and the Houses; so I conclude that the Order is determined with the Session, and the *Earl of Shaftsbury* ought to be Discharged.

Eyres argued to the same effect; That the Warrant is not sufficient, for it does not appear that it was made by the Jurisdiction is desired in the House of Peers; for that is *coram Rege in Parlamento*, so that the King and the Commons are present in supposition of Law, and the *Writ of Error* in Parliament is *Inspecto Recordo nos consilio & advisamento Spiritualium & Temporalium, & Communitatum in Parlamento predict' existent'*, &c. it would not be difficult to prove that anciently the Commons did assist there, and now it shall be intended that they were present; for there can be no Averment against the Record. The Lords do several Acts as a distinct House, as the *Debating Bills*, the *Enquiring of Breaches of Privileges*, and the Warrant in this Case being by the *Lords Spiritual and Temporal*, cannot be intended otherwise, but that it was done by them in their distinct Capacity, and then the Commitment being during the Pleasure of the King and the House of Peers, it is manifest that the King is Principal, and his Pleasure ought to be determined in this Court.

If the Lords should commit a great Minister of State, whose Advice is necessary for the King and the Realm, it cannot be imagined that the King shall be without remedy for his Subject, but that he may have him Discharged by his Writ out of this Court.

This present Recess is not ordinary Adjournment; for it is entred in the Journal that the Parliament shall not be assembled at the Day of Adjournment, but Adjourned or Prorogued to another Day, if the King do not signify his Pleasure by Proclamation.

Some other Exceptions were made to the Return.

1. That no Commitment is returned, but only a Warrant to the Constable to receive him.

2. The Return does not answer the Mandate of the Writ; for that is to have the Body of *A. E. of S.* and the Return of the Warrant is for the Imprisonment of *A. Ashley E. of S.*

Serjeant *Maynard*, argued to maintain the Return; *The House of Lords is the Supreme Court of the Realm; 'tis true this Court is superior to all Courts of ordinary Jurisdiction. If this Commitment had been by any Inferior Court, it could not have been maintained: But the Commitment is by a Court that is not under the Controul of this Court; and that Court is in Law sitting at this time, and therefore the expressing the Contempt particularly, is a Matter that continues in the Deliberation of that Court: 'Tis true, this Court ought to determine what the Law is in every Case that comes before them, and in this Case the Question is only whether this Court can judge of a Contempt committed in Parliament during the same Session of Parliament, and discharge one committed for such Contempt. When a Question of Privilege ariseth in an Action depending in this Court, the Court may determine it; but now the Question is, Whether the Lords have Capacity to determine their own Privileges, and whether this Court can controul their Determination, and discharge during their Session a Peer committed for Contempt. The Judges have often demanded what the Law is, and how a Statute should be expounded of the Lords in Parliament, as on the Statute of Amendments, 40 Ed. 3. 34. 6. 8. Co. 157. and 158. a fortiori. The Court ought to demand their Opinion, when a Doubt ariseth on an Order made by the House of Lords now sitting.*

As to the Determination of the Imprisonment, doubtless the Pleasure of the King is to be determined in the same Court where the Judgment was given.

As to the Determination of the Session, the Opinion of *Coke* is good Law, and the Addition of Provisoes in many Acts is only in *Majorem cautelam*.

Sir *Will. Jones, Att. Gen.* To the same Effect, as to the Uncertainty of the Commitment, it is to be considered that this Case differs from all other Cases in two Circumstances: 1. The Person which is committed is a Member of the House by which he is committed (I do not take upon me to say that the Case would be different if the Person committed were not a Peer.) 2. The Court that does commit is Superior to this Court, and therefore if the Contempt had been particularly shewn, of what Judgment soever this Court should have been as to the Contempt, yet they would not have discharged the Earl, and thereby take upon them a Jurisdiction over the House of Peers.

The Judges in no Age have taken upon them the Judgment of what is *Lex & consuetudo Parliamenti*; but here the Attempt is to engage the Judges to give their Opinion in a Matter whereof they might have refused to have given it, if it had been demanded in Parliament. 'Tis true, if a Writ be brought where Privilege is pleaded, the Court ought to judge of it as an Incident to the Suit whereof the Court was possess'd; but this will be no Warrant for this Court to assume a Judgment of an Original Matter arising in Parliament, and that which is said of the Judges Power to expound Statutes, cannot be denied.

But it is not applicable to this Case; by the same Reason that this Commitment is question'd, every Commitment of the House of Commons may be likewise question'd in this Court. It is objected, that there would be a Failure of Justice if the Earl should not be discharged; but the contrary is true; for, if he be discharged, there would be a Failure of Justice for Offences in Parliament, and therefore the Earl would be discharged from all Manner of Punishment for his Offence, if he be discharged (for he must be discharged or remanded; for the Court cannot Bail but where they have Jurisdiction of the Matter) and so deliver'd out of the Hands of the Lords, who only have Power to punish him.

It is objected, that the Contempt is not said to be committed in the House of Peers, but it may well be intended to be committed there; for it appears he is a Member of that House, and that the Contempt was against the House; and besides, there are Contempts whereof they have Cognizance, tho' they are committed out of the House. It is objected, that 'tis possible this Contempt was committed before the General Pardon; but surely such Injustice shall not be supposed in the Supreme Court, and it may well be supposed to be committed, during the Session in which the Commitment to Prison was.

It would be great Difficulty for the Lords to make their Commitments so exact and particular, when they are employ'd in the arduous Affairs of the Realm; and it has been adjudged on a Return out of *Chancery*, of a Commitment for a Contempt against a Decree, that it was good, and yet the Decree was not shewn.

The Limitation of the Imprisonment is well, for if the King or the House determine their Pleasure, he shall be discharged, for then 'tis not the Pleasure of both that he should be detained, and the Addition of those Words *during the Pleasure*, is no more than was before implied by the Law; for if those Words had been omitted, yet the King might have pardon'd the Contempt, if he had but express'd his Pleasure under the Broad Seal. If a Judgment be given in this Court, that one shall be Imprison'd during the King's Pleasure; his Pleasure ought to be determined by Pardon, and not by any Act of this Court, so that the King would have no Prejudice by the Imprisonment of a great Minister, because he could discharge him by a Pardon. The double Limitation is for the Benefit of the Prisoner, who ought not to complain of the Duration of his Imprisonment, since he has neglected to make Application for his Discharge in an orderly way.

I confess by the Determination of the Session, the Orders made the same Session are discharged, but I shall not affirm whether this present Order will be discharged or no, because it is a Judgment. But this is not the present Case, for the Session continues notwithstanding the Royal Assent given to several Bills, according to the Opinion of *Coke*, and all the Judges. *Hutton* 61, 62. Every Proviso in an Act of Parliament is not a Determination of what was the Law before; for they are often added for the Satisfaction of those that are ignorant of the Law.

Turner, Solicitor Gen. To the same Effect, in the great Case of *Mr. Selden*, 5 Car. 1. the War-

rant was for notable Contempt committed against us and our Government, and stirring up Sedition; and altho' that be almost as general as that in our Case, yet no Objection was made to it for that Clause in any of the Arguments, *Rushworth's Collections*, 18, and 19, in the Appendix. But I agree that this Return could not have been maintained if it were out of an Inferior Court, but during the Session this Court can take no Cognizance of the Matter, and the Inconvenience would be great if the Law were taken otherwise; for this Court might judge one way, and the House of Peers another: which doubtless would not be for the Advantage and Benefit of the Subject. For the avoiding of this Mischief, it was agreed by the whole Court in the Case of *Barnardiston and Somes*, that the Accord for the double Return could not be brought in this Court until the Parliament had determined the Right of Election, lest there should be a Difference between the Judgments of the Courts.

When a Judgment of the Lords comes to this Court, tho' it be of a Reversal of a Judgment of this Court, the Court is obliged to execute it; but their Judgment was never examined or corrected here. In the Case of the Lord *Hollis*, it was resolved that this Court had no Jurisdiction of a Misdemeanor committed in Parliament; when the Parliament is determined, the Judges are the Expositors of the Acts, and are intrusted with the Lives, Liberties and Fortunes of the Subject, and if the Session were determined, the Earl might apply himself to this Court, for the Subject shall not be without a Place where he may resort for the Recovery of his Liberty, but this Session is not determined: For the most part the Royal Assent is given the last Day, as saith *Plowden, Partridge's Case*; yet the giving the Royal Assent does not make it the last Day of Parliament without a subsequent Resolution or Prerogative, and the Court judicially takes notice of Prorogation and Adjournments of Parliament. *Cro. Jac. 111. Ford versus Huntten*, and by Consequence no Order is discontinued, but remains as if the Parliament were actually Asssembled. *Cro. Jac. 327. Sir Chr. Hauden's Case*, so that the Earl ought to apply himself to the Lords, who are his proper Judges.

It ought to be observed, That this Attempt is *Primæ Impressions*, and though Imprisonment upon Contempt hath been frequent by the one and the other House, till now no Person ever sought Inlargement here: The Court was obliged in Justice to grant the *Habeas Corpus*, but upon the whole Matter being disclosed, it appears upon the Return, that the Cause belongs *ad aliud examen*; they ought to remand the Party.

As to the Limitation of the Imprisonment the King may determine his Pleasure by a Pardon under the Great Seal of *England*, as in the Case of *Reinger and Flagossa, Plowden 20*.

As to the Exception that no Commitment is returned, the Constable can only shew what concerns himself, which is the Warrant to him directed; and the Writ does not require him to return any thing else.

As to your Exception, that he is otherwise named in the Commitment than in the Writ: The Writ requires to have the Body of *A. Earl*

of *S. Quocunque nomine Censeatur* in the Commitment.

After this, my Lord *Shaftsbury* made a Speech; the Substance thereof followeth.

My Lords,

I DID not intend to have spoke one Word in this Business, but something hath been objected and laid to my Charge by the King's Counsel, Mr. *Attorney* and Mr. *Solicitor*, that enforceth me to say something for your better Satisfaction. They have told you that my Counsel in their Arguments said, That this Court was greater than the House of Peers, which I dare to appeal to your Lordships and the whole Court, that it was never spoken by them, I am sure was not by any Directions of mine. What is done by my Counsel, and by me, is, That this is the most proper Court to resort unto, where the Liberty of the Subject is concerned. The Lords House is the Supreme House of Judicature in the Kingdom; but yet there is a Jurisdiction that the Lords House does not meddle with. The King's Counsel hath mention'd, as a Wonder, That a Member of the Lords House should come hither to diminish the Jurisdiction of the Lords. I acknowledge them to be Superior to this, or any other Court, to whom all Appeals and Writs of Error are brought; and yet there are Jurisdctions that they do not challenge, and which are not natural to them, or proper for them. They claim not to meddle in Original Causes, and so I might mention in other things; and I do not think it a Kindness to any Power or Body of Men, to give them such Powers that are not natural or proper to their Constitution. I do not think it a Kindness to the Lords to make them absolute and above the Law, for so I humbly conceive this must do, if it be adjudged that they by a general Warrant, or without any particular Cause assigned, do commit me, or any other Man, to a perpetual and indefinite Imprisonment: And, my Lords, I am not so inconsiderable a Person, but what you do in my Case, must be Law for every Man in *England*.

Mr. *Attorney* is pleased to say, I am a Member of the Lords House, and to lay weight on the Word *Member*. It is very true, I am one of them, and no Man hath a greater Reverence or Esteem for the Lords, than my self: but, my Lords, I hope my being a Peer, or a Member of either House, shall not lose my being an *Englishman*, or make me to have less Title to *Magna Charta* and the other Laws of *English Liberty*.

My Opinion is not with one of my Counsel, who argued very learnedly, That the passing an Act by the King's Royal Assent can make a Sessions, because the usual Proviso was not in it. It was without any Instruction of mine to mention that Point.

The King's Counsel tells your Lordships of the Laws and Customs of Parliament; and if this was so, I should submit: But this Case of mine is *Primæ Impressions*, and is a new way, such as neither Mr. *Attorney* nor Mr. *Solicitor* can shew any Precedent of, and I have no other Remedy nor Place to apply to than the Way I take.

Mr.

‘ Mr. *Attorney* confesseth that the King’s Plea-
 ‘ sure may release me without the Lords. If so,
 ‘ this Court is *Coram Rege*. This Court is the
 ‘ proper Place to determine the King’s Pleasure.
 ‘ This Court will and ought to judge of an Act
 ‘ of Parliament void, if it be against *Magna Char-*
 ‘ *ta*, much more may judge an Order of the
 ‘ House, that is put in Execution to deprive any
 ‘ Subject of his Liberty. And if this Order of
 ‘ Commitment be a Judgment, as the King’s
 ‘ Counsel affirms, then it is out of the Lords
 ‘ Hands, and properly before your Lordships,
 ‘ as much as the Acts which were lately passed,
 ‘ which I presume you will not refuse to judge
 ‘ of, notwithstanding that the King’s *Attorney-*
 ‘ General saith that this Parliament is still in Be-
 ‘ ing. I take it something ill that Mr. *Attorney*
 ‘ tells me I might have applied elsewhere.

‘ My Lords, I have not omitted what became
 ‘ my Duty towards the King; for besides the
 ‘ Oath of Allegiance I took as a Peer, or an
 ‘ *Englishman*, there is something in my Breast
 ‘ that will never suffer me to depart from the
 ‘ Duty and Respect that I owe him; but I am
 ‘ here before him, he is always supposed to be
 ‘ here present, and he alloweth his Subjects the
 ‘ Law.

‘ My Lords, they speak much of the Cu-
 ‘ stom of Parliament; but I do affirm to you,
 ‘ there is no Custom of Parliament that ever
 ‘ their Members were put out of their own
 ‘ Power; and the Inconveniences of it will be
 ‘ endless.

‘ Mr. *Attorney* was pleased easily to answer the
 ‘ Objection of one of my Counsel; If a great
 ‘ Minister should be so committed, he hath the
 ‘ Cure of a Pardon, a Prorogation, or a Dissolu-
 ‘ tion: But if the Case should be put, why for-
 ‘ ty Members, or a greater Number, may not
 ‘ as well be taken away without Remedy in any
 ‘ of the King’s Courts, he will not so easily
 ‘ answer; and if in this Case there can be no
 ‘ Relief, no Man can foresee what will be here-
 ‘ after.

‘ I desire your Lordships well to consider what
 ‘ Rule you make in my Case, for it will be a
 ‘ Precedent that in future Ages may concern e-
 ‘ very Man in *England*.

‘ My Lords, Mr. *Attorney* saith you must ei-
 ‘ ther release or remand me; I differ from him
 ‘ in that Opinion. I do not insist upon a Release:
 ‘ I have been a Prisoner above five Months al-
 ‘ ready, and come hither of Necessity, having
 ‘ no other way to get my Liberty, and there-
 ‘ fore am very willing to tender your Lordships
 ‘ Bail, which are in or near the Court, good as
 ‘ any are in *England*, either for their Quality
 ‘ or Estate, and I am ready to give any Sum or
 ‘ Number.

‘ My Lords, this Court being possess’d of this
 ‘ Business, I am now your Prisoner.

The Court deliver’d their Opinion *Seriatim*.

Sir *Tho. Jones*, Justice. Such a Commitment
 by an ordinary Court of Justice, would have
 been ill and uncertain; but the Cause is different
 when it comes before this High Court, to which
 so much Respect has been paid by our Predeces-
 sors, that they have deferred the Determination

of Doubts conceived on an Act of Parliament,
 until they have received the Advice of the Lords:
 and now, instead thereof, it is demanded of us
 to control the Judgment of all the Peers, given
 on a Member of their own House, and during
 the Continuance of the same Session. The Cases
 where the Courts of *Westminster* have taken Cog-
 nizance of Privilege, differ from this Case: for
 in those it was only an Incident to the Case be-
 fore them, which was of their Cognizance; but
 the direct Point of the Matter is now the Judg-
 ment of the Lords.

The Course of all Courts ought to be confi-
 der’d, for that is the Law of the Court, *Lane’s*
Case, 2 *Rest.* and it has not been affirmed, That
 the Usage of the House of Lords has used to ex-
 press the Matter more particularly on Commit-
 ments for Contempts, and therefore I shall take
 it to be according to the Course of Parliament.
 4 *Inst.* 50. It is said that the Judges are Assistants
 to the Lords, to inform them of Common Law;
 but they ought not to judge of any Law, Cu-
 stom, or Usage of Parliament.

The Objection as to the Continuance of the
 Imprisonment, has received a plain Answer, for it
 shall be determined by the Pleasure of the King,
 or of the Lords: and if it were otherwise, yet
 the King could pardon the Contempt under the
 Great Seal, or discharge the Imprisonment under
 the Privy-Seal.

I shall not say what would be the Consequence
 (as to this Imprisonment) if the Session were de-
 termined*, for that is not the present Case: but
 as the Case is, the Court can neither Bail nor
 Discharge the Earl.

Wild, Justice. The Return, no doubt, is il-
 legal; but the Question is of a Point of Juris-
 diction, Whether it may be examined here?
 This Court can’t meddle with the Transactions
 of the most High Court of Peers in Parliament
 during the Session, which is not determined;
 and therefore the Certainty or Uncertainty of
 the Return is not material, for it is not exami-
 nable here: but if the Session had been determi-
 ned, my Opinion would be, that he ought to be
 discharged.

Rainsford, Chief Justice. This Court has no
 Jurisdiction of the Cause, and therefore the Form
 of the Return is not considerable. We ought
 not to extend our Jurisdiction beyond its due Li-
 mits, and the Actions of our Ancestors will not
 warrant us in such an Attempt.

The Consequence would be very mischievous
 if this Court should deliver a Member of the
 House of Peers and Commons who are commit-
 ted, for thereby the Business of Parliament may
 be retarded; for it may be the Commitment was
 for evil Behaviour, or indecent Reflections on o-
 ther Members, to the Disturbance of the Affairs
 of Parliament.

The Commitment in this Case is not for safe
 Custody, but he is in Execution of the Judg-
 ment given by the Lords for the Contempt;
 and therefore if he should be Bailed, he would
 be delivered out of Execution; for a Contempt
in facie Curie there is no other Judgment or Exe-
 cution.

This Court has no Jurisdiction, and therefore

* This was the Case afterwards of the Earl of Danby, N^o 78:

he ought to be remanded. I deliver no Opinion whether it would be otherwise in Case of a Prorogation.

Twifden, Justice, was absent, but he desired Justice *Jones* to declare that his Opinion was, That the Party ought to be Remanded.

So the Earl was remanded to Prison, and staid there 'till another Session of Parliament; when his Application to an inferior Court was Voted a Breach of Privilege by the Lords, for which the Earl was to answer his Contempt at the Bar of the House.

On the 22d of *February* he was accordingly brought to the Bar, where he offered to acknowledge his asserting the Dissolution of the Parlia-

ment to be an unadvised Action, and to beg their Lordships Pardon for his Offence in bringing an *Habeas Corpus*.

Upon which the House proceeded to a Resolution, That the Lord *Shaftsbury* should make his Submission and Acknowledgment in a Form prescrib'd by that House; and accordingly a Declaration was prepar'd for that purpose. The Lord *Chancellor* read the Words to him, and the Lord *Shaftsbury*, kneeling, repeated them at the Bar, and then withdrew. So the House ordered the Lords with white Staves to acquaint his Majesty, That they had received Satisfaction from the Earl of *Shaftsbury*, in the Matter of the *Habeas Corpus*, and the other Contempt, and pray'd him to discharge the Earl from his Confinement, which was done.



LXXII. *The Trial of JAMES MITCHEL**, in Scotland, for attempting the Murder of Dr. JAMES SHARP, Archbishop of St. Andrews †, and Wounding the Bishop of Orkney, the 7th of January, 167ⁱ. 29 Car. II.

