

“ Chancellor was accused of a Bribe of ten pounds, and
“ his Man four pounds and certain Fish; which tho the
“ things are small, yet it had been punish’d, if it had been
“ proved.

But now to the Fact of the City Recorder, it was observed, That when he gave Judgment against the several Convicts before related, and assess’d the several Fines and Amercements upon the Convicts and others, both for their Hats and pretended Crimes for which they were indicted; that *John Smith*, one of the Sheriffs of *London*, being, as was supposed, overjoy’d to hear the Court’s Gratitude in rewarding his pains, for making Proclamations in the Streets, &c. but being somewhat in doubt whether many of the Fines might not fall short, or prove bad Debts, hastily steps out of his Chair, and going to the Recorder, said, *But how shall we come by these Fines?* To which the Recorder answer’d, *Give me one of them, and I will secure you all the rest.* At which answer, with a seeming Joy and Alacrity, *J. Smith* return’d to his Chair, and spoke to some who were supposed his Friends, there present in Court, and audibly declar’d to them, that the Recorder told him, *That if we (meaning the Sheriffs) would give him one of the Fines, he would secure us all the rest of them.*

Surely this was too open and publick a place to make such Bargains as these: But what wonder, when scarce any Passage or Action of theirs, that Sessions, was in Law and Righteousness any more justifiable? What Ratification or Confirmation of this piece of contracted Bribery has been since betwixt them in their private Chambers, we know not; but what’s done and acted in publick Courts, we may and can assert, and declare to the world.

Some may conjecture, That the Mony which *J. Howel* the Recorder afterwards receiv’d, was upon the first proposed and offered Contract, made in open Court with *J. Smith* the Sheriff.

Others may imagine, That it was the Mayor’s Benevolence, for justifying his dirty and filthy Actions and Prosecutions before the People at the Sessions. But the case is this, That the Mayor, Sheriffs, *J. Robinson*, &c. and other the Justices for that Sessions, being met together at *Guildhall* in a Court of Aldermen, proposed to pay the Recorder for his extraordinary pains, and reward him for his execution of Justice, or sitting in Judgment at the *Old Baily* upon the Quakers. *J. Robinson*, the chief of that Flock, and not the backwardest to give what’s not his own, told the Court, *That the Recorder deserved an hundred pounds for his Service done at the Old Baily the last Sessions.* Whereupon the Court consented to pay him

384. *The Tryal of T. Rudyard, F. Moor, &c.*

him for that service an hundred Pounds, by the Chamberlain of London. Who doubts of the truth hereof, are desir'd to repair to the Chamberlain's Office, and they may there find the Order, bearing date the 8th of *October*, 1670. besides other Orders for 200*l.* more to him, within eight months last past. An excellent way to ease that Treasury of being overburden'd with Orphans Mony! By which sinister Ends and cursed Dispositions of its Cash, the Chamber is run so deeply in debt, that it's almost incredible: And here Modesty engages to conceal, being in hopes that e'er long some more faithful Stewards and Guardians may be appointed to have the Charge and Wardship of it, &c.

So that notwithstanding that large Provision which *England's* Laws have made for the Safety of its Inhabitants (as in Chapter 29. of its Charter of Liberties, *Nulli vendimus*, &c. on which *Coke* observes, That all the King's People, Ecclesiastical and Temporal, Free or Bond, Old or Young; yea, altho he be outlaw'd or excommunicated, or any other without exception, *is to have Justice freely without sale, and fully without denial*) yet those Prisoners at the hand of this Recorder and Bench, instead of having Justice freely, have been apparently sold into the hands of their cruel Adversaries; and instead of having it fully, they have been unjustly over-ruled by their Arbitrary and Illegal Sentences and Censures against them.

Thus are we forced to cast the blame of the Prisoners Sufferings upon the Authors thereof, which we must attribute either sprung from their Falseness to their Trust, or their Incapacity to execute that weight of Authority committed to them: And surely this Nation throughout is made sensible of nothing more, than the daily Breach of their Liberties, and of Violence to the Freedom of their Persons and Estates, by such *hostes humani generis*, as these oppressed Prisoners have had just occasion to complain of.

The Actions of that Sessions were a Riddle to the *Englishman*, beyond all that this latter monstrous Age hath brought forth. It's needless to repeat how much the publick Liberty (in denying the Commonalty that Freedom of Jurors the Law allows, fining and imprisoning Jurors for doing their Duty, imposing Fines arbitrarily without Inquest upon the freeborn men of *England*, denying to produce that Law which is pretended to have been transgress'd) is wounded, and how much the Injuries are doubled and trebled upon their Fellow-members, and the evil Consequence thereof, which if drawn into precedent, who can count himself free either in Person or Estate? The Consequence of a wicked Sentence (said Chancellor

cellor Bacon) was infinitely worse than a wicked Fact, as being held a precedent and pattern whereby Oppression beginning upon one, is extended as warrantable upon all.