JAMES Mitchel being indicted for an Attempt to murder the Archbishop of St. *Andrews*, in July 1668, was committed 1674 Prisoner to the *Tolbooth* at *Edinburgh*; whereupon the Lord Commissioner and the Lords of the Privy-Council appointed a Committee to examine him, viz. Lord *Linlithgow*, Preses (President); *Hutton*, Treasurer Depute; *Dundonald*, *Ross*, and *Murray*, Justiciaries; *Craigy*, *Collington*, &c. When he was brought before the Committee, he was persuaded to make Acknowledgment of the Fact; a Relation whereof is thus given by himself.

‘ My Indictment I take up in these two Particulars: *First*, As they term it Rebellion and Treason, aent which I answered to My Lord *Chancellor* in Committee, that it was no Rebellion, but a Duty which every one was bound to have performed in joining with that Party, and I: In the Year 1656, Mr. *Robert Lighton* being then *Primar* in the College of *Edinburgh*, before our Laureation, tendered to us the *National Covenant*, and *Solemn League and Covenant*; upon mature Deliberation, I found nothing in them, but a short Compend of the Moral Law, only binding us to our Duty towards God and towards Men in their several Stations; and I finding, that our banished King’s Interest lay wholly included therein, and both Coronation and Allegiance Oaths, &c. and they being the Substance of all Loyalty; and my Lord, it was well known, that then many were taking the Tender, and forswearing *Charles Stuart*, Parlia-

ment and House of Lords, I then Subscribed both, the doing of which My Lord *Chancellor* would have stood at no less Rate, if as well known, than this my present adhering and prosecuting the Ends thereof doth now; and when I was questioned what then I called Rebellion, I answered, it is in *Ezra* vii. 26. *And whosoever will not do the Law of God and of the King, &c.* But being questioned before the Committee and the Council thereanent, I answered as I said to My Lord *Chancellor* before: In the Year 1656, Mr. *Robert Lighton* being then *Primar* in the College of *Edinburgh*, before our Laureation, he tendered to us the *National and Solemn League and Covenant*: He stopt me, saying, I’le wad ye are come here to give a Testimony: And then being demanded what I called Rebellion, if it was not Rebellion to oppose his Majesty’s Forces in the Face: To the which I answered, viz. My Lord *Chancellor*, if it please your Grace, I humbly conceive they should have been with us; meaning, that it was the Duty of these Forces to have joined with us, according to the *National and Solemn League and Covenant*; at which Answer I perceived him to storm: But, saith he, I heard ye have been over Seas, with whom did ye converse there? Answer, With my Merchant. But, saith he, With whom in particular? Answer, With one *John Mitchel*, a Cousin of mine own. Saith he, I have heard of him, he is a Factor in *Rotterdam*; to which I conceded. But, saith he, did ye not converse with Mr. *Livingston*, and such as he? to which I answered, I conver-

* Burnet’s *Hist. of his own Times*, Vol. 1. p. 413 — 416.

† About two Years afterwards, in 1679, he was actually murder’d by the Mob, as he was going home in his Coach. Ibid. 470

fed with all our banished Ministers. To which he replied, Banished Traitors; ye will speak Treason at the Bar. Then he answered himself, saying, But they would call the Shooting at the Bishop an Heroick Act. To which I answered, That I never told them any such thing. But where did you see *James Wallace* last? Answer, Towards the Borders of *Germany*, some Years ago. But what ailed you at my Lord *St. Andrews*? (pointing at him with his Finger) Answer, My Lord Commissioner, the grievous Oppression and horrid Blood-shed of my Brethren, and the eager Pursue after my own, as it appeareth this Day to your Grace, and to all his Majesty's honourable Privy-Council. After which he commanded to take me away, that they might see what to do next with me.

The Second is, the Shooting of the Shot intended against the Bishop of *St. Andrews*, whereby the Bishop of *Orkney* was hurt; to which I answered *My Lord Chancellor* in private, *viz.* That I looked on him to be the main Instigator of all the Oppression and Blood-shed of my Brethren that followed thereupon, and the continual pursuing after my own; and, my Lord, as it was creditably reported to us (the Truth of which your Lordship knows better than we) that he kept up his Majesty's Letter inhibiting any more Blood upon that Account, until the last Six were Execute: And I being a Soldier, not having laid down Arms, but being still upon my own Defence, and having no other End nor Quarrel at any Man (but according to my Apprehension of him) that as I hope in Sincerity, with fixing either my Sense or Action upon the Covenant it self, as it may be understood by the many Thousands of the Faithful, besides the Prosecution of the Ends of the same Covenant, which was, and in that Point the Overthrow of Prelates and Prelacy, and I being a declared Enemy to him on that Account, and he to me in like manner. So I never found my self obliged, either by the Law of God, or Nature, to set a Centry at his Door for his Safety, but as he was always to take his Advantage, as it appeareth, so I of him, to take any Opportunity offered. Moreover we being in no Terms of Capitulation, but on the contrair, I, by his Instigation, being excluded from all Grace and Favour, thought it my Duty to pursue him at all Occasions: Also, my Lord, Sir *William Sharp* making his Apology, anent his unhandsome and cheating way taken, he took me under the Pretence to have spoken with me about some other Matters. I not knowing him until five or six of his Brothers and his Servants were laying fast hold on me, they being armed of purpose, desired I would excuse him, seeing what he had done was upon his Brother's Account, which Excuse I easily admitted, seeing that he thought himself obliged to do what he did to me without Law or Order, in the behalf of his Brother; much more was I obliged to do what I did, in the behalf of many Brethren, whose Oppression was so great, and whose Blood he caused to be shed in such Abundance. Moreover, he persisting in his bloody Murders, as witnesseth the wounding of Mr. *Bruce* at his Taking, by his Emisseries, some few Days before that fell out concerning himself, I was desirous, if by any means in taking him away I could, to have put a Stop

to the then curreant Persecution. Thus far I have truly resumed what passed. My Confession was made upon Oath and Promise made to me upon Life and Safety, and indeed the Promise made to me by my Lord *Chancellor* was in these Words; *Upon my great Oath and Reputation, if I be Chancellor, I shall save your Life, and if ye will not confess, the Council will take another way to make it out, which I took for the Boots, as I found afterwards.*

After two Years Imprisonment, upon the 18th of *Jan.* 1676, he was unawares, at Six a Clock of the Night (about the time of the inclosing of the Wards) called forth before the Committee.

At his Appearance, the Lords Justiciaries obscuring themselves by putting their Hands upon their Faces, and leaning upon their Elbows upon the Table: My Lord Preses said, Sir, Ye are brought here before the Committee, to see if you will adhere to your former Confession, or not. To which he answered, My Lord, it is not unknown to your Lordship, and others here present, that by the Council's Order I was remitted to the Lords Justiciaries, before whom I received an Inditement, at my Lord *Advocat's* Instance, wherein I was indited both of Life and Fortune, although, my Lord, Fortune have I none. To which Inditement I answered at three several Dyets, being deserted by my Lord *Advocat*. I humbly conceive, that both by the Law of the Nation, and the Practice of the House at that time, I ought to have been set at Liberty, yet notwithstanding I was, contrary both to Law, Justice, and Equity, returned to Prison. And upon what Account I am brought this Night before your Lordship, I know not. To the which my Lord Preses answered, Ye are not accused here, neither upon Life nor Fortune, but to see whether you will adhere to your former Confession. To which it was answered, I am not convinced of any Crime, therefore I know not any such Confession as your Lordship alledges. To which my Lord *Treasurer Depute* replied, He is one of the most arrogant Rogues, Cheats, Liars, and what not. To which he replied, My Lord, if there were fewer of such Persons of whom your Lordship have been speaking, in the Nation, I would not be standing this Night at your Bar: But my Lord *Advocat* knows, that what hath been alledged against me, is not my Confession. To which he replied, Do you not remember that before the Lord Commissioner and the Council ye said such and such thing? To which it was replied, That my Lord Commissioner never enquired about any such thing; only he said, he heard that I had been abroad, and over Seas, and enquired with whom I did converse there; to which it was replied, With my Merchant, my Lord; But with whom in particular? to which I answered, With one *John Mitchel*, a Cousin of mine own; so that there was no such Discourse before the Council. But, says my Lord Preses, we will make a sharper thing make you to confess. To which it was replied by the Pannel, I hope your Lordships are Christians and not Pagans. To which the *Treasurer Depute* added, saying, That the Pannel was no Christian. To which the Pannel replied, My Lord, you know the old Proverb, *Turpe est Ductori &c.* And so he was returned to Prison for that Night.

Upon the 22d Day, he being called before the said Committee who sat in the Town's Council-House, at which time my Lord Preses said to him: Sir, ye are called here again to see if ye will adhere to your former Confession, (opening a Paper to the Pannel, and alledged it to be subscribed by him.) To which it was answered, My Lord, I acknowledge no such Thing. Then he replied, Sir, ye see what is upon the Table before you; I shall see if that can cause you do it. To which it was answered, By that Torture you may cause me blaspheme God, as *Saul* did compel the Saints; you may by that Torture cause me to speak amiss of your Lordship; to call myself a Thief, a Murtherer, or Warlock, and what not, and then pannel me upon it: But if ye shall, my Lords, put me to it, I here protest before God and your Lordship, that nothing extorted from me by Torture shall be made use of against me in Judgment, nor have any force against me in Law, or any other Person whomsoever; but to be plain with your Lordship, I am so much a Christian, that whatever your Lordship shall legally prove against me, if it be a Truth, I will not deny it. But, my Lord, on the contrary, I am so much a Man, yea, and a *Scots* Man, that I never held myself obliged, either by the Law of God or Nature, or by the Law of Nations, to become my own Accuser. Then said my Lord Depute Treasurer to the Preses, He hath the Devil's Logick, and sophisticats like him. Ask at him whether or not that be his Subscription? To which he answered, he acknowledged no such thing. To which *Hattoun* answered, Bid him say, Yea, or Not. Then my Lord Preses said, (pointing his Hand to the Boot) You see what is before you, say either Yea, or Not. He answered, I say Not; and so he was returned to close Prison as before.

Upon the 24th Day they solemnly assembled, to wit, with their Robes in the Parliament-House, where the Lords of the Session sit, at which time the Executioner was present with the Boots, and the Pannel being brought as before to the Bar, the Lord Preses said, You are now brought here to see if you will yet confess before you be put to Torture. But the Pannel knowing, according to the rate of the *Spanish* Inquisition, that always the more he confessed, either concerning himself, or any other Person, the more severely the Torture would be made use of, to make him confess more; therefore he answered after this manner: My Lord, I shall study Brevity by speaking a few Words what I have to say, to wit, That I have been now these two full Years in Prison, and more than one of them in Bolts and Fetters, and upward of thirty Weeks in close Prison, so that my Imprisonment hath been more intolerable to me than the Pains of many Deaths, if I had been capable thereof: Yea, and it is well known, that within a shorter Time in regard of my Imprisonment, several have made away themselves rather than endured the Affliction of a Prison; but, my Lord, an Obedience to the expresse Commandment of God hath made me to undergo all Hardships I have hitherto met with, and to undergo this present Torture, to wit, the Preservation of my Life, and the Lives of others, as far as it is in my Power, and to keep off innocent Blood from your Lordship, and your Families and Relations, which by shedding of mine, doubtless you would bring

upon your selves, Posterity, and Relations, Wrath from the Lord, to the consuming thereof, until there should be no Remnant nor Escaping. And now, my Lords, I do again protest before God and your Lordships, that whatever may be extorted from me by Torture, may not be made use of against me, nor any other Person in Judgment, nor have any force in Law. And so, my Lords, I have done: You may call the Men whom you have appointed to your Work. After which they caused the Macer to call upon the Executioner, and two Officers appointed for that effect, who tyed him in an armed Chair, and brought the Boots, and enquired which of his Legs they should take; but they, after speaking amongst themselves, commanded the Executioner to take any of them, upon which he laid the left Leg upon the Boot, but the Pannel lifted it out again, saying, Seeing ye Judges have not determined it, take the best of the two, for I freely bestow it in the Cause; and laid his right Leg into the Torture; after which the King's Advocate said, I shall speak but one Word or two, but notwithstanding continued his Discourse for a considerable time; so when he had made an end, the Pannel answered thus; My Lord Preses, the Advocat's one Word or two hath multiplied to so many, that my Memory cannot serve me, in the Condition wherein I am, to resume them so as to answer them in particular: But I shall answer to the Scope of his Discourse. First, Whereas he hath been speaking to the Sovereignty of the Magistrat, I shall say somewhat more than he hath said, to wit, that the Magistrat whom God hath appointed, is God's Deputy, and that both the Throne and the Judgment is the Lord's, while he judgeth for God, and according to the Law of God, and that a great part of his Office is to deliver the Oppressed out of the Hand of the Oppressor, and to shed no innocent Blood, according to the Commandment of God to *Zedekiah* by the Prophet *Jeremiab*, Chap. xxii. 3. And, my Lords, Disobedience to his Commandment brought the Wrath of God upon him, his Princes, and the whole Nation of the *Jews*, Chap. xxxvii. Secondly, My Lord Advocat hath been hinting at the Sinfulness of Lying upon any Account: It is answered, my Lords, that not only Lying is sinful, but also a pernicious speaking of the Truth is a horrid Sin before God, while it tendeth to the shedding of innocent Blood, as witnesseth that of *Doeg*, *Pf. lii.* compared with *1 Sam. xxii. 29.* But what my Lord Advocat hath forged against me is false, so that I am standing upon my former Ground, *viz.* the Preservation of my Life and the Lives of others, as far as it lies in my Power, the which I am expressly commanded to do by the Lord of Hosts. After which, the Clerk's Servant being called by the Advocat, they interrogate him of many Questions, upward to the Number of Thirty, only to see if they could catch him in a Contradiction, or to see if they could find out any Person to witness against him; but he understanding their Drift, answered as followeth: My Lords (not knowing that I shall escape this Torture with my Life) therefore I beseech you to remember what *Solomon* says, *He who sheweth no Mercy, shall have Judgment without Mercy.* And if there be any here present, as I hope there are few or none, yet if there be any such here, whose Disposition is so eager in

pursuing after innocent Blood, that nothing less than a full Draught will satisfy them, I say, let such remember what is spoken, *Rev. xix. 5, 6. Thou art righteous, O Lord, which was, and art, and shalt be, because thou hast judged thus, for they have shed the Blood of the Saints and Prophets, and thou hast given them Blood to drink, for they are worthy, &c.* And now, my Lords, I do freely from my Heart forgive you who are Judges sitting upon the Bench, and the Men who are appointed to be about this Piece of horrid Work, and also these who are vitiating their Eyes beholding the same. And I do intreat, that God may never lay it to the Charge of any of you, as I beg that God may be pleased for his Son Christ's sake to blot out my Sins and Iniquities, and never lay them to my Charge here nor hereafter.

Quest. Are you that Mr. *James Mitchel* who was excepted out of the King's Act of Grace and Favour, or not? *Answ.* I never committed any such Crime deserving me to be excluded, but rather to be included, protected and defended. *Q.* Know you any more of that Name? *A.* Yes, there are two within *Midlothian*; and what know I, but there may be more elsewhere? *Q.* When knew you of the Rising in Arms, *Anno 1666*? *A.* My Lords, I knew of it when the rest of the Citizens knew of it. *Q.* When was that? *A.* When there came a Messenger to the Council for that effect, and when *Datzel* and his Soldiers marched out at the West Port in order thereto. *Q.* Went not you out of the Town with Captain *Arnot*? *A.* No. *Q.* Where did you meet with *James Wallace*? *A.* I did not know him at that time. *Q.* Was you at *Air*? or did you join with the Rebels there, or any where else? *A.* I never joined with any such. To which my Lord *Hattoun*, Treasurer Depute, replied, saying, My Lord, he never acknowledges these Men to be Rebels. To which the Pannel answered, My Lord, I shall in answer to what is spoken follow *Salmon's* Advice, in that he says, at some times even a Fool by holding his Peace, will be reputed Wise. Whether or not *Hattoun* took it to be spoken of him, I cannot tell, but there was nothing replied thereto by any of them. *Q.* Where was you at the time of *Pentland*? *A.* In *Edinburgh*. *Q.* Where was you before it? *A.* In *Edinburgh*. *Q.* Where was you after it? *A.* In *Edinburgh*. *Q.* Where did you lodge before that time? *A.* In one *Girfell Whiteford's*. *Q.* Where did you stay at that time, and was you still in the Town, or not? *A.* My Lord Advocate, I do not know what you mean by being still in the Town, for you may call it out of the Town, if I was at the *Wind-mill*, or at *Leith*. *Q.* What, was you no where further abroad, than at such Places? *A.* My Memory cannot serve me now, after ten Years Space, to determine where I was; neither do I keep a Diurnal of times past, nor is it my Duty so to do; neither do I think any Man's Memory here present can serve him for so long a time: But this I judge, that it is my Duty every Day to be about my lawful Employment and Calling, according as God hath commanded, and therewith to rest satisfied. *Q.* What took you out of the Town at that time? *A.* I was making my self ready to go over to *Flanders*. *Q.* With whom went you? *A.* With one *John Forrester*, an *Ostender*. *Q.* How long was it after *Pent-*

land before you went? *A.* I cannot tell. *Q.* Can you not give it a guess? *A.* About a Month or six Weeks. *Q.* What was you doing all that time? *A.* I was making my self ready, and thereafter there came a contrary Wind. *Q.* Who was Merchant in the Ship? *A.* I enquired not. *Q.* But went not the Merchant along with you? *A.* No. *Q.* What was the Reason of that? *A.* It was the time of the *Dutch War* against the *English*, and at such times Merchants of Ships do not hazard their Persons with their Goods, but commits their Affairs to Factors abroad. *Q.* How long stayed you there? *A.* About three Quarters of a Year. *Q.* Why stayed you so long there? *A.* It was a Space before I was ready to return, and thereafter the Report of Peace came, which thereafter followed, and I thought it better to wait a little time than hazard in War. *Q.* With whom came you home again? *A.* With *Dutchmen*, who were *Amsterdammers*. *Q.* Was there no *Scotsman* with you? *A.* I have told you, my Lords, I came home with *Dutchmen*. *Q.* Who was the Skipper of the Ship? *A.* I cannot remember, but he came to *Lime Kills* for a Loading of Coals from Sir *James Hacket*. *Q.* What Goods fetcht you home? *A.* I cannot now remember the Particulars. *Q.* Where did you enter them? *A.* I made the best shift I could to shun the Customers. At which Sir *William Parvas* riseth to cause call the Excise-men; to which the Pannel replied, O Sir *William*, it was out of your time and theirs. *Q.* Did you know *Peniry*? *A.* Yes. *Q.* Is he living? *A.* No. *Q.* Did you know Sir *James Stirling*, and Mr. *Robert Ferguson*? Are they alive? *A.* They are both dead, the one in this Town, and the other in the *Indies*, being called by the *Indian Merchants* to be a Minister in one of their Plantations. *Q.* Knew you *William Young*, and whose Tenant he was? *A.* Yes, I both knew him, and that he was a Tenant of Sir *John Gibson's*. *Q.* Bought you a Horse from him at that time? *A.* I never bought a Horse from him. *Q.* From whom had you a Horse, when you went out of the Town? *A.* There was none in the City who had a Horse to lend for Hire, who would have refused me for my Money. *Q.* But of whom had you a Horse? *A.* Where I could have none, I took me to my Feet.

Which Examination being ended, the Executioner being commanded thereto, took down his Leg from off a Chest upon which it had been lying the whole time in the Boot, and it being set upon the Ground, he began to thrust in the Shafts, and drive the Wedge. And at every Stroak they enquired, if I had any more to say. To which it was answered, No more, my Lords; and thus it continued to the Number of Nine Stroaks, upon the Head of the Wedge, at the end of which he fell by into a little Swarfe thro' the Extremity of Pain, at which the Executioner cried out, Ahs! my Lords, he is gone, he is gone. Then they commanded to leave off the Torture, and rising from their Seats went away. After which he was returned to the *Tolbooth*, being carried by his Friends in the Chair in which he was tied during the time of his Torture.

He still continued Prisoner in the *Tolbooth* till the 7th of *Jan. 1678*, when they proceeded against him before the Justices, as follows:

XXIX CAR. II. 1678.

Curia Jusficiariæ. S. D. N. Regis tenta in Prætorio Burgi de Edenburgi, Septimo die Mensis Januarii, 1678. Per honorabiles viros Dominos Archibaldum Primrose de Caringtoun Jusficiarium Generalem, Jacobum Fouclis de Colintoun, Robertum Nairn de Strathurd, Joannem Lockhart de Castlehill, Davidem Balfour de Ferret, & Thomam Murray de Glendoick, Commissionarios Jusficiariæ dicti S. D. N. Regis.

Curia legitime affirmata.

Intran' Mr. JAMES MITCHEL, Prisoner.

INDYTED and Accused, forasmuch as be the Common-Law and Law of Nations, and the Law of this Kingdom, Murder and the Assaulting and Attempting upon any Person or Persons be way of Forethought Felonie & *per insidias & industriam*, of purpose and design to Kill, are most atrocious and detestable Crimes, destructive to and against the Being of Humane Society, and is severly punishable, but especially when the samen are committed upon the Persons of Counsellors and other Officers who doe represent Authoritie, and are liable to the Mistakes and Malice of wicked Persons for doing their Duty, or when the samen are committed upon the Persons of Churchmen, Bishops or Ministers, who are of the Sacred Function; who be the Laws of all Nations are priviledged and secured, as much as can be, from the Malice and sacrilegious Attempts of wicked Persons. And particularly, it is Statute be the fourth Act of the sixteenth Parliament of King James the Sixth, That whatsoever Person invades or persues any of the Lords of Session, secret Council, or any of his Majesty's Officers, for doing of his Majesty's Service, shall be punished with Death. And be the seventh Act of the first Parliament of his Majesty's Royal Father in Anno 1633, intitulat, *Anent the invading of Ministers*, it is Statute that the same shall be extended to all Archbishops, Bishops, and Ministers whatsoever. And be the fourth Act of his Majesty's second Parliament, and second Session of the same, it is Statute, That whatsoever Persons shall be guilty of the Assaulting the Lives of Ministers, that they shall be punished with the pain of Death and Confiscation of their Moveables. And be the Laws and Acts of Parliament of this Kingdom, the Mutilation and Dismembration of any of his Majesty's Subjects, be way of Forethought Felonie, is ane high and capital Crime, and punishable with the pain of Death. Nevertheless, it is of Veritie, That ye having shaken off all Fear of God and Conscience, Respect and Regard to his Majesty's Authoritie and Laws, and conceiving a deadly Hatred and Malice against a Reverend Father in God, James Archbishop of St. Andrews (a Person who had never known or seen you, so as to take notice of you, and much less had given you any Offence) without any Ground or Quarrell, and upon Account only that he was

advanced and promoted to be Archbishop, and to be of his Majesty's Privie Council, and did serve God and his Majesty faithfullie in the saids Stations and Offices; you did dayly contrive, resolve and design the Murder and Assassination of the said Archbishop: And in order thereto, having provyded yourself with a pair of long Scots Iron Pistols near Musket bore, you did upon the Nynth Day of July 1688, or ane or other of the Days of the said Moneth, proceed and take the Opportunity to execute and goe about your horrid and cruel Design, when the said Archbishop in the Afternoone of the said Day did come down his own Stair, and was going to his Coach, being to go abroad upon his Occasions with a Reverend Father in God, Andrew Bishop of Orkney. And you having a charged Pistol with Powder and Ball, did most cruellic and feloniously Assault the saids Bishops, and did fire, discharge, and shot the said Pistol upon them, being within the said Coach; and God of his Goodness having preserved the Archbishop whom you intended to Murder, you did by the said Shot grievouslie Wound the Bishop of Orkney, to the great hazard and danger of his Life; so that having for a long tyme, and with great Pain, Torture, and expence of Blood, languished of the said Wound, being in a most dangerous Place in the joyning of the Hand and Arm, where there is a Confluence of Nerves and Fibres, he never did recover his Health to that measure and vigour that he had, or might have had if he had not gotten the said Wound. And he was mutilat and dismembred as to his Arm and Hand, so that he could make no use of the same, but languished thereof until he dyed. And after you had attempted and committed the said Assassination and Villanie *tanquam insidiator & per industriam*, and be way of Forethought Felonie, ye did goe away and escape throw the Multitude and Throng that had gathered upon the Noise of the said Shot, having another charged and bended Pistol in your Hands, of purpose and design to have killed any Person who should have offered to take and apprehend you. The foresaid Attempt and Villanie being without any Parallel, the Circumstances being considered, *viz.* That it was committed by one who professed to be of the Reformed Religion, and who did pretend to be and serve as a Chaplain in several Families; that it was committed to the great Scandal and Disadvantage of Christian Religion, and especially of the Protestant Reformed Religion, the Professors and Preachers of the same having so much declared against, and be their Preaching and Wrytting having exprest their Detestation of such Attempts and Practices committed by Persons, and owned by Wrytters of the Roman Profession: And that it cannot be instanced that any of the Protestant Religion was guilty of any Attempt upon the Account of Religion: And that the worst of Men being ashamed to commit such Villanies; for covering of the same, and for their Security, doth take the Opportunity of Darkness and Solitude, in Corners and solitary Places; Your Malice was so implacable, that you was prodigal of your own Lyfe to be Master of the Lyfe of the said Archbishop; and in the High Street of *Edinburgh*, and in the Day-light, and in the face of the Sun, and before many Witnesses, near or at a little distance

from the said Coach, where you could not but expect to be presently seized upon, you did devote your self and did adventure to commit the said most villanous and wicked Attempt. Yet notwithstanding of all the saids Aggravations and Circumstances of Horror and Remorse, you did continue in your implacable Malice, and did converse and keep Correspondence with *Robert Cannon* of *Mondragatt*, and with — *Wells* of *Cornlie*, and — *Mac Cleland* of *Barscop*, declared and excepted Rebels and Traitors; had divers Meetings with them, and upon Discourse concerning the said Attempt, every one of the saids Persons putting it upon one another, when it was put to you, you said and uttered these or the like Speeches, *Shame fall the misse*, and that *ye should make the Fire hotter*: And after the tyme and Attempt forsaide in the Year 1668, and subsequent Years, Moneths, and Days of the saids respective Years, and in one or other of them, your guilty Conscience disquieting and persuing you, you did rove and go abroad several tymes to *Holland*, *England* and *Ireland*. until Divine Justice did drive and bring you back to this Kingdom, that Justice might be satisfied and vindicat in some measure where you had committed so great Villanies. After your Return you did proceed to that height of Boldness and Confidence, or rather Impudence, that you did repair to and live in *Edinburgh*, and was married there with your Wylie, who is yet living, by Mr. *John Wells*, who is a declared and excepted Traitor, and Forefault for his Accession to the Rebellion 1666. And your Boldnes was so great in out-daring both God and Authoritie, that for a long tyme ye have been lodged and has kept a Shop near that Place where the Archbishop doth and is in use to lodge when he is in *Edinburgh*, until at length ye was discovered and apprehended, having upon you when you was taken the same Pistol which ye shot when ye committed the said Attempt, which was found under your Coat charged with Powder and three Ball, of purpose to attempt again and execute your bloodie Design against the said Archbishop, at least against any Person who should offer to take you. From all which Premises, it is evident that ye are guilty of the saids atrocious Crymes of Murder and Assasinat be way of forethought Fellonie, and is a *Percussor & sicarius*, and of Mutilation, and of the other Crymes above-mention'd: And therefore the saids Pains ought to be inflicted upon you as ane Murderer and Assasinat, and as guilty of the Crymes forsaids, in ane exemplarie manner to the Terror of others.

Persuer,

Proctors in Defence.

Sir *George Mac Kenzie* of *Rosehaugh*, our Sovereign Lord's Advocate.

Sir *George Lockhart*.

Mr. *John Eleis*.

His Majesty's Advocate produced ane Warrant from his Majesty's Privy Council for persuing the said Mr. *James Mitchel*, whereof the Tenor follows. *Edinburgh*, the sixth Day of *December* 1677, The Lords of his Majesty's Privie Council do hereby grant, order, and warrant to Sir *George Mac Kenzie* of *Rosehaugh*, his Majesty's

Advocate, to raise and persue a Criminal Process before the Lords Commissioners of Justiciary against Mr. *James Mitchel* for the Assasination attempted by him upon the Archbishop of Saint *Andrews* and the Bishop of *Orkney*. Extract be me sic subscribitur, Al. Gibsone.

Maller *John Eleis* Advocate produced ane Act of his Majesty's Privy Council empowering Sir *George Lockhart* and him to appear for the Pannals Defence, whereof the Tenor follows. *Edinburgh* the third Day of *January*, 1678, the Lords of his Majesty's Privie Council, having considered a Petition presented in behalf of Mr. *James Mitchel* Prisoner, representing, that he is upon *Munday* next to undergo a Trial before the Justices at the instance of his Majesty's Advocate, as the alledged Person who shot a Pistol at the Archbishop of St. *Andrews*: Yet no Advocate will undertake to appear for him, without they be speciallic commanded so to do. And therefore supplicating, that Sir *George Lockhart* and Mr. *John Eleis*, Advocates, may be ordered to that Effect, the saids Lords do hereby order and recommend the said Sir *George Lockhart* and Mr. *John Eleis* to appear and plead for the Suppliant before the justices, in the Cause abovementioned, upon *Munday* next, and other Dyets of that Process, and appoints Intimation to be made hereof to the said Sir *George Lockhart* and Mr. *John Eleis*, and to the Petitioner. Extract be me, sic subscribitur, Al. Gibsone.

His Majesty's Advocate declares he passes from my Lord Justice General as a Witnes in this Cause.

Mr. *John Eleis*, Advocate, as Proctor for the Pannal, declares, that they sustain my Lord Justice General to be a Judge in this Cause notwithstanding of his being cited as a Witnes both by Persuer and Defender.

Mr. *James Mitchel* Pannal denyes the *Dittay*, and any pretended Confession alledged emmitted be him.

Mr. *John Eleis* for the Pannal alledges, that he cannot pass to the Knowledge of any Assyse: And the Conclusion that the Pannal has committed Murder, cannot be inferred from the Subsumption of the Lybell, because be the Laws of this Kingdom, the Civil Law, the common Opinion of Doctors, the Law and general Custom of all Nations, *Nudus conatus & affectus sine effectu*, even in the most atrocious Crymes, except Treason, Parricide, and other excepted Crymes, is not punishable by Death. And it were against all Reason, seeing Punishments ought to be proportional to the Crymes, that a naked and simple Design of Murder should be punished as Murder that had taken Effect. *Et in criminibus gravioribus & gravissimis, viz. Adulterium, Furtum, Sodomie, &c.* the naked Design is not punished *puna ordinaria*, even by the Civil Law. And tho' *Lex Cornelia de sicariis* by ane extraordinary stretch does declare *si quis cum telo ambulaverit*, yet it is but a Statutory Law, and deregot to by the Law of Nations, and the special Laws of our Nation, in sua far as Murder in our Law is defined to be, and has only place in *Interfectis per felloniam*, and these who were killed upon forethought Fellonie. (2do) In sua far as the Lybell concludes him guilty of Assasination, the same is no ways relevant, it being both a Term and a Cryme unknown in our Law. And be the Laws and Acts of Parliament

of this Nation, the Subjects of *Scotland* are to be governed by the Laws of *Scotland*. And tho' the Cryme of Assassination were a Point of *Ditay* by our Law, as it is not; yet it is not, nor cannot be pretended he was hired for that Effect, nor is it lybelled. (3^{to}.) In sua far as the Lybell concludes the Pain of Death for Mutilation of the Bishop of *Orkney*; it is answered, that the same is no ways relevant. And the said Conclusion cannot be inferred from the Subsumption, because the Act of Parliament does only declare Demembration to be punished as Slaughter. (2^{do}.) The said Act declares Demembration to be only punished as Slaughter when it proceeds upon forethought Felonie. (3^{to}.) The said Act requires another Qualification, viz. That it be perused by the Partie: None of which can be subsumed upon in this Case, because it is not lybelled that the Bishop was dismembred, or had his Hand cut off, but only had a Wound in the Hand. And the Lybell does expressly bear, That the Bishop of *Orkney* got the Shot in the Hand accidentlie, when the Design was against the Bishop of Saint *Andrews*, and so was not upon forethought Felonie as to him. And lastlie, the Bishop's nearest of Kine does not concurr nor peruse, which is a special Requisite in the said Act of Parliament. Like as the said Act is *exolet*, and in no Register can it be made appear that any Person was capitallie punished for Dismembration: But upon the contrary, many accused and condemned in Arbitrarie Punishments. So that the Lybell is no ways relevant as to that Article, for the Reasons foresaids; speciallie seeing Dismembration is not so much here as lybelled or pretended. And whereas it is insinuat, that the Bishop did languish and die of the said Wound: It is answered, that the Lybell is no ways relevant, he conceived, because it is not lybelled that the Wound was *ex sua natura* lethal or mortal. And it is offered to be proven, that the Bishop did live several Years thereafter, and go about his ordinary Function as a Bishop, by Preaching, &c. which is a sufficient Ground of Exculpation and Defence.

4^{to}. In sua far as the Lybell is founded upon the Act of Parliament anent invading of Counsellors, it is answered, That this present Case does not fall under the Compass of the said Act of Parliament, because it is not lybelled that the Cause of the pretended Invasion of the Archbishop was upon the account he was in the Prosecution of his Majesty's Service; but upon the contrar it may appear strange to any rational Man *Quorsum & cui bono* he could have done it.

5^{to}. As to the Acts anent invading of Ministers, they import no capital Punishment, but only Confiscation of Moveables. And as to which the saids Acts are opposed, and as to the Act 1675, it is posterior to the Fact lybelled.

In sua far as the Lybell seems to be founded on a Confession; and in sua far as the Confession may be made use of as a sole or conjunct Probation, the Pannal does object against the sament upon the Grounds and Reasons following. *Primo*, If any such Confession was emitted by the Pannal, which he has absolutlie denied in Presence of your Lordship (no ways acknowledging the Lybell) no respect can be had thereto: And it is not probatorie, because

the sament is extrajudicial & *extra Bancam*, in regard it is not made in Presence of the Assise, who are Judges to the Probation, which is expressly contrar to the 95. Act, 7. Parliament, King *James* 6, which requires the hail Probation to be led in Presence of the Assise and Partie. And which Act of Parliament was not only made for Securitie of Pannals, as to a just and legal Procedure against them; but also that the Assysers to whom the Truth of the Lives of the Subjects of this Kingdom is committed, as to the Point of Probation, might not proceed upon Fame and Report, but upon a clear Probation before them. For if that were not, the Assise would be altogether deprived to know how the Confession was emitted, if spontaneously or *ex constanti vel trepidatione*, or *spe venie*. And the most that ever was sustained in this Case, was, that the Assise did find a Partie guilty upon a Confession emitted before a *Quorum* of the Justices in a fenced Court. *Esso* the said pretended Confession should be sustained probative, as for the Reasons above-represented (the Pannal with all Submission to your Lordships humbly conceaves) it cannot: Yet, if any such Confession was, it is null because it was *elicite spe venie & immunitatis*. And for proving thereof, the Pannal does repeat his Exculpation, which he conceaves is relevant in Law; and craves the Witnesses therein to be examined upon the Contents thereof. (2^{do}.) The said Confession being emitted *extra Judicium & spe venie*, as said is, *est in se nulle*, and cannot be confirmed or validat by the Testimonie of any Witnesses whatsoever. And to evidence that the Pannal's Lyfe was never intended to be taken upon the said pretended Confession: The same (if any was) is opposed; by which it evidently appears that he was examined upon Oath, as to the most material part of the Cryme, viz. his Complices, which makes it more than evident, that it being *in materia criminale & capitale*, in which Oaths cannot be taken by Law, renders the Confession null and invalidat, at least makes it evident that the Lybell has been restricted *ad civiles effectus*.

My Lord Advocat insists in the first Place upon the fourth Act of the sixcent Parliament, *James* 6. By which *nudus conatus* attempting and invading, tho' nothing follow, is found relevant to infer the pain of Death. But so it is that the said Mr. *James Miltobel* did attempt the killing the Archbishop of Saint *Andrews*, a Privy Councillour; which Attempt *devenit ad actum proximum*, the said Mr. *James* having done all that was in his Power. And as to the Quality adjected in the Act, insinuating the Defence, that it must be proven that it was for doing of his Majesty's Service; it is replied, That this Qualitie is inferred, and cannot, nor requires not to be otherways proven, than by a presumed Inference. For the Design of the Attempter being ane Act of the Mina and the Secret of the Heart, it cannot be otherways proven, but simplie by the attempting a Secret Councillour, or any of his Majesty's Officers, against whom the Pannal could have no Quarrel, but for doing of his Duty, and therefore the Law still concludes the same, except the Pannal will offer to condescend upon another relevant Reason, viz. any private Fead; for if it were otherways,

ways, the Act would be absolutelie useles, since any Person might attempt or kill a Privie Counsellour, it being impossible to prove what was the Designe. And this Act was designed meerly to make all Attempts against Privie Counsellours punishable by Death; for otherwise it could be no Fence nor Protection for Privie Counsellours, if it were onlie granted to them under a Qualitie which were impossible to be proven. Nor can this seem hard, since the Subjects have only themselves to blame, who attempt against the Lives of Privie Counsellours. And it were very ridiculous to think, that if the Brother of a Pannal should attempt to kill the Judge or King's Advocate immediatlie after a Process, that it were necessar to prove the Designe otherways than by the natural Contingencie which obviously aryses from the Qualitie and Circumstances of the Perpetration: But in this Case as Mr. *James Mitchel* is a Person who can condescend upon no private Offence betwixt the Archbishop and him, they being absolute Strangers to one another; so besides the Presumption of Law above-specified, it is offered in Fortification of the Act, That, *Primo*, the said Mr. *James* ownes himself to be of a Profession who hates and execrates that Hyerarchie, and of which Sect the unhallowed Penman of *Nephtalie* declares it lawful to Kill those of that Character. *2do*. It is notour and offered to be proven, that Mr. *James* himself defended that it was lawful to kill such, and indeavoured by wrested Places of Scripture to defend himself, and gain Profelytes thereby. And if need were, as there is none, it is specificklie and distinctly offered to be proven, that he acknowledged that the Reason why he shot at the Archbishop, was, because he thought him a Persecuter of the nefarious and execrable Rebels who appeared on *Pentland-Hills*: Nor can Designs nor Acts of the Mind be otherways proven than by such emmitted Declarations, Arguments and Acknowledgments. Likeas in the whole Course of our Law, the invading or attempting any of that Sacred Function is still declared equivalent to Killing: And tho' the last Act be posterior, yet it is sufficient to demonstrate and clear. And, *3tio*. By the Common Law *conatus* and indeavour is *in criminibus atrocissimis* punishable by Death, *ubi reus devenit ad actum proximum & omne quod in se erat fecit*, which is in it self most reasonable, since the Atrocity of the Cryme should put the same even beyond an Attempt. And there can be nothing more just than that the Extraordinaryness of a Cryme should have an extraordinarie Allowance. And Guilt attempted in atrocious Crymes, such as sacrilegious Assasination, is in the Eye of the Law as great and greater than the stealing ane Horse or Cowe, speciallie where Securitie from the Effect proceeded from no Innocencie in the Committer, who did all he could; But from the special Providence of God disappointing the Effect of a Cause he so much hated. And *Carpsovinus* requires only three Qualifications to make Indeavour punishable by Death: *Primo*, *Quod eventum erat ad actum mortis proximum*. (*2do*.) *Quod non stetit per Assasinum quin consummaretur delictum*. (*3tio*.) *Quod occidendus fortuito casu tantum Evaserit*; all which concurr but too well here. And that *in omnibus criminibus atrocissimis Conatus* is punishable, is clear

from *Gotfred. tit. de Conatu*, from *Covarinus in Clementina, Si furiosus, num. 6*. And particularlie in the Cryme of Assasination *totidem verbis*, by *Matheus de Siccariis, num. 3*. *Assasinus tamen nihil prodesse debet solusque conatus capite puniendus*, a great Instance whereof is given in a Decision by *Gotfred* in the Senate of *Savoy*, where Death was inflicted upon a Person who but struck with a Batton. And whereas it is pretended that Assasination is no Cryme in our Law, and that it is only inferred where the designe of Murdering proceeds from the Committers taking Money: It is answered, that this part of the Defence is most groundless: And our Nation would be more barbarous than those of *Lapland* or the *Tartars*, if the lying in wait with a constant designe to Kill clandestinely & *per insidias* any Person who had never offended us, should not be raised to a higher Degree of Detestation than ordinar Murder. For, though the Law does not always punish a meer Indeavour when designed against such as have offended us, when Nature pleads some Excuse from the greatnes of Passion and Resentment, or where the Partie killed gave some Occasion by doing the Wrong, or where the suddenness of the Design allowed no tyme to consider or repent; yet where a Person after mature Deliberation ryppens his own Villanie, and resists the Motions of Reason and the Inspirations of God Almighty, by lying in wait to kill a Person who never offended, the Law thinks the Common Wealth can never be secured as long as such a Viper is alive, who wants nothing but Opportunitie to kill Mankind one by one. And the Specialitie of taking Money is only demonstrative, and not restrictive, since the Guilt in this, and such like Cases, is greater and more dangerous than that of taking Money. For, he who takes Money will not kill but in Darknes, and where he may escape; but the Sun, and the Cross, and the Confluence of all the World, cannot secure against Murders, where the Partie imagines that the Cryme deserves Heaven, or at least where he thinks that these of his Persuasion will rise in a Tumult upon the Streets for his Defence. Likeas since the Law has inferred Death *ob conatum* in the Crymes of *Raptus robbrie, &c.* much more should it infer Death in this unparalleled and execrable Cryme.