And this conclusion he draweth out of this place of Scripture, *Fons turbatus & urina corrupta est justus cadens coram impio*: A just man falling into the hands of the wicked, is like a Fountain troubled with the foot, or the Urine corrupted in the Body.

To the honour of which arbitrary Sentences, Censures and severe *Judgments* have stricken the Commonalty with Amazement, that the Courts of Justice, ordain'd for publick Preservation and Safety, should be wrested to enslave, oppress, ruin and destroy us. How much that Mayor and Recorder have usurp'd upon the Rights and Liberties of these Prisoners, is too apparent in their waving the Rules of Law, and measuring out Justice by their fantastical Discretions and Arbitrary Wills and Power; the consequence of which cannot but be inevitably mischievous and inconvenient to both those that there were censur'd and judg'd evil, and to the People of England. Hence was deriv'd that excellent Maxim; *Melius sub iniquissima lege quam sub equissimo arbitrio vivere*: That is, *It's better to live under a hard and harsh known written Law, where every man may read his Duty, and know his Offence and Punishment, than under the mildest Arbitrary Government, where the Subject is condemn'd at the Will of every Bench of Justice before which he shall appear, without any certain or known Rules and Measures for the Offence and Punishment.* And how specious soever the pretence for these Proceedings may be, we know that the pretence of Necessity to act contrary to the known written Laws, in the Mayor, Recorder, &c. or any others, is but to usher in Tyranny and Oppression.

There appears no other end that this Bench had in this fortious sort of proceeding, than to fill their Sheriffs Pockets with extorted Gain, or arbitrarily to punish a most innocent and peaceable People, to gratify their Lusts and Malice.

And how many flourishing States have been ruin'd by the Avarices, Cruelty, and Non-observance of the Laws, by the Governours and Magistrates, were tedious to insert. Only take notice what Coke in his 2 *Inst.* 388. declares, *That three things overthrow the flourishing State of the Roman Empire: Latens odium, juvenile consilium, & privatum lucrum.* And observes there, *That it's the greatest Injustice, when the Innocent, under colour of Justice, whereby he ought to be protected, is oppress'd.*

But good Government consisting principally in the execution of their just and known Laws, procures Love from the Subject. It's only their Love which supports a State in adversity:

sity: And our desire that such as *London's Mayor and Recorder, &c.* may not by their Actions sow a jealousy among the Freeborn People of *England*, that it's the intent of our Supreme Magistrates to hold up that common Maxim of all oppressing States, *That their Interest is to maintain the Publick wealthy, and the Particular poor.*

Therefore permit not these Persons in their Courts to create the Precedents of Oppression to enslave our Posterity in future times: to that end hath this been made publick, that the Supreme Magistrate and Legislators of this Nation, for the Dignity and Honour of their Rule and Government, and for the Safety of the free-born People of this Land, not only take care to purge the Benches of Justice from that Partiality and Corruption, which hath usurp'd those Places of great Trust; and punish the Offenders who have been guilty of such enormous Crimes with condign Punishment, answerable to their respective Offences and horrid Oppression; but also command the keeping, observing, and executing in all their Courts the known, written, promulg'd, antient, and fundamental Laws of this Land: And that they may, as they have often avow'd, maintain the Liberties of the Freeborn People of *England*, in assuring to them, that *Salus Populi est suprema Lex.* Can it be reasonably thought, that the Impunity of these that have been so faithless to their Oaths and Trusts repos'd in them, shall ever be serviceable to this State or Magistrates under whom they act? No, they'll rather take courage to betray them, when they find the first opportunity. Therefore like our old Proverb, *Tho we love the Treason, yet we hate the Traitor*: So it hath been the prudence of the wisest and best-govern'd States, *Never to pardon any man for a notorious Crime committed against the Commonwealth, for any good Service before done to it.* To which *Clement Edmonds*, upon *Cesar's Commentaries*, well agrees, fol. 174. *It more importeth a Commonwealth to punish an ill Member, than to reward a good Act.* So that State or Commonwealth that will keep it self in good order, and free from ruin, must cherish Impeachments and Accusations of the People against those that thro Ambition, Avarice, Pride, Cruelty, or Oppression, seek to destroy the Liberty and Property of the People; so shall they keep their State free from Envy; and secure from Supplantation. And the Free-born People of this Nation being thus preserv'd and secur'd against Tyranny and Oppression, will never seek after other Liberty, but rejoice under their own Governours. For as it never turn'd to any State's advantage to gain the People's Hatred, so it's the most stable lasting Government,
under

under which the People rejoice and live cheerfully; according to that Maxim of *Camillus the Roman*, *Firmissimum Imperium quo obedientes gaudent.*

An APPENDIX, by way of Dialogue, in a Plain and Friendly Discourse between a Student in the Laws and Liberties of England, and a true Citizen of London: Whereby is shew'd, That a Jury of twelve Men are the only proper Judges of their Neighbours Actions, and may by the establish'd Laws of England give a Verdict of such Facts, according to their Consciences, without incurring Fine and Imprisonment, &c.

Student. **W**Hither are you hastening out so fast this morning, my Friend?

Cit. Truly, about some earnest Business, that will not admit of delay.

Stud. I know you to be a Man of business; but in my apprehension you seem more than usually in haste, now I am come to give you a visit.

Cit. I acknowledg your kindness; and since you are so opportunely come, I would request your Advice in what I am going about.

Stud. Yea, most freely: But what's the Case?

Cit. I am summon'd to appear to morrow, as a Jurymen, at the *Old Baily*, but would willingly get my self excus'd, and was but now going out to one of the Sheriffs, my old Acquaintance, to intreat his Favour, to do me that kindness; but it's probable you know a nearer way to effect such a matter, and may direct me.

Stud. It's very like, did it much concern you, I might get your discharge: But why should not you rather serve your Country in these publick concerns? If all men were of your mind, how should Right be done in Courts of Justice?

Cit. There's many others that are better skill'd in such matters, who are more fit to perform that Office; as for my part, I have ever so loved Peace that I have forborn going to Law, tho it has been much to my loss.

Stud. That's no Excuse; for the more peaceable man you have been, the more fit you are for such Services. The Office of a Jury-man is conscientiously to judg his Neighbour, who needs no more Law than is easily learned to direct him therein.

Cit. I should willingly appear according to this Summon, but that the Mayor's and Recorder's carriage to Juries was such the last Sessions, that I question whether I could undergo so much hardship, and not endanger my Life; so I find that all my Neighbours, as well as I, are endeavouring to get themselves excus'd.

Stud. Then it's a Restraint from your Trade that deters you?

Cit. No truly, that's not all; but to be kept without Meat and Drink two days and nights together, and not to be allow'd the privilege of Nature's easement, and after all, to be cast into *Newgate*, is hard service.

Stud. I must confess this was very hard, yet it should not deter you from doing your Duty: and if those Jurors suffer'd unjustly (which I question not) their Service was the easier to them.

Cit. I am of opinion they were unjustly dealt withal; many of them I know, who had the Repute of Honesty, especially those four, who yet lie in Durance: but I may suffer by reason of my Ignorance of the Duty and Office of a Jury-man; therefore on that account principally I desire to be excus'd my appearance, which if I understood as well as many do, with all my heart I would do my service.

Stud. Now you speak honestly like an *English*-man; and in case that be all your cause of scruple, it may soon be remov'd if you will take my Advice.

Cit. Yes, with all my heart: Then pray let me have your Answer to some Questions, which often of late I have had upon my thoughts to propound to you, or some Practitioner of the Law, that would be plain with me.

Stud. Offer what you think meet, and I will endeavour to give you that Satisfaction you desire.

Cit. Since Jurors are thus of late menaced, threatned, fined, and imprison'd by our Recorder at the *Old Baily*; pray wherein lies their Privilege and Safety? What say the Fundamental Laws of *England* to such Practices?

Stud. The Jurors Privileges, and every *English*-man's by them, as they are very considerable, so the Laws have very well guarded them against Usurpation, as I shall shew you.

Cit. But pray first let me know their Antiquity. I have heard it said, That Tryals by Juries have been of long standing in this Nation.

Stud.

Stud. Their Antiquity no one knows, but all Authors agree that they have been very antient. *Coke*, the Oracle of our *English* Laws, writes, That long before the Conquest it was order'd, that in every Century there should be twelve good and honest men to judg, &c. And *Camden* in his *Britannia* correcteth *Polidore Virgil*, for saying *William* the Conqueror first brought in this way of Tryal; affirming that it was most certain and apparent by the Laws of *Etheldred*, that such Tryals were in use many years before: Which *Horn* in his *Mirror of Justice*, written in the time of *E. 1.* doth well confirm and assure us.

Cit. But what say the Law-Books of later date, and our Predecessors in later years about them?

Stud. When the great Charter of our *English* Liberties, in the 9th year of *H. 3.* was made, and put under the Great Seal of *England*, then were these Tryals by Juries confirm'd down to us; and therein it was establish'd, That no Amercements should be assess'd upon any man, but by the Oaths of good and lawful Men of the Vicinage: And also that no Freeman of *England* should be imprison'd in his Person, or destroy'd in his Estate and Liberties, without the lawful Judgment of his Equals. Which Charter has been confirm'd by thirty two Parliaments, and now stands firm to justify and maintain the Freedom of this sort of Tryals, which *Coke* calls the Subjects Birthright; and which I must say is the only Preserver of our Lives, Freedom and Property; as you may read in the Book of the Tryal of *W. P.* and *W. M.* last Sessions.

Cit. I am very well satisfy'd in this point; but pray, what says the Law about menacing, threatning, fining and imprisoning of Jurors, as before I mention'd to you?

Stud. As to the menacing and threatning Language which that Bench gave the Jurors, it only evidenced and manifested to the world their Envy and Malice against the Prisoners that the Jury had in charge, and so may be said also of their fining and imprisoning of the Jury afterwards.

Cit. Hath a Court then no power by the Law to fine and imprison a Jury?