As to what is alledged against the Acts of invading Ministers; it is answered, That the first Act appoints that it shall be punished with all Rigor. And the 7 Act, King *Charles 1.* and the last Act is sufficient, tho' posterior to the Cryme, to declare what was the meaning of that General or punished with all Rigor. And since our Law makes the Attempting of such as are doing his Majesty's Service Capital, that General ought to be extended to Death, since lesser Crymes and other Crymes are for the same Reasons which are applicable to this, punishable by Death: Nor can there be any Hazard in this, since there is a Law for the future. And no Man shall ever dye for so great a Cryme in our Nation.

Whereas it is alledged, that here the Pannal did only confess upon hopes of Lyfe: It is replied, that *Primo*, The Promise of Lyfe from a Judge, who could not grant the same, cannot defend, especiallie where no threatning preceded; and where it is clear that what was confess,

felt was founded on other Presumptions & *indicia*. Nor is this relevant, except the Pannal could offer to prove, *First*, Threatning, to the Fear whereof he yeelded; *2do*. That he expresse-ly pactioned that this Confession should not operate against him, which is very clear from *Bossius, tit. De confessis per torturam, Num. 12.* where he states the Case, and concludes, that a spontaneous Confession, though Lyfe were promised, does not defend: Nor is the Guilt less, nor the Truth less, that a Judge promise. And if this were sufficient, every Judge might make himself King, and grant Remissions at his Pleasure. And though this might weigh with the Judge who promised; yet the Law considers the Partie confessing still guiltie, and so does never secure him. *Et quod potest condemnari tenent, Cinus Cod. de iis qui ad Ecclesiam effugiant, Alciad. lege de verborum significatione;* and *Clarus* himself sayes, That *Ego suspicor opinionem Ceni esse majus commu-tem;* but giving his own Opinion rather as a private Man than as a Lawyer, he sayes, *Ego tamen non condemnarem ad mortem nisi aliis indiciis fuerit gravatus, Ergo reus indiciis gravatus est morte plectendus,* which is most just and reasonable. For, though the Law be jealous where a meer sillie Innocent confesses to a Judge, who may terrifie him, or have an Interest in causing him confess to lay the blame off his Friends, yet where the Confession proceeded from a Person suspect by all the World, by a Person who publicly in all Places since has owned the Deed; who fled upon that Account; who was taken with unlawful Weapons, unfit for his Profession, and the specifick Weapons which committed the Attempt; who condescended upon all the Circumstances, and declared that he gloried in being a Martyr upon that Account: In being seen run away immediatly upon doing of the Deed with a Pistol in his Hand; in being found out in a thousand Lies and Prevarications when he was examined; in having renewed his Confession publicly: It were but to scorn the Law and Massacre Mankind, to think that a Confession so adminiculated should not bind the Confessor, who can alledge nothing of any Threatning used against him by the Judge to whom he confessed. And Lawyers do in that Case consider the qualitie of the Judge as severe, unjust, rigid or partial: but the Confession is alledged to be made here upon Promise of Lyfe given by my Lord Chancellor, whose benign, gentle Temper frees him from all Suspition. And the proponing of Exculpation acknowledges the Deed to be done by Mr. *James Mitchel* the Pannal, against which the Protestation denying the Lybell cannot be sustained, being *Contraria facto*, as is evident to any rational Man; and that the Pannal cannot either pretend *alibi*, nor any other pretence of Error, for excuseing his Retraction: so his Majesty's Advocate opposes his Confession, bearing no Qualification. And though he is very secure that the Exculpation cannot be proven, yet since it is notorly known that he is the Committer, and that this may be a Preparative to other Pannals, against whom no Probation is ordinarly had, but Confessions *elicit* by Judges, with fair and gentle Promises, he *mordicus* adheres to the Relevancie. For, as *Bossius* says, *Et si Judex dixerit nihil mali eveniet tibi vel etiam promittat ut liberabitur Majus tamen communis est opinio Confessionem valere quia*

Judex etiam poterat ita fingere ad veritatem inve-niendam. And as this is most advantagious to the Common Wealth and Mankind, so there can be no Hazard to a private Pannal, since if he can but astruict his own Innocencie, or the reason of his Error, by alledging that he was *alibi*, or that there was severe Threatnings or Torture used, the same will still be allowed to qualifie his Confession. But the general Presumption lies, that a Judge will not damn his own Soul, stain his Function, ruin his Fame, expose himself to the Terrors of God Almighty, by alluring a Confession from a poor Innocent.

As to what is objected against the Confession as extrajudicial and before an incompetent Judge: It is replied, That Confessions are of all Probations the most infallible, since Witnesses may, but it cannot be presumed a Man will wrong himself: And the Rise of that Maxime, That extrajudicial Confessions are not relevant, was only to exclude Probation upon Confessions emitted where there was no Judge nor no design of Inquirie. But the Confessor being loose and inconsiderate, and under no Reason of Advertance, did at random own a Deed of which they were most innocent, either for Ostentation, or to please the Companie, or in Raillerie: But, to say that a Man should not be judged by what he deliberatly confesses, where he knows the Designe is to inquire into the Cryme, and that the Event must be a Criminal Trial, is without all Foundation or Probability of Reason: Nor can Judges or Assysers be so much convinced by what Witnesses will say, who may have Malice, or be brybed, or mistaken; as what proceeds from a Man's own Breast deliberatly and in cold Blood, which in Effect is oft tymes the Inspiration and Influence of Almighty God, who to show his Love to Justice and Kindness to Mankind, draws even from the greatest of Malefactors the clearest Confessions. And since Men do not use to bring Witnesses when they commit Crymes, nor can the Nature of the Thing allow Probation by Wrytt, to cut off Confessions in these Cases were to make Crymes for ever pass unpunished, and to make Law, which is founded upon Principles of Reason, and the good of the Common Wealth, vanish in meer Ternis of Art and hard Words, contrar to the Designe of Lawyers and the solid Principles of sincere Truth.

That this Confession is then Judicial is clear, being taken by Authority of the Privie Council, the Supream Judicatorie of the Nation, and where the Design was to expiscate this Truth. And the Pannal knew that he was upon a Trial for his Life: Nor can the Incompetencie of that Judicatorie be here alledged, since as the Session is a Judicatorie meerly Civil, so the Council is a Judicatorie above both, comprehending the Power of both. And being so far competent in the Cognition of Crymes, that they take Precognitions in criminal Causes; they modifie and qualifie the Sentences of the criminal Court; they determine intricate Cases remitted to them be the Justices in Point of Law. And the King, and the greatest part of the Criminal Court being there; it were absurd to think, that a Confession emitted before them should not prove. And if in a Precognition a Partie should confess, and so the Trial there cease, what could be more absurd than to think

think that this Confession should not bind, especially seeing Confessions emitted before the Lords of Session in Cases of Improbation, and Decrees following thereupon, are a sole, a final, and plenarie Probation before the Justice Court? Likeas that Principle in Law, That *Confessio coram Judice incompetente* does not hold, is, where, *Judex est incompetens tam ad Inquisitionem quam ad accusationem*, as, *in forum penitentiae*, such as Kirk Sessions, or *forum mere civile*. Neither of which can be said in this Case where the Judge before whom the Confession was emitted is the ordinary Judge of Inquisition, and Trial in Criminal Causes & *Judex non solum Jurisdictionis prerogabilis*; but a Judge who originallie and generally examines all the Pannals of Scotland. Likeas this Confession was made in Presence of his Majesty's Privie Council and the King's Commissioner, in whom all the Judicatories of the Kingdom doe eminentlie reside. And who might have sent the Pannal to the Scaffold without any Assyse, seeing *in confitentem nullae sunt partes Judicis*.

Whatever favour may be allowed to Retracting of Confessions *facta ex Incontinenti, ubi potest docere de errore*; yet what Reason can there be where a Pannal denies without shewing of Proofs of his Innocencie? And therefore *Bossius, tit. de Confessis, Num. 64.* concludes, *Est etiam necessarium allegare errorem ceterum si simpliciter revocaverit Confessus non est audiendus.* And *Num. 70.* he adds, *Quia fateor quod quis non auditur simpliciter dicendo post confessionem: Non est verum quod confessus fui, tamen si per testes constare potest de innocentia majus attenditur veritas quam confessio.* And since Minors in Law are obliged *docere de errore*, when they revock, it were absurd to think that the Law would be so ridiculous, that a Man confessing before a grave Judicatorie should have Libertie to retract without shewing any Reason of his Retracting: And the Guilt rather grows *per inficiationem*, and by that impudent Lye, than is lessened by the Retracting.

In the Case likewise where Debates are concerning the Validity of a Confession, Lawyers consider whether what was confest was or can be adminiculated by other collateral Probation, *Argumenta & indicia*, and whether the Probation be *veri similis*; whereas here this Confession is adminiculated by many other Circumstances, such as Persons who saw him run away, by his owning of the Principle since, by his fleeing, &c. So that here neither can he instruct why he retracts, and the thing confest is *adminiculate & circumstantiis & indicis*. As to the Objection founded upon the Act of Parliament, that the Probation must be in Presence of the Assyse: It is replied, that the whole Frame of that Act is grosslie mistaken; for the Design of that Act was to correct a barbarous Custom, whereby Accusers were allowed to solist and to produce to them such Wrytt and Wirnesses as they pleased for Probation of the Cryme, to preclude the Pannal of what he could say against the same, since false Papers might be thrown in as Confessions and Proofs: But that cannot reach in this Case, where a Confession is produced before a Pannal and his Proctors, and they heard to object against the same. Nor can it be urged from this Act that no Paper can be relevant but what is owned by the Pannal in Presence of the Assyse; for we daylie see that Letters produced

under the Pannal's Hand, though he should deny his Subscription, will be sustained: And it will be sufficient to prove by Witnesses, that he did subscribe, or by comparison of Letters. Likeas this Act of Parliament does not exclude that Confessions before the Lords of Session in Matters of Falshood, and Decrees following thereupon, may not probative before the Justices. Like as Confessions taken before the Justices, tho' no Assyse be present, do without all Controversie and Debate prove the Cryme: Yet neither can the Justices condemn without an Assyse, nor does that Act of Parliament militate more against that Case than against this. And in the Case of *Finlay Mac Gibbon*, a Confession taken in the *Tolbooth* without a fenced Court, and before one Judge, was found sufficient to infer the pain of Death both by the Council and Justices. And it is admired how it can be thought that Presumptions can be sustained as the Foundation of a criminal Sentence, as we daylie see; and that Witnesses which in effect are but presumptive, and a Man's own Confession emitted seriouslie and in cold Blood, should not be sufficient. And as there could be nothing more dangerous to the Common-wealth, than that Crymes should be thus rendered unsearchable; so what Hazard can there be to the People on the other hand, or the Pannal, when they are made their own Judges. And to take off all possibilitie of Danger, it shall be allowed to them to prove Error, Force, Innocence, or Mistake. And this Probation has been in all Ages and Nations sustained as uncontraverted, as, *David* ordained the Person who said he had killed *Saul* immediatlie to be executed without further Inquirie, giving as the undoubted Reason that he had condemned himself out of his own Mouth; and which is registrate in Scripture, to secure the Image of God against those who would deface it. And if such Confessions should be sustained in any Case, much more in this, where the Nature of the Cryme is atrocious, and the manner of the Discovery extraordinarily difficult. And if either Atrocitie or Difficultie prevails with Lawyers to remitt something of its ordinarie Rigor in exacting clear Probation, as we see *in criminibus exceptis & criminibus domesticis*, much more where both these concur, ought a Man's own Confession to be admitted. And whereas ordinarily Pannals are penitent first when examined, the Horror of the Crymes softning their Hearts; that their Confessions then should not prove, is very strange: And it were impossible and fruitless to expect, that after they are imprisoned amongst a Company of other Malefactors, and after they have a kind of Men towards the Law to teach them the Art of Retracting, and that their Conscience turns Callus, and acquainted with the Idea of their own Cryme, a sincere Confession may be then expected from them.

My Lord Advocat declares, he does not insist against the Pannal for conversing with Rebels at this tyme, and upon the shooting at a Bishop or Minister before the late Act of Parliament, *Anno 1670*, to inferre ane Arbitrary Punishment: And insists upon Mutilation as Capital upon the Act of Parliament anent Demembration, which is *reddere membrum inutile*. And a Man is as much dismembred when he has ane useles Hand, as if he had no Hand; and insists upon the 28 Act

Parl. 3 James 4. wherein Slaughter and Mutilation upon forethought Felonie are equiparate, and the Pannal declared to be punished by Death in both these Cases, but refers the Punishment of Mutilation to be qualified by the Justices, according to what shall be found here proven, and to what has been the Custome of the Justice Court formerlie in such Cases.

Sir George Lockhart duplyes, That the Lybell is no ways relevant, as founded upon the fourth Act 16. Parl. King Ja. 6. And the Defence is no ways eleided by the Alleadgances, contained in the Reply. For, *Primo*, The Lords of Justiciarie would be pleased to take notice, that there is no Specialitie in the Case of this Act of Parliament, as to Privie Counsellours; but that it extends to all his Majesties Officers, and consequently the meanst Officer being invaded in the Terms and under the Qualification contained in the Act of Parliament, might plead the Benefite thereof. And if the Lybell should be sustained in general Terms without the expresse Qualification in the Act of Parliament, the simple Act of Invasion of a Lyon Herald, though neither Death nor Wound followed on it, would inferr the pain of Death; but that no such thing is the meaning, nor can subsist with the Act of Parliament, is so clear and evident, as it was impossible for the Witt of Man to expresse the Qualification to be lybelled and positively proven in more plain and direct Terms than is sett down in the said Act. In sua far as the Act of Parliament requires be way of Provision and Condition in the Statutory part thereof in thir Termes; it being verified and proven, that any of the saids Counsellours, Sessioners, and Officers, was pursued and invaded for doing of his Highness Service, shall be punished to the Death. And there is great Reason and Necessitie for this Qualification, because the Act of Parliament intending contrary to the general Custom of Nations, and of this Kingdom, in all other Crymes that *Conatus & attentatum*, which is onely relevant in the Cryme of Treason, should be reputed *Crimen consummatum* in case of Invasion of any of his Majesty's Officers. Therefore the Law requires this Qualification in Matter of Fact, That it be verified that the Person invaded was doing his Majesty's Service; in which Case the Cryme had a respect in the Construction of Law, as done against his Majesty's Authoritie, which he was then executing. And this Qualification in Matter of Fact, that it was for doing of his Majesty's Service, is not here so much as lybelled. And in the common Opinion of all Lawyers, as may appear by *Julius Clarus, §. Assassinum, Num. 2. Ubi agitur de imponenda pena alicujus Constitutionis specialis requiritur quod concurrent omnes qualificationes de quibus in ipsa Constitutione.* And *Quest. 85. Num. 9.* he has the same Words, *Ubi agitur ad imponenda pena alicujus specialis Constitutionis oportet quod in eo casu verificentur omnes qualitates in ipsa Constitutione expressas, alias pena non committitur, & hæc* (says he) *est doctrina communiter ab omnibus recepta*, and most especiallie when it is not ane intrinsick Qualitie and Aggravation, but where it is a Qualification required by Law it self as *intrigans delicti*, and as *Gomes.* sayes, it is *alterativum pæne*, and therefore it must be *totidem verbis* lybelled and positively proven.

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And as to that Pretence that it is presumed and inferred from the Circumstances, and the Way and Manner of the committing of the Fact it self, and that *Propositum* and *Delign* cannot be otherways proven *nisi per indicia & conjecturas*: It is duplyed, That the Qualification required by the Act of Parliament is *toto celo* different from the Design: For, if a Person did invade any of his Majesty's Officers in doing of his Majesty's Service, and would pretend that he had no Design to invade, certainly the Pretence were absurd. And in that Case the Design *presumitur ex natura attentati*: But the discharging of his Majesty's Service is not a Design, but a Matter of Fact, which consists in ane extrinsick Action, and must be proven, and may and does often occur. As for Instance, If a Magisttrat should be invaded in the actual Execution of his Majesty's Authoritie, or if the Invader should be so transported with Rage, as when he invades a Judge, to tell him, that it was because he has unjustlie decerned. These and the like Cases are indeed the Terms of the Act of Parliament. And there simple Invasion, though no Wounds followed, being directlie levelled against his Majesty's Authority, *Nudus conatus & effectus delinquendi reputatur pro effectu.* And as this is clear from the expresse Words of the Act of Parliament, and which being *in materia correctoria & criminale*, is strictly to be interpret; so it is unanswerable evidenced from the Act of Parl. K. Ch. 1. of blessed Memorie, by which it is provyded, that the Invasion and Violence done to Ministers is punishable, conform to the Act of Parliament 1587, to which it relates, which is Confiscation of Moveables, and declares that the said Act is to be extended to Archbishops and Bishops, from which the Pannal's Proctors argue thus, If by the posterior Act of Parliament in *Anno 1633*, the Invasion and Violence done to Archbishops and Bishops is not punishable with the Pain of Death, but only ane Arbitrary Punishment, how is it possible that the 4 Act Parl. 16 Ja. 6. should inferr the pain of Death upon the Invasion, as it is circumstantiat and lybelled, wherein nothing is lybelled, but that the Archbishop was invaded, who was a Privie Counsellour, and not the Qualification that is required by the Act of Parliament, that it was for doing of his Majesty's Service.