Stud. We find in our Law-Books, or Books of Cases, that Jurors have been fined by a Court, for these following matters.

1. If a Jury-man take mony (from the Party to be try'd) before or after he be sworn. *39 Ass. 19. Fitz. Exam.*
2. If they receive any Writings from the Persons they have in tryal. *17. 14 H. 7. 30.*

36 H. 6. 27. per Cur. C.B. & B.R. 3. If a Jury-man appear, and then depart before he be sworn, it is a contempt of the Court.

34 E. 3. Fitz. Of- fice de Court 12. 4. If a Juror, after he shall be sworn, depart from his Fellows before they deliver in their Verdict.

40 Ass. pl. 10. 5. If Eleven Jurors shall give in their Verdict without, or against the Consent of the Twelfth.

Dyer 37. b. 218. a. b. Old Entries 251. 6. If a Jury eat or drink after they are gone from the Bar, and before they bring in their Verdict (This, I suppose, is meant where the Court will accept of the Verdict, when the Jurors tender it.) And for such like Misdemeanors as these, they have been Fined and Imprisoned, but how warrantable, is a Query.

Cit. As for these Miscarriages you have instanc'd, it seems reasonable they should be punish'd, which no honest Man will be found guilty of; neither do I fear to suffer for such like Misdemeanors. But what say you to the Fining a Jury for giving in a Verdict according to their Consciences, yet pretended by the Court to be contrary to Evidence?

Stud. To Fine them at all is an Abuse, tho it has been long practis'd; but to Fine them for giving their Verdict according to their Conscience, such Practises are very much against Law and Reason too: For a Jury of twelve Men *Co. 4. Inst, 84.* are by the Laws the only proper Judges of matter in issue before them: As for instance,

First, That Evidence which is deliver'd to induce a Jury to believe, or not to believe the Matter of Fact in issue, is call'd Evidence, because the Jury may out of many Matters of Fact (*videre veritatem*) that is, see clearly the Truth, of which they are proper Judges.

Secondly, When any Matter is sworn, Deed read, or offer'd, whether it shall be believ'd, or not; or whether it be true or false in point of Fact, the Jurors are the proper Judges,

Thirdly, Whether such Men met together intentionally to do such an Act or not, the Jurors are Judges; for the Court is not Judg of these Matters, which are Evidence to prove or disprove the thing in issue.

Cit. What then is the Court to take cognizance of in the Tryals of mens Liberties and Properties?

Stud. The Court, as their Duty is, are to do equal Justice and Right; so they in such Tryals do direct, whether such Matter shall be admitted to be given in Evidence, or not; such a Writing read, or not; or such a Man to be admitted a Witness,

ness, or not: And this belongs to the Judgment of the Court, as they are upon their Oaths to see Justice done 'twixt Party and Party. Therefore has the Common Law ordain'd, That Matters of Fact (which are drawn to an Issue) shall be try'd by Jurors, and Matters of Law (upon a Demurrer and special Verdict, &c.) by the Justices, according to that Rule or Maxim of Sir *Edw. Cook*; *Ad Questionem facti non respondent Judices, ita ad questionem Legis non respondent Juratores*: The Justices meddle not with Matter of Fact, nor Jurors with Matter of Law. So it's the Juror's Office to find (*veritatem facti*) the Truth of the Fact in issue, and the Court's to give Judgment accordingly. By which we may see the Wisdom of the Law, in referring Things to Persons, in which they have cognizance, and are most expert, according to that Maxim, *Quod quisque norit, in hoc se exercet*. 11 Co. 10. b. 4 Inst. 84. 4 Inst. 207. 9 Cook 13. *ceat*.

Cit. According to this Account you have given me of the Duty and Office, as well of the Court, as the Jurors; the Law seems to have dealt justly and equally betwixt them both. But one Question further, Pray whence is it that Jurors are summon'd of the Neighbourhood, where the Fact is suppos'd to be done or acted?

Stud. As the Common Law of this Land is nothing else than Common Right, pure and try'd Reason; so it never fails to render a Reason of its own Actions: A *Jury* is therefore summon'd of the Vicinage, because it's always presum'd that the Neighbourhood are best acquainted with the Persons inhabiting, or the Actions and Facts done or acted within their own Limits and Jurisdiction; and that they themselves may know something of the matter in controversy, being (*de Vicineto*) of the Vicinage where such matter was in action. Therefore the *Jury* must be return'd, *de Vicineto*, of the place where the Fact was done, and of Men (*per quos rei veritas melius scire poterit*) by whom the Truth of the matter may be better known: So the *Jury* having some Self-knowledg of the Matters afore-hand, besides hearing the Evidence, may the better pronounce (*veritatis dictum*) or a just Verdict of the Fact.

Cit. But wherein do you conceive a Jury-man may have Self-knowledg of Matter, that may not as fully be evidenc'd by Witnesses?