As to that Alleadgance, That the Pannal cannot condescend upon any private Ground of Quarrel or other Reason why he did invade the Archbishop: It is answered, if this Alleadgance were sustained, it were contrar to the Act of Parliament lybelled upon, which does not require the Pannal to prove, but says that it must be tryed and verified, that the Invasion was for doing of his Majesties Service; and so his Majesties Advocate must prove the same by a clear and positive Probation, as a Point in Matter of Fact.

As to that Pretence that the Pannal did glorie that he had committed the Fact and Invasion lybelled, and indeavoured to justifie the same, and perswade others that it was lawful: It is duplyed, That as the saids Qualifications are altogether disowned, so they are no ways the Qualifications in Matter of Fact required by the Act of Parliament, *viz.* That the Invasion and Violence was for doing of his Majesties Service, which is indispenibly required upon the Reasons abovementioned, otherways the Act of

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Parliament should have said no more, But that all Invasions of his Majesties Privie Counsellours, or other Officers, should be punished with the pain of Death; whereas the Act of Parliament thought it fit, necessar and just for all Mens Securitie, that a single Act of Invasion of any of his Majesties Officers, however it might be punished *pœna arbitraria*, yet should not import or inferr the pain of Death.

In sua far as the Dittay is founded upon the Common Law, and that it is *Assasinium*, in which *Conatus & attentatum habentur pro crimine consummato*: It is answered, the Dittay is noways relevant, because it is not founded upon any Law or Act of Parliament of this Kingdom. And the Common Roman Law cannot be the Foundation of criminal Dittays, whereby to draw in Hazard the Lives of any of his Majesties Subjects. Likeas there is clear, exprefs and positive Acts of Parliament to the contrar, as the 48 Act of Parl. 3 Ja. Act 79 Parl. 9 Ja. 4. Declaring that the Laws of no other Realm are to be regarded, especiallie whereupon to found Criminal Indytments. And albeit by the Common Law *Conatus in homicidio* especiallie where it was *homicidium dolosum*, and designed to be committed *proditorie & per insidias* was punished as *crimen Consummatum*; yet all Lawyers agree, as may appear by *Julius Clarus*, Quest. 102. *Farm.* Quest. 80. and by the Authorities by them cited, That by the general Custom of all Nations, *in omni genere homicidii affectus conatus & attentatum* is not punishable *pœna ordinaria delicti*, and so cannot inferr a capital Punishment or pain of Death, as is concluded in this Indytment. As to that Pretence that the Cryme lybelled is the Cryme of Assasination, in which *Nudus conatus* is sufficient, especiallie *si devenerit ad actum proximum*: It is answered, *Primo*, That all Lawyers agree in this, that *crimen Assasini* is only where a Person does hyre or conduce another to commit the same *interveniente pretio*. And for which *Julius Clarus*, § *Assasinium*, where he so descryves the Cryme. And *Matheus de Criminibus* does so descryve the same, and does expresse lie assert that unless Money or Reward intervene, the Cryme of Assasination cannot be committed, where the Words are, *Credideram tamen nisi merce certa & secleri proposita & constituta fuerit sive in specie seu corpore sive in pecunia numerata non posse enim videri assasinium*. And there is no Lawyer extant did ever otherways descryve the Cryme; and there is great Reason why Money or Reward should be considered in the Constitution of this Cryme, because the Law did consider the Cryme with Respect to the Hazard; and the Hazard lay where Persons were hyred or conducted by Infidels giving Money or other Reward to kill Christians. And albeit even in the proper Cryme of Assasination it self in some particular Nations, where the said Cryme was too frequent, as in *Italie*, *Conatus* is punishable: Yet *Julius Clarus* in the same §. and others does mantaine, that by the general Custome of most Nations, in the precise Cryme of Assasination, *Conatus seu attentatum* is not punishable with the Pain of Death. But the Pannal has no Reason to insist upon this; the Matter of Fact lybelled being no ways the Cryme of Assasination, but only that which Lawyers call a Designe to commit Murder *proditorie & per insidias*. In which all agree, that by the Custom of all Nations *Conatus faciendi non reputatur pro facto*.

As to that Point of the *Dittay* founded upon the Mutilation of the decessed Bishop of *Orkney*, conform to the 28 Act Parl. 3 *James* 4. It is answered, that denying that the decessed Bishop of *Orkney* was mutilate so, albeit it could be proven, it cannot inferr the pain of Death; *First*, because it is clear by the said Act of Parliament, that it is not in the Case of Mutilation, but Demembration. And it were a strange I-magination to think that if a Partie were mutilate, or lost a Finger, that the pain of Death could be inferred. And there is a great difference betwixt Mutilation and Demembration: Mutilation being onlie ane Inabilitie or Privation of the Use; whereas Demembration is the intire Loss of the Member. And it is a Principle in Law, that Acts of Parliament, especiallie *in casu criminale & capitale*, cannot be extended *de casu in casum etiam ex veritate vel paritate rationis*; and that *Cortici verborum adherendum est & Casus omissus habetur pro omisso*. And here there is no Paritie of Reason, both the Prejudice and Deformitie being far greater in Demembration than Mutilation.

And whereas it is pretended, That though the Pannal's Confession had been *elicite sub spe impunitatis*, that yet it is not sufficient whereupon to liberate from capital Punishment, because a Judge cannot remitt a Cryme: And that *Bossius* and others are clear, That notwithstanding of any such Confession upon Promise of Impunitie, yet a Judge might and ought to condemn *ad penam ordinariam delicti*; it is answered, The Pretence does not cleid the Defence, because, supposing it should be proven that the Confession was *elicite sub spe veniæ*, and upon Assurance of Lyfe. Such a Confession so elicite, cannot be a Ground whereupon to violate the Faith and Impunity given; and far less can such a Confession (though any could be proven) being retracted be considered as a Confession: And as to which Law and Lawyers are very clear and positive. The Law is, *Lex. 3. Cod. de Custode reorum*, and Lawyers, as may appear by *Matheus de Criminibus*, Quest. 16. where his exprefs Words are, *Querunt an Confessio promissa Impunitate & spe veniæ elicita sufficiet ad condemnandum? Respondendum, Non sufficere, tametsi enim in Judicis potestate non sit promittere impunitatem adeoque ex promissione non obligatur, tamen dolo extorta est, & per hanc fraudem etiam Innocentes illaqueari possunt*. And *Bossius* in that Title *De Confessis*, after he has stated the Case, resolves it thus, *Tutius tamen est ut dicamus requirere perseverantiam & est ex mente Doctorum & cum ratione quin negari non potest quitalis Confessio sit obumbrata*, and says, it were against Humanitie it self to condemn *ad penam ordinariam delicti* in such a Case. And *Julius Clarus*, cited be his Majesties Advocate, sayes, *Ego non condemnarem ad mortem*, and which is indeed the constant and irrefragable Opinion of all Lawyers, and Practice of all Criminal Tribunals. And whereas it is pretended, that *Julius Clarus* subjoins these Words, *Nisi aliis indiciis sit gravatus*, and his Majesties Advocat condescends upon several Presumptions: It is answered, that if his Majesties Advocat will lay aside the Confession, and adduce such a presumptive Probation, whereupon the Pannal may be condemned, then he may plead the Benefite of that Qualification: But the Presumptions condescended upon any remote Conjectures, and no ways concluding;

cluding; and the Pannal after the alleadged committing of the Fact, did return and live peaceable for several Years, and denys the Fact, and cannot otherways be convict thereof. And if any pretended Confession should be made use of, either *per se*, or in *modum admniculi*, it cannot be divided from the Qualitie under which it was granted, which the Pannal offers to prove, was upon exprefs Assurance. And whereas it is pretended, that the granting of an Assurance and Impunitie is upon the Matter a Remission which no Inferior Judge can grant, but that notwithstanding he may and ought to condemn; it is answered, *Primo*, it will appear by the Probation of what Character and Qualitie the Granter of the Assurance was.

2do. Lawyers do not consider whether a Judge *potest veniam concedere*, or remitt a Cryme: But a Confession being *elicite sub spe veniæ*, is not a full and absolute Confession, but a qualified, and cannot be made use of, and the Qualitie not performed and made good. And it were a Prejudice to Publick Interest, and a way to preclude the Ingenuitie of all Confessors, if notwithstanding of the Interposition of Publick Faith and the granting of Assurances, and the eliciting of Confessions *sub spe veniæ*, these Confessions might be made use of, and the Qualitie and Condition upon which it was emitted altogether neglected, which is downright inconsistent with the Opinion of Lawyers and the Practices and Customs of Criminal Judicatories.

As to what is pretended, that though this Confession be not emitted before the Lords of Justiciarie, yet it was not extrajudicial or revocable, because it was deliberatlie given, and before a Committee, who had Authoritie from the Lords of his Majesties Privie Council: It is answered, this Point is of extraordinarie Importance and Consequence, as to the Lives and Fortunes of his Majesties Subjects, and as to the Lords of Justiciarie and the Procedure of the Inquest, who are Judges to the Probation; and therefore it is represented in behalf of the Pannal, That admitting any pretended Confession should be produced, yet if it was not emitted before the Lords of Justiciarie, it is not a judicial, but an extrajudicial Confession, & *fidem non facit*, as to the Probation of the Cryme. As to which, *Primo*, There is an universal Concord in the Opinion of all Lawyers, and in the Practice and Customs of Criminal Judicatories, and as to which the Lords of Justiciare are desyred to cast their Eye upon all who have wrytten upon this Point. And as *Clarus* says, *Non invenies dissentientem in Mundo*; and it is strange that all Lawyers and the Custom of all Nations should have hallucinat in this Point. For which the Pannal's Proctors cites *Julius Clarus, Quest. 55. Farin. Quest. 81.* and many others.

2do. Lawyers are likeways clear, that Confessions emitted *Coram Judice competente sed non sedente pro Tribunali* is but an extrajudicial Confession, and much more where it is *Confessio emissa coram Judice incompetente*. And when the Question is, who is to be repute *Judex incompetens*; it is positive lie resolved, That *omnis Judex is incompetens* who could not proceed *ad Condemnandum*, as to the Cryme anent which the Confession is emitted. And certainly though any Confession were produced emitted before a Committee of the Lords of Privie Council, they have no

criminal Jurisdiction so as to proceed *ad condemnandum in crimine capitale*; that being clear by *Craig. dieg. 8.* that *ex eorum Statutis nec periculum vitæ, hæreditatis aut omnium fortunarum subire posse*. And whereas it is urged that the Lords of Privie Council have a mixed Jurisdiction, and may proceed be way of Precognition & *per modum Inquisitionis*, and may resolve doubtful Cases and qualifie Sentences: It is answered, That it is not denied but the Lords of Privie Council have and doe very well deserve that Jurisdiction; but as to criminal Jurisdiction in capital Crymes, it is only competent to the Lords of Justiciarie: And the Precognitions, or previous Inquisitions, tend not *ad Condemnationem*, but only as to this, whether to stop or remit to the Lords of Justiciarie. And nothing is considered as a judicial Confession, but where there is *formatus processus*, and where a Partie is called *coram Judice competente*, and is *sub instante periculo vitæ*, and knows that the infallible Import of his Confession is to that very Effect for his Condemnation, none of which can be pretended where the Confession is emitted *coram Judice incompetente ad Condemnandum*.

And whereas it is alleadged, That a Confession in the Opinion of Lawyers cannot be retracted, unless the Party could *docere de errore*, and purge his Innocencie, and did it *ex incontinente*: It is answered, the Alleadgance is groundless; for though Confession were emitted *coram Judice competente pro Tribunali*, it might be retracted *ex incontinente* if he were able *docere de errore*: And there is no Lawyer ever required it in other Terms. But where the Confession is emitted *coram Judice incompetente fidem non facit quoad probationem delicti*, and may be retracted either *ex incontinente* or *ex intervallo*, and without showing of any Error or purging of Innocence, such Confessions in Law amount not to any Probation, no more than as Lawyers argue if the Depositions of Witnesses taken in *uno Judicio* would *fidem facere* either in *Casu civile aut criminale in alio Judicio*. And certainly there is less Reason for Confessions where Parties disown the same, and retract them if emitted; and much more here where the pretended Confession was *elicite sub spe veniæ*, so far was the Pannal from thinking that the emitting of this Confession was in order to Condemnation, speciallie seeing it neither is, nor can be proven, that the said pretended Confession was so much as judiciallie given in face of Privie Council, where his Grace the Duke of *Lauderdale*, being then his Majesties Commissioner, was present: And though it were, the Pannal's Proctors will not debate the Import of his Grace's Commission, but remitts the same to the Commission it self, in Case it be offered to be proven, that the Confession was emitted before him and the Lords of Privie Council.

And whereas it is alleadged that the Act, 9 Parl. King *James 6.* ordaining all Probation to be led in Presence of the Assyse does not concern the Case, and is misunderstood, seeing here the Confession will be produced in Presence of the Assyse: It is answered, The Act of Parliament is clear to the contrar, and can admit of such Interpretation. For albeit the Narrative of the Act of Parliament was onlie *causa impulsiva*, and the Statutorie Part of the Act of Parliament is clear and positive, that all Probation should be adduced in presence of the

Assyse, who are Judges of the Probation. And of all other Probation there is the greatest Reason that the verie Act of Confession should be in presence of the Assyse, who are Judges to the Probation, and who are to proceed upon Oath, and whose Consciences are to be satisfied and instructed as to the Way, Manner, Conditions and Terms whereupon such Confessions were elicite; all which are concealed where there is nothing produced to them but a Confession taken without their Presence, especiallie seeing the Pannal alleadges and offers to prove that several Points of Fact and other Particulars, were condescended upon and declared, none of which are mentioned in this pretended Confession; all which should have been insert, and could not be divided, as being in *Articulo conexo*.

And whereas it is pretended that Decrees pronounced before Lords of Session, is *Probatio probata*; whereupon Assysers may and ought to condemn: It is answered, the Argument is *in materia disparata*, and does not concern the Matter of Confession, and is only in the special Case of Falshood, and that upon a special Reason, because the Investigation of Falshood depended upon a Tryall and Concourse of many and violent Presumptions, which may require a long Tract of Tyme and Examination of Parties and Witnesses. It were impossible that such Tryalls could be adduced before ane Inquest; these depending several Years many tymes before the Session before they can be brought to a close: And therefore Law and Custom in that Case has sustained a Decreet of the Lords of Session as a Probation *in Judicio criminale*; but it is absolutlie denyed that it would in any other Cryme. And certainlie if the Cryme of Theft were persued civillie before the Lords of Session *ad damnum & interesse*, though the Theft should be proven or confest before the Lords of Session, it would not *fidem facere in Judicio criminale*, as is evident by the Authoritie of Lawyers who agree, that *acta probatoria in uno processu fidem non facit in alio*: Nay, which is more, *acta probatoria in uno processu fidem non facit in alio processu coram eodem Judice*. And as to the Instance of the *Practiq;* of *Mac Nabb*, the Pannal opposes the same, wherein there were Depositions of Witnesses; and though many tymes in the Adjournal-Bookes, the Cases of Confessions emitted has been obruded, yet it cannot be instanced that ever the Lords of Justiciarie did by Interloquitor sustaine the same as Probation; but on the contrar it does appear in the Case of *Frazer*, in the Year 1641, That Sir *Thomas Hope* being then his Majesty's Advocate, declared, that a Confession emitted before a Shirref Depute, who has a Criminal Jurisdiction in some Cases in the Terms allowed by Law, and who beyond all doubt is Judge competent *per modum Inquisitionis*; yet so convinced was he, that it was ane extrajudicial Confession, that he only insisted therein *in modum adminiculi*, and joyned it with the other Probation mentioned in that *Practiq;* which was *per se* convincing and sufficient: As also since his Majesty's happy Restauration in the Case of one *Robertsone*, although the Confession was emitted before one of the Lords of Justiciarie and his Majesty's Advocate for the tyme; yet he was so convinced of the Insufficiencie of the same, that after it was pro-

duced *per modum probationis*, he took up the same even in that State of the Process when the Assyse was sworn. And as to the Instance of Divinitie in *David's Practice*, it does not concern the Point of Law, and cannot be made appear that the Partie retracted his Confession; and it is a *Practiq;* that either *nimum* or *nihil probat*. In respect whereof, &c.

The Lords Commissioners of Justiciarie continue the advysing of this Debate till the Nynth Day of this Instant, at two a Clock in the Afternoon; and ordaines Assysers and Witnesses to attend ilk Person under the Pain of ane hundred Merks.

The said Day *John Grahame* Post-master, *Patrick Grahame* his Brother, — *Keith* of *Ludgarne*, *Matthew Colvill* Writer in *Edinburgh*, *Alexander Levingstone* Ensigne to Captain *Wynrbame*, *Walter Kennoway* Merchant in *Edinburgh*, *James Fletcher* of *New Craustoun*, *John Achmoutie* Ensigne to the Castle of *Edinburgh*, being oftymes called to have compeared before the Lords Commissioners of Justiciarie this Day and Place in the Hour of Cause to have past upon Mr. *James Mitchel's* Assyse, as they who were lawfully cited to have made their Appearance for the Effect forsaide, lawfull tyme of Day bidden, and they nor none of them enterand nor appeirand; The Lords Commissioners of Justiciarie therefore, be the Mouth of *Gibert Mair*, Macer of Court, discerned and adjudged, the forenamed Persons, and ilk ane of them, to be in ane Unlaw and Amerciamment of ane hundred Merks *Scots*, which was pronounced for Doom.

Curia Justiciarie S. D. N. Regis tenta in Prætorio Burgi de Edenburgi, Nono die Mensis Januarii, 1678, Per honorabiles viros Dominos Archibaldum Primrose de Caringtoun Justiciarium Generalem, Jacobum Foulis de Colintoun, Robertum Nairn de Strathurd, Joannem Lockhart de Castlehill, Davidem Balfour de Ferret, & Thomam Murray de Glendoick, Commissionarios Justiciarie dicti S. D. N. Regis.

Curia legitime affirmata.

Intran' Mr. JAMES MITCHEL Prisoner.

INDYTED and Accused for the Crymes of Assasination, invading of Privy Counsellours, Ministers and others, *ut in die precedente*.

Pursuer,

Proctors in Defence.

Sir George Mac Kenzie of *Rosebaugh*, our Sovereign Lord's Advocate.
Sir George Lockhart.
Mr. John Eleis.
Mr. John Stewart.

The Lords Commissioners of Justiciarie having considered the *Dittay* and Debate relating thereto, find that Article of the *Dittay* founded upon the fourth Act, 16 Parl. King *James 6.* baring

bearing the Pannal's invading by shooting and firing of a Pistol at his Grace the Archbishop of *St. Andrews*, a Privie Counsellour, for doing of his Majesty's Service, relevantlie lybelled, his Majesty's Advocate proveing the Presumption in his Replie, *viz.* That the Pannal said that he did make the same Attempt and Invasion because of the Archbishop his persecuting those that were in the Rebellion at *Pentland*, or some Words to that purpose, relevant to infer the Paine contained in the forsaide Act of Parliament, and remitt the same to the Knowledge of ane Assyse.