Stud. It's probable, First, That they may know the Witnesses on the one side, or the other, to be Persons of no Credit; or,

Secondly, They may know the Party accus'd to be a Man otherwise qualify'd or principl'd, than to do such an act or thing that is charg'd against him. As for instance; They may know a Man to be,

1. A quiet peaceable *Quaker*; therefore no Fighter or Rioter, or Routous Person.

2. A *Protestant* of the *Episcopal Church of England*; therefore no House-Preacher.

3. An honest sober Man amongst his Neighbours; therefore probably no Thief or Robber. And many other Instances might be offer'd to this purpose.

Cit. To Fine a Jury then for things, which probably they may know of their own knowledg to be true or false, seems very hard; and surely our Jurors of *London* have met with hard usage, to be fin'd and imprison'd for doing their Duty, in what the Laws of this Land have made them sole and proper Judges.

Stud. Their hard usage and severity to the Jurors is not so much as the ill consequence that such practices will be to every English-man, and their Posterity, if not timely remedied.

Cit. Truly the Citizens of *London*, in general, have much dreaded the late Procedure at the *Old-Baily*, and fear it's a Fore-runner of much Mischief that may be acted in the Country, who generally take *London* for a Precedent in their Courts of Justice. But pray what's your Thoughts about these things?

Stud. The Consequence of such Practices, the Parliament have very well set forth in Chief Justice *Keeling's Case*, 11 Dec. 1667. when they Voted, That Fining *Juries* were not only Innovations, in the Tryals of Men for their Lives and Liberties, but that it was of Dangerous Consequence to the Lives and Liberties of the People of *England*; and tended to the introducing of an Arbitrary Government: And their Reason was very good; for the King sits not in Judgment upon his Subjects, but by his Justices in his Courts: And if the Justices, who are commanded to be guided by the Law, shall, contrary to the Law, fine and imprison Juries, for giving Verdicts in such Matters which the Laws allow and appoint them to be proper Judges of, where then is the English-man try'd by his Peers, and by the Law of the Land? To deny us this free Tryal, is to rife us of our Birth-right, and most arbitrarily and tyrannically to deny us Equal Law, Justice and Right.

Stat. 3. 13 E. 3.

Cit.

Cit. Surely when the Parliament meets again, they will call these illegal Proceedings of that Bench to Question before them, as well as they did *Keeling's*.

Stud. It as much concerns them, in behalf of themselves and Posterity, as any of us, to curb these subordinate Judges, who have broken both their Oaths and the Law, to run into those Arbitrary and Illegal Practices; the consequence of which, if suffer'd, in a short time will be, *Sic volo, sic jubeo, stat pro ratione voluntas*. And it will necessarily follow, That,

First, Every Justice of Peace, Mayor, Bailiffs of Corporations, Stewards of Leets, &c. whatever Matters are try'd before them, shall have Verdicts to their minds, or Fine and Imprison the Jurors till they have; so that such must be either pleas'd, humour'd, or gratify'd, else no Justice or Right to be had before them in their Courts.

Secondly, A further ill consequence will be, That altho a person may challenge a Jury-man, or Sheriffs, if they be of Kin to this Adversary, yet he cannot challenge a Justice, Mayor, &c. who will have a Verdict for their Kinsman, or Fine and Imprison them till they have. So that by this means our Lives, Liberties and Properties shall be solcly try'd, and wholly at the Will, and in the power of every mercenary or corrupted Justice, Mayor, Recorder, Bailiff, &c.

Cit. But has it been practicable in former times to fine and imprison Juries, for finding contrary to Evidence, as the Recorder pretends our Jurors have done?

Stud. No surely, we find not one Precedent in all our Books, till *Keeling's*; and he 'scaping that condign Punishment which the Parliament promis'd him, your Recorder and Mayor has trod in his Steps. And pray see how such Judgments on Jurors leave them remediless of relief, which is sufficient ground to conclude such practices to be against the Law.

First, It can never be try'd, whether they found with or against their Evidence, by reason no Writ of Error lies in the Case.

Secondly, They are in worse condition than the Criminals that are try'd by them; for in all civil Actions, Informations, and Indictments, Appeals and Writs of Error, do lie into superior Courts, to try their regular Proceedings of the Inferior: but here can be none.

Thirdly, In the way of an Attaint, the Truth or Falshood of a Juror's Verdict, in Matters of Fact, may be try'd by another Jury: but in this case the Jurors are concluded, by reason that whether they have found with or against their Evidence, can never be try'd. *Litt. Sess.* 108.

And

And further, Reason (which is Law) tells us,
F. N. B. 21. That as the King's Justices of the Law have given out, that they ought not to have any Action brought against them, if they shall in any thing err or mistake the Law: So much the more twelve Jurors, who are Judges of all Matters in issue before them, agreeing together in one, ought not to be fined, where they find a Verdict according to their Consciences; albeit, the Evidence may seem strong and clear to another person, to the contrary of which the Jury have found: For they may (being *de Vicineto* where the Fact was done) know something of their own knowledg of the Matter of Fact before them, which the Judg or Standers-by are probably Strangers unto, and ignorant of it. Therefore the Knowledg of twelve Men, agreeing together, ought to be prefer'd before the single Apprehension of any one Person whatsoever. All which does manifest, not only the Illegal and Arbitrary Proceedings of your Mayor and Recorder, against those twelve Men, but the Ill and Dangerous Consequence of such Practices to all the People of *England*.

Cit. But it's pretended, That one of the Crimes charg'd upon the Jurors (by the Recorder) was for finding their Verdict against Law. How can the Jury justify such an Action? Sure they are not (as it is said) Judges of Law, but Fact.

Stud. Admitting they are so, which will not be granted, yet that a Jury can find against Law, is to me a Paradox: For as we say, Where there is no Law, there is no Transgression; so where there is no Transgression, there is no place for Law, the Law being made for the Transgressor. And, said Learned

Cook (*Ex facto jus oritur*) upon stating the
4 C. 42. b. 53. b. Fact or Transgression, Law doth arise; yea,
11 Co. 10. b. in the Law doth grow out of the Root of the
Pinddle & Nap- Fact: Therefore it's one of their adjudg'd
per's Case. Cases, That if a Jury find a Matter of Fact,
 but conclude against the Law, the Conclusion is void, and the Court ought to give Judgment according to Law.

Now the Jury being the sole Judges of Fact, and Matter in Issue before them, not finding the Fact on which the Law should arise, cannot be said to find against the Law, which is no other than a Superstructure of Fact. Then to say they have found against the Law, when no Fact is found, is most impossible.

Cit. You have given me very good satisfaction as to the Unreasonableness and Illegality of that Court's Procedure; and since I see the Law has made so good provision for our
 safety,

safety, I purpose to appear upon the Jury, according to my Summons, but desire withal a little of your Direction about my Office of a Jury-man.

Stud. I am very confident, that you would not willingly violate an Oath, which you take; but that there are such, who as frequently break them as take them, is too too much apparent, through their careless Custom on the one hand, or slavish Fear on the other; against which I would fully caution you, that you may defend your self against those Enemies of your Country's Peace, and keep a good Conscience towards God and Man.

First, The Oath that's administred to you at the Sessions, is, That you shall well and truly Try, and true Deliverance make, between our Sovereign Lord the King, and the Prisoners at the Bar, according to your Evidence. Then is the Indictment read against the Prisoner, either for his Life or Liberties, which probably takes up a large time in debate, and in examining Witnesses on both sides, according as the Case may be. And when the Jurors are commanded to withdraw, that they may consult of their Verdict; they soon forget that solemn Oath they took, or that great Charge of the Life and Liberty of Men, whereof they are made Judges; and without one serious Thought, or consulted Reason offer'd, *pro* or *con*, presently go to holding up of hands, or some other way voting, whether to find for Prosecutor or Prisoner; so the major Votes of such shall dispose of men's Lives, Liberties and Properties, which the Law counts so dear to every Man. This practice is too customary among Jurors, as I'm credibly inform'd, which occasions their dispatch of that business in a quarter of an hour, which held the Court full six hours Debate: Witness that second Jury, that were sworn on the Prisoners last Sessions, and try'd *T. R. F. M. &c.* Therefore have a care of such Fellow-Jurors.

Secondly, Such a slavish Fear attends many Jurors, that let the Court direct to find Guilty, or not Guilty, accordingly they bring in their Verdict; and therefore many of them never regard what the Evidence was, more or less, to prove the Indictment, but as the Court sums it up, they bring in; as if Jurors were appointed for no other purpose, but to eccho back to the Court (as one observ'd) what the Bench would have most Illegally and Arbitrarily acted upon such persons, against whom they themselves Prosecute and Inform. Now against those Companions I caution you to beware.

Cit. I am very well satisfy'd that these Practices are too frequent amongst Jurors, of which I have been witness. But pray
what

what is the Reason that the Mayor turns Informer, and forceth his Officers and Servants to prosecute?

Stud. You Citizens should best know the reason of your Magistrate's Actions: But it's most probable, that your Mayor turns Informer to get Money into the Sheriff's Pockets, who have purchas'd all the Fines from the King, which the last Sessions amounted to no less than 500*l.*

Cit. It's too apparent they are Confederated; I have heard a muttering, that they together have lick'd their Fingers of 500*l.* and more of *Cripplegate-Ward* Money. I can give no certain account of the business; but the Hue-and-Cry is gone out, and it's like, in a little time, the Malefactors may be apprehended: And since *London* was incorporated, I believe it never had such a pack of Knights to govern it. But to our business; Let me have some farther direction.

Stud. My Advice to you is, That those things in issue, whereof you are proper Judges, you still remember, as I instanc'd before, (*Ad questionem facti non respondent Judices*) If any injustice be done by the Court to a Prisoner, by reason of their negligence or carelesness, that injustice will lie at your door: *Qui non malum prohibet cum potest, facit*: He that prevents not an Evil when it is in his power, does it. Therefore remember, as you of the Jury are Judges of the Matters of Fact in Issue, (that is) Whether a thing sworn is to be believ'd, or not? Whether any thing offer'd be true, or false? Whether Men met together to do such an Act against the Law, or not, in Manner and Form as the person is indicted? You are conscientiously to look to. Therefore,

First, Observe well the Indictment that is read, and the several Parts thereof, both as to the Matter, Manner and Form.