And likewise find that part of the *Dittay* anent the invading of Bishops and Ministers, relevant to infer ane arbitrary Punishment, and remitt the same to the Knowledge of ane Assyse.

And siclike that Article of the *Dittay* anent the invading, wounding and mutilating of the Bishop of *Orkney*, relevant to infer any arbitrary Punishment, and remitt the same to the Knowledge of ane Assyse.

And also having considered that part of the Debate anent the Pannal's Confession made and emitted before ane Committee appointed be Authoritie of Council to receive it, and thereafter adhered to and renewed in Presence of his Majesty's high Commissioner and Lords of Privie Council convened in Council, find it is Judicial and cannot be retracted.

And also having considered the Debate and Defence against the said Confession, *viz.* That the same was emitted upon Promise or Assurance of Impunitie of Lyfe and Limb, find the same relevant to secure the Pannal as to Lyfe and Limb, reserving to the Commissioners of Justiciary to inflict such arbitrary Punishment as they shall think fit, in case the Defence shall be proven, and remitts the same to the Knowledge of ane Assyse.

A S S I S A.

—Gordon of *Cairneborrowe*.

David Burnet, Merchant in *Edinburgh*.

James Wood at the *Colledge Port*, Chan.

David Forsyth, Taylor.

Robert Campbel, Apothecary.

Captain *Andrew Dick*.

David Bruce, Gentleman.

John Hay of *Baro*.

Thomas Comlie, Vintner.

Mr. *Alexander Achmontie*, Ensigne.

Capt. *John Binning*, Vintner.

Alexander Levingstone, Ensigne.

William Steinson younger, Merchant.

Charles Scot of *Bonnetoun*.

Peter Wishart, Lieutenant.

The Assyse lawfullie sworn, no Objection in the contrar.

His Majesty's Advocate for Probation adduced the Pannal's own Confession, with the Witnesses after deponing; of the whilk Confession, the Tenor followes.

Edinburgh, 10 February 1674. *In Presence of the Lord Chancellor, Lord Register, Lord Advocate, and Thesaurer Depute, Mr. James Mitchel, Prisoner, being called, did freelie confess he was the Person who shot the Pistol at the Archbishop of St. An-*

draws, when the Bishop of Orkney was hurt thereby, in the Year 1668, and depones upon Oath, that no living Creature did perswade him to it, or was upon the Knowledge of it. Sic subscribitur,

James Mitchel.

Roths.

A. Primrose.

John Nisbet.

Ch. Maitland.

Master *William Paterson*, Advocate, purged of partial Counsel, and solemnly sworn, depon's, he met a Man with a Pistol in his Hand in *Black-frier Wynd*, immediatlie after the Pistol was shot at the Archbishop, but knows not the Pannal, nor if he was the Person that shot. And this is the Truth, as he shall answer to God.

Will. Paterson, A. Primrose, J. p. d.

Patrick Vansse, Keeper of the *Tolbuith* of *Edinburgh*, purged of partial Counsel, and solemnly sworn, depon's, That a Day or two before or after the Pannal was examined be the Council, he confest to the Deponent, that he shot a Pistol at the Archbishop of *Saint Andrews*, and escaped down *Black-frier Wynd*, and went up the *Cowe-gate* and into Mr. *Robert Ferguson's* House, and patt on a *Pirivick*, and then came to the Street and searched for the Man that shot the Pistol. Being demanded if he heard Mr. *James Mitchel* justify the Deed; he depon's, he remembers it not. *Sic subscribitur,*

P. Vansse. A. Primrose, J. p. d.

Mr. *John Vansse*, Son to the Keeper of the *Tolbuith*, purged and sworn: Being interrogate, if he heard the Pannal acknowledge the Deed of shooting at the Bishop, or defend it, depon's, That being in Conference with the Pannal in the Prison-house, he inquired at him how he or any Man could be accessorie to so impious ane Act, as to kill a Man in cold Blood who had not wronged him; he said it was not in cold Blood, for the Blood of the Saints was reiking at the Cross of *Edinburgh*. *Sic subscribitur,*

John Vansse, A. Primrose, J. p. d. Com.

John Bishop of *Galloway*, being purged of partial Counsel, sworn and examined, depon's, That the first tyme he saw the Pannal was in Sir *William Sharp's* outter Rouse, where he saw a Pistol, which was said to be taken from him, out of which (as he supposes) there were three Balls taken; and that the Pistol was like to the Pistol produced. Depon's, that at that tyme the Pannal did not confess any Guilt, but seemed to be in a great Consternation, and fell a trembling. And that the Deponer hearing that he had made a Confession, went to Prison to speak to him about it, who acknowledged to the Deponent, that he had made Confession of that Attempt against the Archbishop before the Chancellor, and some others of the Council; and that he had hopes of Lyfe, and desired the Deponent to interceed for him. And the Deponer having asked him how he could do such a Deed against ane innocent Man: He answered, that he thought him ane Enemy to the Godlie, and that they could not be in Securitie so long as he was alive. And the Deponer having inquired of him if he was sorry for it; he did not say he was sorry for it, but if it were to doe again

again he would not do it. And this is the Truth, as he shall answer to God. *Sic subscribitur,*

Jo. Gallovidien, A. Primrose, J. p. d.

Doctor *Christopher Irwin*, purged of partial Counsel, and solemnly sworn, depon's, that he was the first Chirurgeon that came to the Bishop of *Orkney* after he received the Shot, and that he did see a Ball fall out of his Sleeve, so that he knew that it was with a Shot, and that the Bones were fractured, and that they cured him so as he was able to lift his Hand towards his Head; but there was still Scales coming out of the Orifice of the Wound. Depon's, the Bishop said he got the Wound when he was laying his Hand upon the Archbishop's Coach. *Sic subscribitur,*

Irwin, A. Primrose, J. p. d.

John Jossie, Chirurgeon, purged, sworn and examined, depon's, That he was called to the Bishop of *Orkney's* Cure, and that he had a Wound betwixt the Wrist and the Elbow, which did cast out several small Bones at the two small Orifices; and that the Bishop was not able to lift his Hand towards his Head. *Sic subscribitur,*

Jossie, A. Primrose, J. p. d.

William Borthwick, Chirurgeon, purged of partial Counsel, solemnly sworn and examined, depon's, conformis to *John Jossie* in all things. *Sic subscribitur,*

Will. Brothwick.

John Earle of Rothés, Lord High Chancellor of *Scotland*, being sworn, and the Confession under Master *James Mitchel's* Hand being shewn to him, depon's, he was present and saw Mr. *James Mitchel* subscribe that Paper; and depones that he heard him make the Confession contained therein, and that he thereafter heard him ratify the same at the Council-Bar, in presence of the King's Commissioner and Lords of Privie Council sitting in Council, and that his Lordship subscribed the said Confession. Depones, That his Lordship the Advocate, and Thesaurer Depute, were appointed by the Privie Council to examine Mr. *James Mitchel*. And being interrogate, if after they had removed the Pannal to the Council-Chamber, whether or not his Lordship did offer to the Pannal upon his Confession to secure his Lyfe in these Words, Upon his Lordship's Lyfe, Honour and Reputation: Depones, that he did not at all give any Assurance to the Pannal for his Lyfe; and that the Pannal never sought any such Assurance from him: And his Lordship does not remember that there was any Warrant given by the Council to his Lordship for that effect; and if there be any Expressions in any Paper which may seem to infer any thing to the contrary, his Lordship conceives it has been insert upon some Mistake. *Sic subscribitur,*

Rothés, A. Primrose, J. p. d.

* *Charles Maitland* of *Hatton*, Lord Thesaurer Depute, being sworn, and the Confession under Mr. *James Mitchel's* Hand being shewn unto his Lordship, depon's he was present when Mr. *James Mitchel* made that Confession, and his Lordship first heard him make it verballic, and

then he saw him subscribe it; and that his Lordship subscribed it also, and at that tyme there was nothing spoken of any Assurance: But when the Pannal was asked by some of the Committee, upon what Account he committed that Fact; he seemed at first unwilling to answer, but thereafter said, it was because the Archbishop is an Enemy to the good People or Godlie People in the West. Depon's, that within few Days thereafter, at a Meeting of the Council, where the Duke *Lauderdale* then his Majesty's Commissioner was present, the Pannal being brought to the Bar, and the Confession produced being shewn to him, he acknowledged the same to be his Hand Wrytt; adhered unto and renewed the same in presence of his Majesty's Commissioner and Council: And depones that he did not hear the Pannal either seek Assurance of his Lyfe, or any other Person offer the same to him. *Sic subscribitur,*

Ch. Maitland, A. Primrose, J. p. d.

John Duke of Lauderdale, being sworn, depon's, That his Grace was present, as the King's Commissioner in Council, when Mr. *James Mitchel*, was brought to the Bar. Depon's his Grace saw the Pannal's former Confession made at the Committee of Council shewn to him, and he acknowledged it to be his Confession, and that he did adhere thereto and renew the same in presence of his Grace and the Council. His Grace heard no Assurance given to him, and that his Grace did not give him any Assurance, nor gave Commission to any others to give him any Assurance, and could not do it, having no particular Warrant from his Majesty for that effect. *Sic subscribitur,*

Lauderdale, A. Primrose, J. p. d.

James Archbishop of Saint Andrews, being sworn, depon's, That that Day that the Pannal did fire a Pistol at his Grace, he had a View of him passing from the Coach and crossing the Street, which had such Impression upon his Grace, that upon the first sight he saw of him after he was taken, he knew him to be the Person who shot the Shot. Depon's, his Grace saw him at the Council-Bar in presence of his Majesty's Commissioner and the Council acknowledge his Confession made before the Committee, and heard him adhere thereto and renew the same; and that there was no Assurance of Lyfe given him, nor any sought by him there. Depon's, that his Grace himself did never give him any Assurance, nor gave Warrant to any others to do it; only he promised at his first taking, that if he would freely confess the Fault, and express his Repentance for the same at that tyme, without farther troubling Judicatories therein, his Grace would use his best Endeavour to favour him, or else leave him to Justice: But that he either gave him Assurance, or gave Warrant to any to give it, it is a false and malicious Calumny; and that his Grace made no Promise to *Nicoll Somervell* other than that it was best to make a free Confession. And this is the Truth, as he shall answer to God. *Sic subscribitur,*

St. Andrews, A. Primrose, J. p. d. Com.

The Pannal, Mr. *James Mitchel*, after swearing of the Assyse, produced ane Copie of ane pretended Act of Council, and craved that the

* See State Trials, Vol. VIII. p. 430.

Register of Council containing the said Act might be produced. And after the Examination and Depositions of the Witnesses upon the *Dittay* and Exculpation, the Pannal and his Proctors farther urged, that the Register of Council might be produced. Seeing the Pannal produced ane Instrument against Mr. *Thomas Hay*, one of the Clerks of Council, for giving ane Extract thereof; and the Pannal and his Proctors alledged, that the Register of Council containing the said Act was produced in Court the Day before, and that the said Act was read be several Members of Court; and being once produced, and ane Instrument taken against one of the Clerks of Council, who with the other Clerk were cited as Witnesses be his Majesty's Advocate, the Clerks ought to be ordained either to give ane Extract or produce the Register containing the forsaid Act; and the Pannal and his Proctors desyre to be heard in Wryt upon the said Act of Council.

His Majesty's Advocate answers, That he was not obleidged to produce a Register for the Pannal; and if any such pretended Act was, he should have used a Diligence and cited the Clerks of Council for producing of the Registers, or giving ane Extract; which the Pannal not having done, he cannot be allowed a Diligence in this State of the Process. And if any such Act of Council was, it was unwarrantable and could not be made use of, after the Lord Chancellor, the Duke of *Lauderdale*, the Lord Thesaurer Depute, and other Lords of Council had deponed that there was no such Assurance given, as is either pretended by the Exculpation, or insinuate by the pretended Act of Council. And be the Copie produced it is evident, That the Designe thereof is to take from the Pannal any pretended Favour he pleads; and if the Act be founded one, it cannot be divided; so that ane meer Narrative must prove, and the Statatorie Words should not prove; especiallie seeing there is nothing more notour and ordinary, than for the Council not to consider a Narrative if the Statutory Words be Right. And as the Pannal pretends that his Confession cannot be divided from the Assurance given, but that it must be taken with the Qualitie; so much less must this Act be divided. And the pretended Act is long posterior to the Pannal's Confession, and even posterior to a former Dyet in the Justice Court appointed for the Pannal's Trial for the said Cryme. And farther, no such Assurance could have been granted, seeing none but his Majesty can grant Remissions.

The Pannal and his Proctors desyred the Copie produced to be read.

His Majesty's Advocate consents to the Reading of the pretended Copie of the Act of Council, and which being publickly read, is of the Tenor following.

Edinburgh, 12 March, 1674.

THE Lord Commissioner his Grace, and the Lords of his Majesty's Privie Council having appointed a Committee of Council to examine Mr. *James Mitchel*, Prisoner in the *Tolbuith* of *Edinburgh*; the said Mr. *James* being brought before the said Committee, did

make a free and voluntarie Confession of his Accession to the Rebellion, and rising in Arms in the West; and that after he had Notice of the same, he went from *Edinburgh* with Colonel *Wallace* and others, and joynd with the Rebels there, and from thence came along, and was with them until the Night before the Fight at *Pentland-hills*; and that at the Desyre of Captain *Arnot*, he came then to *Edinburgh* to speak to some Persons there concerning them. And being examined upon the Attempt made upon the Person of the Archbishop of *St. Andrews*, and who shot the Pistol at the said Archbishop, when the Bishop of *Orkney* was hurt in the Moneth of *July* 1668, he did declare that at that tyme, and the Day that the said Attempt was made he was in the Town of *Edinburgh*; and that he had bought the Pistol, which was about him, charged with three Balls when he was apprehended, about that tyme when the Bishop was shot, from *Alexander Logan*, Dagger-maker in *Leithwynd*: But refused that he was the Person that made the said Attempt, until having retired a pace with one of the said Committee, he did confes upon his Knees that he was the Person, upon Assurance given him by one of the Committee, as to his Lyfe, who had Warrant from the Lord Commissioner and the Council to grant the same. And did thereafter confes freelic, before all the Lords that was upon the said Committee, That he shot the forsaid Pistol at the said Archbishop, and did subscrive his Confession in Presence of the said Committee, which is also subscribed by them. And thereafter the said Mr. *James* in presence of the Commissioner his Grace and Council, did renew and adhere to the said Confession, both as to the Accession to the Rebellion and the Attempt forsaid; and acknowledged he made the said Attempt because he thought that the said Archbishop had ane Hand in troubling and persecuting these that were in the Rebellion. And nevertheless, being brought before the Lords Commissioners of the Justiciarie, and asked if he did own the Confession forsaid, he did altogether refuse to answer and adhere to his saids Confessions, notwithstanding he was told by the Lords Commissioners of Justiciarie and his Majesty's Advocate, that if he would adhere to his saids Confessions, he should have the Benefite of the said Assurance; and if otherways, that he should lose the same. Therefore the Lord Commissioner his Grace, and the Lords of his Majesty's Privie Council, do declare, That they are free, and that the said Mr. *James* ought not to have the Benefite of any such Promise or Assurance, and that the same is altogether void; and that the Lords of the Justiciarie and the Assylt ought to proceed without any Respect to the same. And farther do declare, That the said Mr. *James Mitchel* is the Person intended and meaned in the Proclamation in the Years 1666, and 1667, discharging any Intercomoning with the Rebels therein mentioned, and excepting the said Mr. *James*, and the other Persons therein, from his Majesty's Favour and Indempnitie, and no other under the Name of Mr. *James Mitchel*, though there had been any other of that Name involved in the said Rebellion.

The Pannal and his Proctors renew their Desyre, and crave to be heard to debate upon the Act of Council in Wrytt.

The Lords Commissioners of Justiciarie considering that the Copie of the pretended Act of Council produced was never urged, nor made use of, nor any Diligence craved for producing the Registers of Council, until this Afternoon that the Assyse was sworne, after which no Diligence can be allowed nor granted in this State of the Procefs be the Law of the Kingdom, and Practique of this Court; especiallie, seeing it appears be the said Copie, that the Designe was to take away any Assurance that the Pannal could have pleaded; and that the Truth of the Narrative of the Copie founded upon insinuating that there was an Assurance, is cancel'd be the Depositions of the Duke of *Lauderdale*, then his Majesty's Commissioner, the Lord Chancellor, and other Members of the Committee and Council: The saids Lords therefore ordaine the Assyse to inclose and return their Verdict to Morrow at Two a Clock in the Afternoon.

Curia Justiciarie S. D. N. Regis tenta in Prætorio Burgi de Edenburgo, Decimo die Mensis Januarii, 1678, Per honorabiles viros Dominos Archibaldum Primrose de Caringtoun Justiciarium Generalem, Jacobum Foulis de Colintoun, Robertum Nairn de Strathurd, Joannem Lockhart de Castle-hill, Davidem Balfour de Ferret, & Thomam Murray de Glendoick, Commissionarios Justiciarie dicti S. D. N. Regis.

Curia legitime affirmata.

The said Day the Persons who past upon the Assyse of Master *James Mitchel*, returned their Verdict in presence of the saids Lords: Whereof the Tenor followes.

As to the first part of the Lybell, founded upon the 4 Act, 16 Parl. King *James 6*. The Chancellor and whole Assyse, with one Voice, find it proven conform to the Lords Interloquitor.

As to the Invading of Bishops and Ministers, and Wounding the Bishop of *Orkney*, siclike proven with one Voice.

As to the third part of the Lords Interloquitor concerning his Confession, first before a Committee, and thereafter before his Majesty's High Commissioner and Council, the whole Assyse with one Voice find it proven conform to the Lords Interloquitor.

As to the fourth and last part of the Interloquitor concerning the Exculpation, the whole Assyse with one Voice find it no ways proven. And furder concerning the Exculpation, when the Pannal was pressing it stronglie upon my Lord Chancellor, the whole Assyse heard his own Confession and Acknowledgment of the Fact. *Sic subscribitur,*

Jo. Hay, Chancellour.

After opening and reading of the whilk Ver-

dict of Assyse, the Lords Commissioners of Justiciarie, by the Mouth of *Adam Auld*, Dempster of Court, Decerned and Adjudged the said Mr. *James Mitchel* to be taken to the *Grass Mercat* of *Edinburgh*, upon *Fryday* the Eighteenth Day of *January* Instant, betwixt Two and Four Aclock in the Afternoon, and there to be Hanged on ane Gibbet till he be Dead, and all his Moveable Goods and Gear to be Escheat and inbrought to his Majesty's Use; which was pronounced for Doom. Upon which Day he was Executed according to the Sentence.

He had prepared a Speech, which he intended to have delivered, but being interrupted by the beating of Drums he threw it over the Scaffold; it was as follows.

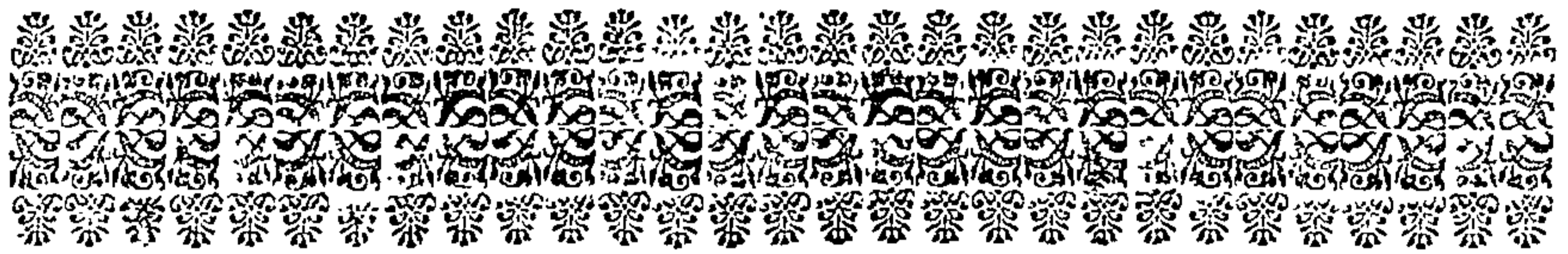
Christian People,

IT being rumoured abroad immediately after I had received my Sentence, that I would not get liberty to speak in this Place, therefore I have not prepared a formal Discourse and account of these pretended crimes, for which I was accused and sentenced, neither did I think it very necessary, the fame of your procefs having gone so much abroad, what by a former enditement given me near four Years since, the dyet whereof was suffered to desert in respect the late Advocat could not find a just way to reach me, with that extrajudicial confession they opposed unto me. All know he was zealous in it, yet my charity is such unto him, that he would not suffer unwarrantable zeal so far to blind him, as to overstretch all Lawes of the Land beyond their due limits, in prejudice of the life of any natural Subject, and next by an extreame enquiry of torture, and then by exiling me to the Bals, and after all, giving me a new enditement at the instance of the new Advocat, who before was one of mine, when I received the first enditement, to which new enditement and debate in that procefs I remit you, and particularly to these two defences of extrajudicial confession, and to the promise of Life given to me thereupon by my Lord Chancellor, upon his own, and the publick faith of the Kingdome, upon the verity whereof I am ready to die, and consent to lay down my Life. And I hope, your Charity will be such to me (a dying Man) as not to misconstrue me therein, especially when it is so notourly adminiculated by an Act of the secret Council, and yet denied upon Oath by the Principal Officers of State, present in Council at the making of the said Act, and which the Act bears to have been present thereat; the Duke of *Lauderdale* being then his Majesty's Commissioner, and which Act of Council was by the Lords of Justiciary their Interloquitor most illegally repelled, but I shall have charity to some of these Lords, whom I knew would have given Law and Justice place, even as to my just absolution, if they had not been overpowered by the plurality of Votes of those who were over-awed and dared by the Lords of the Secret Council. But that will not absolve their Consciences at the last day. As to my Advocats and Lawyers, I ingenuously acknowledge their Care, Fidelity and Zeal in my Defence, and which, I hope, shall be some standing Fame to them for this, and all future Generations. So thus

thus much as a short account of that Affair, for which I am brought unjustly to this Place. But I acknowledge my particular and private Sins have been such, as have merited a worse death unto me: But I die in the hope of the Merits of Jesus Christ to be freed from those eternal Punishments due to me for Sin; yet I am confident, God doth not plead with me in this for my private and particular Sins; but I am brought here, that the work of God may be made manifest, and for the trial of Faith, *Job. ix. ver. 3.* and *1. Pet. i. ver. 7.* and that I may be a witness for his despised Truth and Interest in this Land, who am called to seal the same with my Blood. And I wish heartily that this my poor Life may put an end to the Persecution of the true Mem-

bers of Christ in this Kingdom, so much cheated by these perfidious Prelates, and in opposition to whom, and in testimony of the cause of Christ, I at this time willingly lay down my Life. And I thank God, that he hath thought me so worthy as to do the same for his glory and Interest. Finally, conceiving it a Christian Duty in a singular and extraordinary case anent my particular judgment concerning both Church and State, it is evidently declared and manifested more fully elsewhere. So farewell all earthly enjoyments, and welcome Father, Son and Holy Spirit, into whose Hands I commit my Spirit.

JAMES MITCHEL.



LXXIII. *The Trial of PHILIP Earl of PEMBROKE and MONTGOMERY, at Westminster, for the Murder of NATHANAEL CONY, the 4th of April, 1678.*
30 Car. II.

ABOUT Nine of the Clock the Prisoner with his Guard came from the Tower, with the Ax before him, and went into the Room appointed for him. Between the Hours of Eleven and Twelve at Noon, the Lords, Judges, and Assistants of the House, came in Order, two and two, from the House of Lords, to the Court erected in *Westminster-Hall*, with four Maces before them, and before the Lord High-Steward four more, besides his own Serjeant and Purse-bearer, with Garter King at Arms, and the Deputy Black-rod bearing the White Staff. After Obedience made to the Throne, each Lord, and the others, took their places, the Serjeants, with their Maces erect, kneeling, four on each side of the Throne.

Then the Clerk of the Crown in Chancery on the right hand, and the Clerk of the Crown in the King's-Bench on the left hand, making three Reverences to the Lord High-Steward, came up to his Seat, and there both kneeling, the Clerk of the Crown in Chancery delivered the Commission for the Office of High-Steward (*pro hac vice*) to his Grace, who delivered it to the Clerk of the Crown in the King's-Bench to read, and then they both in the same manner went back to their Seats at the Table.

Then the Clerk of the Crown in the King's Bench said as followeth.

Clerk of the Crown. Serjeant at Arms, make Proclamation.

Serjeant at Arms. O yes, O yes, O yes: My Lord High-Steward of *England* straitly chargeth and commandeth all manner of Persons here assembled, to keep silence, and give ear to his Majesty's Commission, unto my Lord High-Steward his Grace directed, upon pain of Imprisonment.

Then all the Peers and Assistants standing up, and uncovered, he read the Commission in *hæc verba*.

Clerk of the Crown. *Carolus, &c.*

Serjeant. God save the King.

Then Garter and the Usher that held the Staff, making three Reverences to his Grace, Garter on his Knees presented him the white staff, which his Grace delivered to the Usher, who likewise kneeled to hold the same, during the rest of the Ceremony.

Clerk of the Crown. Serjeant at Arms, make Proclamation.

Serjeant. My Lord High-Steward of *England* his Grace straitly chargeth and commandeth all manner of Persons here present, to be uncovered, upon pain and peril shall fall thereon.

Then the Clerk read the *Certiorari* to the Commissioners, before whom the Indictment was found, to return the same into the House of Lords with the Return in *hæc verba*.

Clerk of the Crown. *Carolus, &c. Virtute, &c.* Serjeant at Arms, make Proclamation.

Serjeant. O yes: Constable of the Tower of *London* return thy Precept and Writ to thee directed, and bring forth thy Prisoner *Philip Earl of Pembroke and Montgomery*, on pain and peril shall fall thereon.

The Constable of the Tower of *London* being a Peer, by Sir *John Robinson* his Lieutenant returned his Precept, and with the Ax borne on his left hand, the edge from him, the Earl of *Pembroke* was brought to the Bar, the Lord High-Steward of *England* having then ordered the Judges to be covered, spake to the Prisoner as followeth.

† *Lord High Steward.* My Lord of *Pembroke*, Your Lordship is now brought before this Great Assem-

† *Earl of Nottingham.*

bly in order to your Trial, wherein you have to maintain all that can concern you in this World, your Estate, your Honour and your Life itself. There is no less a Crime charged on you, than the Murder of one of the King's Subjects, and this is not charged on you by common Voice and Fame, nor by the growing Rumour of the multitude, but by the grand Inquest of this County, which was made up of Gentlemen of good Quality and Consideration. Though all this amount to no more than a bare Accusation, (for God forbid that they who neither did nor could hear the Evidence on both sides, should any way pre-judge your Trial by their partial Examination) yet hath produced the Presentment of such a Crime, as is attended with extraordinary and unusual Circumstances.

And now for this Fact your Lordship is to be tried in full Parliament, and your Arraignment is to be made as full and as solemnly as is possible. The King (who will have a strict account of the Blood of the meanest of his Subjects, by whomsoever it is shed) hath for this purpose appointed an High-Steward: And now your Lordship is to be tried not by a select number of Lords, but by the whole House of Peers, who are met together to make Inquisition for this Blood.

Doubtless the shame of being made a Spectacle to such an Assembly as this, and the having a Man's faults and weaknesses exposed to the notice and observation of such a Presence as this is, to a generous Mind must needs be a penance worse than Death itself; for he that outlives his own Honour, can have very little joy in whatsoever else he lives to possess.

In such a state and condition as this is, it will be very fit for your Lordship to recollect your self with all the care and caution you can; it will be necessary for you to make use of the best temper, and the best thoughts you have, when you come to make your defence; let not the disgrace of standing as a Felon at the Bar, too much deject you; no man's credit can fall so low, but that if he bear his Shame as he should do, and profit by it as he ought to do, it is in his own power to redeem his reputation. Therefore let no man despair, that desires and endeavours to recover himself again, much less let the terrors of Justice affright you; for though your Lordship have great cause to fear, yet whatever may be lawfully hoped for, your Lordship may expect from the Peers.

It is indeed just cause of dreadful apprehensions, when you consider how strict and impartial the Judicature is which you stand before, and how impossible it is that any Consideration of your Lordship's Relation or Family, shall have any kind of Ingredience into their Lordships Judgment; nay you have cause to fear all this will make against you, when you consider how the Quality of the Offender doth aggravate the Crime.

You have reason to fear and be dismayed again, when you consider how severe, and how inexorable the Rule of Law is, in the Case of Blood; and how certain it is that the Lords will make that Rule of Law the measure of your Life or Death: But yet, my Lord, there are other Considerations that may support you.

Your Lordship may be sure that they will receive no proof against you, but direct and positive Evidence; it will not be left to any proof,

but such proof, as by the manifest plainness of it, deserves to be called Evidence. In the next place, your Lordship shall suffer no prejudice for want of Counsel, for where there are any advantages that the Law can give you, this Court takes itself obliged in Honour to put you in mind of it; nor can your Lordship suffer an Inconvenience, by having Counsel to plead against you, for no Arguments nor Skill can pervert their Lordships Justice; you shall not fall by the charms of Eloquence; nothing shall load or press you but your own Crime, and even that burden may be alleviated, if there be any room for an Abatement, so far as it doth not contradict what they owe to the King, to themselves, to the Law, and to the Justice of the Kingdom.

Hearken therefore (my Lord) to your Indictment with patience and attention, give no Interruption to the Counsel or Witnesses that speak against you, and reserve what you have to say for yourself 'till the time come, when your Witnesses shall be examined, and you make your Defence, of which I will give you notice. And this you may rely upon, that when you do come to speak for yourself, you shall be heard with as much favour and candor as the matter will bear; and when my Lords have heard all that can be said on both sides, doubtless their Lordships will give such a Judgment in the Case, as is fit for you to receive, such a Judgment as becomes this great Court, and such a Judgment as is suitable to that known Equity, which their Lordships do always observe in all their Proceedings.

Lord High-Steward. Read the Indictment to my Lord.

Clerk of the Crown. *Philip Earl of Pembroke and Montgomery, hold up your Hand.*

Which he obeyed by holding up his Right Hand.

Cl. of Cr. *You stand indicted by the Name of Philip Earl of Pembroke and Montgomery, late of the Parish of St. Martins in the Fields, in the County of Middlesex, for that you not having the Fear of God before your Eyes, but being moved and seduced by the Instigation of the Devil, the 4th of February, in the 30th Year of the Reign of our Sovereign Lord Charles the Second, by the Grace of God, of England, Scotland, France and Ireland, King, Defender of the Faith, &c. with Force and Arms, at the Parish aforesaid, in the County aforesaid, in and upon one Nathanael Cony, Gent. in the Peace of God, and of our said Sovereign Lord the King, then and there being, feloniously, voluntarily, and of your Malice forethought, did make an Assault; and that you the said Philip Earl of Pembroke and Montgomery, with the Right Fist of you the said Philip, &c. the said Nathanael Cony, in and upon the Left part of the Head of the said Nathanael Cony, then and there feloniously, wilfully, and of your Malice aforethought, did strike and bruise, and him the said Nathanael Cony, with your Right Fist aforesaid, did beat and throw down to the Ground; and that you the said Philip, &c. the said Nathanael Cony so lying upon the Ground, in and upon the Head, Neck, Breast, Belly, Sides and Back, of him the said Nathanael Cony, then and there feloniously, wilfully, and of your Malice before-thought did strike and kick, by reason of which said kicking and bruising of the said Nathanael Cony on the said Left part of the Head of the said Nathanael Cony with the said Fist of you the said Philip,*

Philip, &c. and of the beating and throwing him to the Ground aforesaid; and also by reason of kicking of the said Nathanael Cony with the said Feet of you the said Philip, &c. on the Head, Neck, Breast, Belly, Sides and Back of the said Nathanael, he the said Nathanael Cony, from the aforesaid 4th Day of February in the aforesaid Year, to the 10th of the same Month of February, in the Parish aforesaid, did languish, and languishing did live; on which said 10th Day of February in the Year aforesaid, he the said Nathanael Cony, of the striking and bruising, beating and kicking died; and so you the said Philip, &c. the said Nathanael Cony, at the Parish aforesaid, in the County aforesaid, in manner and form aforesaid, feloniously, voluntarily, and of your Malice forethought, did Kill and Murder, against the Peace of our said Sovereign Lord the King, his Crown and Dignity. How say you, Philip Earl of Pembroke and Montgomery, Are you guilty of this Felony and Murder whereof you stand indicted, or Not Guilty?

E. of Pemb. Not Guilty.

Cl. of Cr. Culprit, How will you be tried?

E. of Pemb. By my Peers.

Cl. of Cr. God send you a good Deliverance. Serjeant at Arms, make Proclamation.

Serj. O yes, if any one will give Evidence for our Sovereign Lord the King, against Philip Earl of Pembroke and Montgomery, the Prisoner at the Bar, let them come forth and they shall be heard, for the Prisoner stands at the Bar upon his Deliverance.

Then Sir William Dolben, Knt. the King's Serjeant at Law, Recorder of the City of London, opened the Indictment thus:

Sir William Dolben. May it please your Grace my Lord High-Steward of England, and the rest of my Noble Lords.

Philip Earl of Pembroke and Montgomery stands indicted, for that he, the 4th Day of February last, in the Parish of St. Martins in the Fields, in the County of Middlesex, of his malice forethought did make an Assault upon one Nathanael Cony, in God and the King's peace there being; and that he the said Philip Earl, &c. with his right Fist, on the left part of the Head of the said Nathanael, then and there feloniously did strike and bruise, and with his right Fist aforesaid him did cast and throw down to the Ground, and being so on the Ground, with his Feet did kick and strike, of which said striking, bruising and kicking, the said Nathanael Cony, from the said 4th of February, to the 10th of February following, did languish and then died; and so the Jurors do upon their Oaths say, That the said Philip Earl of Pembroke, &c. the said Nathanael Cony, at the Parish and County aforesaid, feloniously, wilfully, and of his malice forethought, did murder, against the King's peace, his Crown and Dignity. To this indictment the Earl of Pembroke hath pleaded Not Guilty, and put himself upon his Peers for his Trial: We who are of Counsel for the King, shall produce our Evidence to confirm this Accusation, with what it is, and of what nature, his Majesty's Attorney-General will acquaint your Grace, and the rest of you my Noble Lords.

Then Sir William Jones, Attorney-General, (who being called by Writ, as Assistant to the House, was within the Bar) opened the Evidence to this effect.

Att. Gen. May it please your Grace my Lord

High Steward of England, and the rest of my Noble Lords; Philip Earl of Pembroke and Montgomery stands here Indicted for the Murder of Nathanael Cony: That my Lord of Pembroke was the cause of his death, I humbly conceive, will need very little question before your Lordships, for we have such proof that it was his hand threw him down, and his feet that trod upon him and kicked him, which was the cause of his death, that it cannot be denied: But whether or no this killing amount to Murder, may be a matter of further controversie; and I hold it my duty to acquaint your Grace and my Lords, what the proof is, and then what we have to offer to prove it to be an offence even of this nature.

My Lords, I know to maintain an Indictment of Murder, there must be a proof of Malice; but the Law is plain (your Lordships know, and my Lords the Judges will tell it you) that there are two sorts of Malice, the one is Malice express'd, and that is when a Man can be proved to have born before-hand an ill-will and hatred to the person he killed; this sort of Malice we pretend not to be in this case: But there is another sort of Malice, which also in Law gives the denomination of Murder to the killing of a man, which is Malice implied, when any one shall without any provocation given by the party slain, bring another by violence to his Death: For our Law supposeth, and that upon good Ground, that no man without a provocation would kill his Brother, unless he had Malice to him before-hand; and that is the Malice that falls out to be the Ingredient of this case, for the poor unfortunate Gentleman that was killed, did not for ought that did appear to me, (and I have had all the proof given at the Coroner's Inquest under my Examination) give the least provocation to this noble Lord. Some have thought that a person might be guilty of malicious Murder, though the party killed had given the Murderer a blow; but I shall not contend for so strict a construction of a Provocation, for there was not in this case a blow struck, no nor an angry word given: All that I can find came from Mr. Cony was, to complain that a Friend of his that came into the Company with him, was turned out of doors; and sure such a thing will never be taken to be a Provocation, at leastwise such a one as will take away Malice implied. I shall now (my Lord) give your Lordships an account of the nature of our Evidence, as to the Fact, and that (my Lords) in short; for as I shall not use any aggravation above what the Cause requires, so I shall not tire your Grace, and my Lords, with any long Speech, but barely open the Evidence, and tell you in short what will come in proof before you.

It was on Sunday the 3d of February, that my Lord of Pembroke and his Company were drinking at the House of one Long in the Hay-Market, (I am sorry to hear the Day was no better employed by them) and it was the misfortune of this poor Gentleman, together with one Mr. Goring, to come into this House to drink a Bottle of Wine; my Lord of Pembroke saw them coming in, and knowing Mr. Cony, was very importunate with him to join Company: He at first refused, because of his Friend, and told his Lordship they had Business together; but no denial he would take, and so at last they did go into my Lord's Room. After some distance of time, when it was

near twelve of the Clock at Night, there fell out a difference between my Lord, and Mr. *Goring*, (the Gentleman that came in with Mr. *Cony*) who (it seems) gave my Lord of *Pembroke* some Words, which provoked him to express his distaste of them, by throwing a Glass of Wine in his Face; which injury Mr. *Goring* so far resented, as that he was about to draw his Sword, but was prevented by some of the Company, and put out of the Room to avoid further mischief. This Gentleman Mr. *Cony* that was killed, was not at all concerned in the matter of the difference, but only desired to go out of the Room, that he might look after his Friend who was thrust out of doors. He knew not why, (without any Provocation, as you will hear by and by) my Lord of *Pembroke* falls upon him, strikes him with one blow to the ground, and when he was there trod upon him on his Back, on his Belly, on his Side, and kicked him so that the poor Gentleman fell into a Swoon, and was after some time with some difficulty brought to himself again: After they had perceived there was Life in him, they lifted him up, and laid him down on some Chairs that were in the Room, and thinking too much had been done by them already, they take their leaves of him, and commit him to the care of the Drawer. He was not (as it should seem) so carefully attended by the Drawer, whose ignorance could not look after him as his condition required, and so fell down off the Chairs again divers times. After some time, early in the morning he was carried away in a Sedan to his own Lodging, and being there put to Bed, as he grew a little more and more recovered out of his stupefaction, so he grew more and more in pain, and sent for Doctors and Chirurgeons to consult with, by whom he had all the means used that was possible to have saved his Life; but it proved there was so much Blood forced out of his Veins, and gathered into one Place of his Body, by those Blows and Bruises, that he could not be recovered, and so after a Weak's time passed in intolerable pain, died: But yet all the time of his dying, and even constantly to his death, he did complain that it was my Lord's Bruises brought him into that condition. It will also be prov'd, that after his death, upon View of the Body by the Coroner and his Jury, there was the appearances of those Blows and Abuses, by broad Bruises in several parts of the Body, and this some of the Jury will testify. This in short is the matter of the Evidence, which we shall briefly prove, and then submit it all to your Lordships Judgment.