Secondly, Take due notice and regard to the Evidence offer'd for Proof of the Indictment, and each part of it; as well to Manner and Form, as Matter: which endeavour to write down, or so much thereof as you are able; and weighing them seriously together, you may give a Verdict upon that joyn'd Issue, according to Truth, which is call'd by *Cook* (*Veritatis dictum*) The Saying of Truth.

And observe, That as you are sworn to try and deliver according to Evidence; so also you deliver in your Verdict, That the person, you have had in Tryal, is guilty in Manner and Form, as the Party stands indicted; which thing you should very well weigh: and tho a person be prov'd to be guilty of some Fact or Misdemeanor, yet if it be not also prov'd to be done in such Manner and Form as the Party stands indicted, he is not Guilty, and ought to be acquitted by you.

Cit.

Cit. But is not there both Law and Fact in an Indictment, as those against *W. P.* and *W. M.* and the rest of the *Quakers* last Sessions? And how shall a Jury deal in such Cases?

Stud. If Matter of Law do or shall arise, and mingle it self with the Fact, the Jury are not compellable to find the Law, but only the Fact, if they will, according to the Statute of *Westm.* cap. 30. the second, which declareth, That, *Justiciarii ad Assisas capiendas assignati non compellant Juratores dicere precise si sit disseisina vel non, &c.* Justices of Assize shall not compel Jurors to say precisely; that is, to determine a

Matter in Law. And *Cook* commenting upon *Cook 2. Inst. 425.* this Statute, puts a Question, Whether in all

Actions, a Jury might give a special Verdict. “ In the end

“ (saith he) it hath been resolv’d, that in all Actions, real,

“ personal and mixt, and upon all Issues joyn’d, general and

“ special, the Jury might find the special Matter of Fact per-

“ tinent, and tending only to the Issue joyn’d, and thereupon

“ pray the discretion of the Court for the Law: and this the

Jurors may do at the Common Law, not only in Cases between

Party and Party, but also in Pleas of the Crown at the King’s

Suit. And if Jurors be not Judges of Law, but Fact, as our

Sophisters in Law would have it; then the Jury may give in

the Matter of Fact, and leave the Matters of Law to the

Court: Which special Verdict (*Cook* says

the Court cannot refuse, it being pertinent to *Cook 1 Inst. 92.*

the Matter in Issue. So according to their di-

stinction of Law and Fact, the Jury is not bound *Pla. Cau. 92.*

to give in upon their Oaths, that Men did *Lib. 9. 12.*

meet or assemble themselves together unlaw- *Lib. 9. 69.*

lawfully, but only to find that they did meet

and assemble themselves together, and let the Court judg of

the Lawfulness or Unlawfulness of it; for, *Ex facto* (says *Cook*)

jus oritur. Therefore upon an Indictment for Murder (*Quod*

felonice percussit) that he feloniously struck him, the Jury find-

ing (*percussit tantum*) only that he struck him, the Verdict was

adjudg’d good, &c.

Cit. What’s the Reason then, that the Court will not accept

of such special Verdicts, but frequently turn the Jury back, till

they bring in general?

Stud. Because then they have your Oaths as well for Law

as Fact; and if the Judgments be severe, it shall lie at your

door.

Cit. But we are not Judges of Law, as they say: Wherefore

then should they have our Oaths for the Law?

Stud. This is an Artifice, whereby they cheat the Jury into

frequent Perjury, as I shall at large plainly shew you. As,

First,

First, Observe the Form wherein they draw up their Indictments; that is, subtilly to place a small Matter of Fact, as they call it, in the midst of a whole Sea of their Decriminating and Obnoxious Terms, which they call Law, that deserve severe Punishments wherever they are found, viz. *To do an Act with Force and Arms, Riotously, Routously, Tumultuously, Seditiously, Illegally, Deceitfully, Subtilly, Fallaciously, in contempt of the King and his Laws, to the Disturbance and Affrighting the King's Liege People, to the evil Example of others, against the King's Peace, his Crown and Dignity, and such like.*

Secondly, The Fact in issue, pretended to be committed, altho it be never so Innocent or Lawful, (as standing in the Street, or High-way, in peaceable Manner, or Assembling in their own House, there persuading the People to turn from the Evil of their ways, as *Drunkeness, Whoredom, Swearing, &c.*) they environ with many of those foul Criminations, thereby

* *Garments on which are painted the shapes of Devils, and infernal Spirits, &c.*

to misrepresent the Fact, or Matter in Issue, to the Jury; like as the Inquisitors in Spain (so much applauded by J. H. your Recorder) do cloath those Innocent Christian Protestants (whom they have censur'd to the Faggot) with their * *Sambenitoes*, that the People beholding them in so Dismal and Hellish a Dress, may be so far from pitying them, that they may rather condemn them in their very Thoughts as Miscreants, not worthy to live.