L. H. St. Call the Witnesses together, and speak out, Mr. Attorney.

Att. Gen. Those we shall call first are Mr. *Henry Goring*, Mr. *Richard Savage*, Mr. *John Shelly*, and Capt. *Fitz-Patrick*.

Cl. of Cr. The Evidence which you and every one of you shall give for our Sovereign Lord the King, against *Philip Earl of Pembroke* and *Montgomery*, the Prisoner at the Bar, shall be the truth, the whole truth, and nothing but the truth: So help you God.

L. H. St. Mr. Attorney, whom do you begin with?

Att. Gen. Mr. *Henry Goring*.

L. H. St. Stand forward, *Goring*.

Att. Gen. Pray Sir acquaint my Lords of the manner of your coming with Mr. *Cony* to Mr. *Long's*, and what happened there.

L. H. St. Sir, you must speak so loud that I may hear.

Goring. May it please your Grace, Mr. *Cony* and I did on *Sunday*, the 3d of *February* last, dine in the City, we staid very late there, and I must ingenuously confess, we had drank more than was fit for us to have done; after that (if it please your Grace) I offered to set down Mr. *Cony* at his Lodgings, but he was so very ceremonious, that he would see me at home; it seems *Long's* House, the Tavern in the *Hay-market*, was in the way, and Mr. *Cony* would needs have us drink another Bottle of Wine ere we parted: It was late, and the door shut, but we knocking pretty hard for admittance, did get it opened, and as soon as the door was opened, Mr. *Cony* went towards the Bar, and made some noise, being in drink; my Lord of *Pembroke* was then in a low room in the House, and knowing Mr. *Cony*, (as I thought) came and asked him, if he would come in and drink with him; he replied, My Lord, I am with a Friend, and we have some Business together: At length my Lord asked me very civilly to come in, and we did after some time come in, and when we were in, my Lord drank to me, as I remember, and we stood round the Table a while, and at last sat down in some Chairs, for we were not so much our selves as to be able to stand all the while; then there was, it seems, some Dispute between my Lord of *Pembroke* and me, wherein my Lord did conceive I had done him some injury, and threw a glass of Wine in my Face.

Att. Gen. What kind of Discourse was that, pray Sir?

Goring. Truly (may it please your Grace) I cannot remember all the Discourse, because I was so much in drink at that time; they say, it was about Families and Play, I cannot positively say what it was; but after my Lord of *Pembroke* rose up to draw his Sword, and I laid my hand on mine.

Att. Gen. Well Sir; and what followed then?

Goring. Captain *Savage* stept in between my Lord and me, and the Drawer came bustling about, and took me and shoved me out of the room; while I was thrusting out I heard a noise behind me, and I saw my Lord make somewhat towards Mr. *Cony*; but more I cannot say what was done, because Mr. *Savage* was between my Lord and me. When I was out of the room, I found my Sword gone, and my Hat and Periwig; I then made a noise at the door, and would not go away 'till I had recovered my things; the Man of the House (who was in bed, it seems, for he was then undrest and in his Night-gown) came and asked me what was the matter? I told him, I had been in that room with my Lord of *Pembroke*, where I had received some ill usage, and had lost my Hat and Periwig; and they had broken a piece of my Sword, and taken it from me, which I desired to have again; and (said I) Mr. *Cony*, I doubt, is in danger, for there is quarelling within, and I desired to come in to see what they did with him.

Att. Gen. Well Sir, when you came in, what then?

Goring. Upon this, the Master of the House did desire me to go into a room, and a Gentlewoman (his Sister, as I after understood) did also press me to go into another room, and promised they would bring Mr. *Cony* to me; upon

on which I went into a room there by, but it was something long before I heard from them; and being under some Impatience, they at last came and told me, Now, Sir, you may go in, if you please: when I came in, I found a Gentleman lying along upon the Chairs, and no body else in the room; I began to be suspicious (for I was then, as I thought, somewhat soberer) that he had some Wound, and took the Candle and walked about him, and would fain have awakened him, but could not by all my Endeavours; the Drawer told me, he was only dead-drunk, and would in a little time come to himself; upon which I desired them to lay some Blankets upon him, and some Pillows under him, and set some more Chairs, to make the Place broader, that he might not fall down; and I ordered the Drawer to be sure to watch with him till he awaked, and make a good Fire, which he promised to do.

The next Day Mr. Cony sent to my Lodging to come and see him, but I did not that Day, because I did go out early, and did not return till late; but the very next Day after, (being Tuesday) when I came to him, Harry, (said he) I was very much abused the other Night in my Lord's Company; I am sorry for that (said I) with all my Heart; and I asked him, how he came to be abused; My Lord of Pembroke (said he) threw me down, and there some body trod upon me and kicked me, and he shall know that he has abused me, and that I expect Satisfaction for it, I hope you will let him know so much, and carry him a Challenge from me: Mr. Cony, (said I) who did tread upon you? I know not, (said he) for I was in a Swoon, either my Lord of Pembroke, or some of his Creatures for him. I never had the Honour to know my Lord of Pembroke before, nor above one or two of the Gentlemen that were with him then in the company.

Att. Gen. Sir, had you any Discourse with him afterwards?

Goring. Yes, every Day till Thursday at Night.

Att. Gen. Did he complain of much Pain?

Goring. Yes, constantly in his Belly, his Sides, and his Shoulders.

Att. Gen. What did he tell you was the Cause of his Death?

Goring. He said it was my Lord of Pembroke that had done him the Injury in throwing him down; who trod on him, or kicked him, he cou'd not tell, but said, my Lord should answer for it to him.

Att. Gen. Do you remember what Part he complained of most?

Goring. His Belly.

Att. Gen. And what else?

Goring. I think his Sides and Shoulders.

Att. Gen. What Distance of Time was it between your being thrust out of the Room, and your coming in, and finding him upon the Chairs?

Goring. About half an Hour.

L. H. St. Mr. Goring, you say you saw no Stroke given by my Lord of Pembroke to Mr. Cony.

Goring. No truly, may it please your Grace, I saw my Lord make towards him, but Mr. Savage was between my Lord and me, and I was put out of the room.

L. H. St. You did not hear Mr. Cony charge

my Lord with kicking him, or stamping on him?

Goring. He did not in my hearing charge him with stamping on him, but that he threw him down, and that then some one did kick him.

Att. Gen. My Lords, We have done with this Witness.

L. H. St. My Lord of Pembroke, Will your Lordship please to ask that Witness that spoke last, any Questions, for now is your time?

E. of P. No, my Lord.

Att. Gen. Then we desire Mr. Savage may be examined: Mr. Savage, pray do you acquaint his Grace and my Lords what you know of this Business.

Savage. May it please your Grace, I was in company with my Lord of Pembroke at Mr. Long's House in the Hay-Market, when Mr. Cony came in, and making a great Noise at the Bar, my Lord of Pembroke being in a lower Room, looked out at the Door, and seeing who it was, my Lord saluted him very kindly, and told him he was glad to see him, and desired him to walk into his Room. Mr. Cony told him he had a Friend at Door, and desired his Lordship to admit him, which my Lord embraced very kindly: And then Mr. Cony goes to the Door and calls Mr. Goring, desiring him to come in, and they came together into the Room; my Lord desired them to sit down and drink a Glass of Wine, which they did, and after some time falling into Discourse, Mr. Goring began to make use of some impertinent Language to my Lord, and amongst the rest told him he was as good, or a better Gentleman than he was.

Att. Gen. Goring did?

Savage. Yes, Goring did; upon which my Lord threw a Glass of Wine in his Face, and immediately stept back and drew his Sword: Mr. Goring was going to draw, but I came up to him, and took his Sword from him, and broke a Piece of it, and upon my Persuasion my Lord put up his Sword again; but for fear there might be more Words, I took Mr. Goring in my Arms, and shoved him out of the Room: And whilst I was thrusting him out of Doors, I heard a Noise of a Buffle behind me, and leaving the Drawer to keep Mr. Goring out, I saw my Lord of Pembroke strike Cony with his right Hand, who immediately fell down, and then gave him a kick; and so upon that, finding him not stir, I took Mr. Cony, being on the Ground, (I and my Lord together, for I was not strong enough to do it my self) and laid him on the Chairs, and covered him up warm, and so left him.

Att. Gen. You say, my Lord struck him a Blow.

Savage. Yes, he did strike him.

Att. Gen. On what Part?

Savage. I suppose on the Face.

Att. Gen. You say, Sir, my Lord of Pembroke did kick him when he was upon the Ground.

Savage. Yes.

Att. Gen. Did he kick him once, or oftner?

Savage. But once, that I saw.

Att. Gen. Pray, Sir, on what Part was it?

Savage. Somewhere on the Body, but I cannot tell what Part.

Att. Gen. With what Force did his Leg move?

Savage. Not with a very great Force.

Att. Gen. How high was his Leg lifted up?

Savage.

Savage. He pushed his Leg with a quick motion forward.

Att. Gen. When you took him up he was senseless, you say; pray, Sir, how long was it ere he was brought to Life again?

Savage. Two or three Minutes.

Att. Gen. What Means did you use to bring him to himself?

Savage. We chafed him over the Temples, and such things.

Att. Gen. When he came to Life again, did he speak?

Savage. He did open his Eyes, but did not speak.

Att. Gen. What followed then?

Savage. We laid him upon some Chairs gently, for his Pulse was almost gone, that we could feel.

Att. Gen. Did his Eyes continue open after he was revived?

Savage. Not long; for I asked him if he knew me, he seemed to shake his Head, as if he did, and then closed his Eyes again.

Att. Gen. Before that Accident, what Condition was he in? Was he able to talk?

Savage. He was very drunk, but he did say something.

Att. Gen. What Discourse had he before he was struck down?

Savage. I cannot well remember, but I think he proposed Play to my Lord.

Att. Gen. Why did my Lord strike *Cony*?

Savage. I cannot tell, I was then putting *Goring* out of the Room, and hearing the Noise of my Lord's Motion towards *Cony*, I looked back and saw my Lord strike him.

Att. Gen. What Language did he use to my Lord, to provoke him to it?

Savage. I cannot tell any at all.

Att. Gen. Did you see Mr. *Cony* after that time, and what did he then say to you?

Savage. I went two Days afterwards to see Mr. *Cony*, who told me he was then in a pretty good Condition. He asked me whether my Lord had struck him? I told him, Yes. Truly, said he, I did not know that my Lord had struck me, but finding my self so much in pain, I thought I had fallen, partly through my Drink, and partly through my Fits I used to have.

Att. Gen. We (my Lord) have now done with this Witness.

L. H. St. My Lord of *Pembroke*, will you ask Mr. *Savage* any Questions?

E. of P. No, my Lord.

L. H. St. Mr. *Savage*, I think you say you saw my Lord of *Pembroke* kick him once; in your Judgment, was that Kick of such Force as to give any great Bruise?

Savage. I did (my Lord) see him kick him once, but not with any great Force, as I conceive.

L. H. St. You did not hear Mr. *Cony* complain my Lord had kick'd him?

Savage. No; for, as I told your Lordship when I was to see him two Days after, he asked me the Question, and said he did not know it before.

L. H. St. Mr. Attorney, pray go on with your Witnesses.

Att. Gen. We shall next call Mr. *John Shelly*: Mr. *Shelly*, pray tell his Grace and my Lords your Knowledge in this untoward Accident.

Shelly. May it please your Grace, I was in the Room at *Long's*, when Mr. *Cony* and Mr. *Goring* came in; they were both very far in Drink, in so much that *Goring* could hardly stand, but desired he might have leave to sit down, which he had: Mr. *Goring* in a little time proposeth Play to my Lord, and my Lord told him he would throw with him for 500*l.* and was sending away for the Money; but then Mr. *Goring* would not Play: I believe (said my Lord to him) you are an idle Fellow, that you will propose these things and not pursue them: Upon that Mr. *Goring* tells my Lord, his Name was a better Name than his Lordship's, and he a better Gentleman than my Lord: Then my Lord takes some Wine, and threw in his Face; hereupon Mr. *Goring* steps back, and drew his Sword, and my Lord did the same: Captain *Savage* steps in between them, and keeps my Lord, while *Goring* was put out of the room: my Lord then desired Mr. *Cony* to go out with his Friend: Said he, I do not know upon what Account my Friend is sent out; whereupon my Lord hit *Cony* a Box on the Ear, and that threw him down.

Att. Gen. Pray, Sir, before my Lord struck him, did not *Cony* give my Lord some ill Language?

Shelly. He only said as I told you before, I know not upon what Account my Friend is turned out of Doors.

Att. Gen. Did you see my Lord strike him?

Shelly. Yes.

Att. Gen. Whereabouts?

Shelly. On the Head, with his Fist, or his Hand.

Att. Gen. Did he fall at the first Blow?

Shelly. Yes.

Att. Gen. Did he afterwards say any thing?

Shelly. No.

Att. Gen. Did you see my Lord kick him?

Shelly. No.

Att. Gen. Did you see my Lord hold up his Foot to do it?

Shelly. Yes.

Att. Gen. How high?

Shelly. A pretty Height.

Att. Gen. Pray what became of the Gentleman afterwards?

Shelly. They took him up in their Arms, and laid him upon some Chairs.

Att. Gen. Did you see him laid there?

Shelly. Yes.

Att. Gen. Was he senseless when he was taken up?

Shelly. Yes.

Att. Gen. What was the Reason do you think that he did not open his Eyes, and keep them open?

Shelly. Truly, I believe his Drink, as well as the Blows.

Att. Gen. The one as well as the other.

Shelly. Yes.

Att. Gen. What then did they do with him?

Shelly. They laid Blankets upon him, and Pillows under him, and laid him upon the Chairs.

Att. Gen. How many Chairs?

Shelly. As many as reach'd his length.

Att. Gen. Who did you leave him in charge withal?

Shelly. With the Drawer.

Att. Gen. Did he speak between the time of his first Fall, and your going away?

Shelly.

Shelly. No.

Att. Gen. Did you see him after?

Shelly. Yes, three Days after.

Att. Gen. What did he then say to you?

Shelly. That he had a Fit, but was pretty well recovered.

L. H. St. When was it you saw him after that?

Shelly. On the *Saturday* after, and then he told me the same again.

L. H. St. Did he impute any thing to my Lord of *Pembroke*?

Shelly. He said nothing at all to me of the Ground of his Illness, but that which I have told your Grace.

L. H. St. My Lord of *Pembroke*, will your Lordship ask this Witness any Questions?

E. of P. No, my Lord.

Att. Gen. Then We for the King desire to examine Mr. *Fitz-Patrick*. Captain *Fitz-Patrick*, pray tell my Lord High-Steward, and my Lords the Peers, what you know.

Fitz-Pat. My Lord, I was in the Room at *Long's* with my Lord of *Pembroke*, and my Lord was walking about the Room, and he hears a Noise without, and steps to the Door, where opening the Door half, he saw Mr. *Cony* at the Bar, who was just come in, and seeing my Lord, comes to salute him; my Lord returning into the Room, said to him, Will you come in and join Company? Mr. *Cony* answered, I have my Friend here, my Lord; and brings Mr. *Goring* to my Lord, who saluted him kindly, and desired them both to walk in: Upon which all we that were in the Room stood up, and the Drawer gave them Chairs; after the drinking about of a Glas or two, Mr. *Goring* (both being drunk) said, amongst other Discourse, I will drink, I will play, I will fight with any Man. Who is this Gentleman, said my Lord of *Pembroke*, that I should never hear of, or know him? How, said *Goring*, ('Sblood) not hear of me? My Name is *Goring*, a Name and Family as good as any Gentleman's in *England*. There is no body doubts it, said my Lord. Your Betters, said *Goring*; and then my Lord threw the Wine in his Face; and *Goring* going to draw, was put out of the Room by Mr. *Savage*, and my Lord, upon some Words from *Cony*, struck him down with his Hand.

Att. Gen. What Words were those?

Fitz-Pat. When I asked my Lord the Reason why he struck *Cony*, he told me, it was because *Cony* had told him *Goring* should not go out of the Room till he knew the Reason of it.

L. H. St. Did you hear him say so?

Fitz-Pat. No, not I, but my Lord upon my asking, gave that for the Reason.

L. H. St. What was the Reason?

Fitz-Pat. Because Mr. *Cony* told him, *Goring* should not go out of the Room, till he knew some Reason for it: After my Lord had struck him, I was on the other Side of the Table, and could not see whether my Lord did stamp on him, or kick him; but I saw my Lord's Knee stir, and if he did kick him, he kickt him but once, for we ran in and took him up to lay him upon the Chairs, and taking his Handkerchief out of his Pocket to wipe his Face, we pluckt out of his Pocket with it some false Dice, which we afterwards put into the Hands of Mr. *Long*, to prove that they intended and proposed Play;

and after we had laid him on the Chairs, and wrapt him up warm, we left him.

Att. Gen. How was he after he was taken up?

Fitz-Pat. He open'd his Eyes, but being very drunk before, could not keep them open, but shut them again; and we made a Bed for him on the Chairs, and having wrap'd him up warm, we left him, and ordered the Drawer to make him a Fire.

L. H. St. Did you hear him speak after he was up?

Fitz-Pat. No, my Lord: Mr. *Savage* spoke to him, and asked him, if he knew him; he only lookt on him, and by a turn of his Head seem'd to answer him Yes.

L. H. St. On the Oath you have taken, did you hear him speak to my Lord of *Pembroke* at any time before he was struck?

Fitz-Pat. Yes, my Lord, he had spoken before, and I saw his Lips make a Motion towards my Lord, but what he said, I know no otherwise than as I said before.

L. H. St. My Lord of *Pembroke*, Will your Lordship ask this Witness any Questions?

E. of P. No, my Lord.

Att. Gen. We have now, my Lord, done with the Witnesses that were by when the Fact was committed; by all whom your Lordships hear, the Blows were all given by my Lord of *Pembroke*, and in their Company; they are all Gentlemen of Quality, and therefore, I believe, speak the Truth: We will now call some Witnesses that were with the unfortunate Gentleman in his Sickness, whereof one was his Physician, another his Nurse, and others, who were often with him, and after his Death had a View of the Body. These will give your Grace and my Lords an Account, that he died of those Wounds, and Bruises he then received; they are these four, Dr. *David Bruce*, Mr. *Thomas Hemes*, Mr. *Charles Jackson*, and *Alice Avery*.

Cl. of Cr. Hearken to me, you four. The Evidence that you and every of you shall give for our Sovereign Lord the King, against *Philip Earl of Pembroke*, shall be the Truth, the whole Truth, and nothing but the Truth: So help you God.

L. H. St. Whom do you call first, Mr. Attorney?

Att. Gen. Dr. *Bruce*, my Lord: Pray, Sir, acquaint my Lord High-Steward his Grace, and my Lords the Peers, what you know of Mr. *Cony's* Sickness, and the Cause of his Death, as you apprehend.

Dr. *Bruce*. May it please your Grace, all that I can evidence in particular of Mr. *Cony's* Sickness is this: On *Monday* Morning after his being in company of the Earl of *Pembroke*, I was sent for to come to Mr. *Cony's* Lodgings, and about Ten of the Clock I came; he was then in Extremity of Pain in both Shoulders, so that he could not move, and his Pains were so acute, that he could not admit of touching: Upon the abating of those Pains by my Application the next Day, he then began to complain of Pains in his Belly, but those not so extreme as those in his Shoulders; after some Applications thereto, he complain'd of both, but in a little time was so eased, that he kept well all Night, and till Nine or Ten the next Morning. The next Day, which was *Wednesday*, when I came to

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