Against any of which criminal Terms, if the Jurors object, by reason the Evidence did not reach them; the Court presently stops their mouths with saying, *You have nothing to do with that, it's only matter of Form or matter of Law, you are only to examine the Fact.* Which the ignorant Jurors taking for Answer, bring in the Prisoners Guilty (as they suppose) of the Fact or Trespass only; but the Clerk of the Peace recording it, demands a further Confirmation, saying thus, *Well then, you say A. B. is guilty of the Fact or Trespass, in manner and Form as he stands indicted, and so you say all?* To which the Fore-man answers for himself and Fellows, *Yes.*

Whereupon the Verdict is drawn up (*Juratores super Sacramentum suum dicunt*) that the Jurors do say upon their Oaths, *That A. B. did, or committed such a Fact, with Force and Arms—did such a seditious Action—did meet such Persons in a riotous, routous manner—did such an Act deceitfully, subtilly, illegally, fallaciously, in contempt of the King and his Laws, to disturb or affright the King's Liege People, against the King's Peace, his Crown, and Dignity.* So the Jurors are ignorantly and fallaciously perjur'd upon Record, and Oppression thereby is acted upon the Innocent.

cent. So by reason of the Court's Subtilty on the one hand, and the Juries Ignorance on the other, they upon their Oaths having clothed the innocent Matter or Fact in issue with the *Sambenitish* Garment, the Court with safety passes most severe Judgments and Censures upon such Prisoners; and all because the Jury have upon their Oaths (as was said before) made that innocent Action, or pretended Fact, criminal, which the Law or Court never could have done, had not they in such manner given a Verdict, so many degrees worse than the Fact in issue was evidenc'd unto them.

Cit. Then I perceive those subtil Fellows make use of our Oaths (as it's fabled the Monky did by the Cat's Foot, to claw the Chessnuts out of the Fire) and so thereby cover their cursed Ends and Designs upon the Innocent, whom they daily prosecute; as for my part, I never heard of so much of their Knavery before, neither did I think that it was possible that so much Villany should have been acted under colour of Justice.

Stud. Sir *John Howel* your Recorder, and your City Magistrates, have a further Artifice; that is, to indict all Men by the Common Law, and wave intermeddling with any of the Statutes in force against such Misdemeanours, as they pretend the Persons indicted are guilty of.

Cit. Pray what do you suppose their drift is in that?

Stud. No other than that they may as well make the Law, as proportion the Punishment; for when an Indictment is grounded on the Common Law, and the Prisoner desires to have the Law read to the Jury (who are his Judges, whether he be guilty or not guilty *Modo & Forma* of the matter in issue) on which such Indictment is grounded, the Court answers, *It's Lex non scripta, a Law not written, therefore not to be produced.* By this means the Prisoner is incapacitated to make his Defence, and the Jury kept ignorant, whether the Offence charg'd to be done by the Prisoner be Innocency or Guilt: And so the Bench at the *Old Baily* acted last Sessions, in the Case of Riots, Routs, and unlawful Assemblies. And altho there be several Statutes in force, which point out the Persons that ought to be apprehended and punish'd, as Rioters and Routers, as the Statute of 17 R. 2. 8. 13 H. 4. 7. 2 H. 5. 8. with others; yet your Recorder and Magistrates pretending to proceed by the Common Law (*non scripta*) apprehended quiet and peaceable Religious Assemblies, as Riots and Routs, and punish'd them as such: the greatest Abuse to the Common Law, as has been done in any Age, by such who pretend to sit upon a Bench of Justice.

And

And after the rate of their Proceedings, by their abuse of the Law, they might have fram'd an Indictment against a man, for (*vi & armis*) eating Meat at his own Table with his Wife and Children, and at last ushering in the Fact committed with these obnoxious Terms, as, *Against the King and his Laws, illegally, and in contempt of his Crown and Dignity, &c.* And a Jury of their packing would have found them guilty *Modo & Forma*. Therefore it concerns you to have great care and regard to the Charge you undertake; which is, well and truly to try, and true deliverance make, according to what is evidenc'd to your Conscience.

Cit. But what's the reason that Indictments, and all the Proceedings of the Sessions, be drawn and enter'd in *Latin*; a Language which few, either Jurors or Prisoners, understand?

Stud. It's such a practice, that no reason can be given for it, except to keep the People ignorant, especially the Grand Inquests who first pass the Bills of Indictment; who being generally unknowing in such Language, may perjure themselves blindfold, being only inform'd or made to understand so much of what they swear to, as a mercenary Clerk will read to them, or let them know, which besure shall be no more than what's for the interest of the Prosecutors, and the Prisoners disadvantage. And if these twelve Men (who by the Law are uncontrollable Judges) shall not bring in, or return *Billa Vera*, to such Indictments as the Bench shall favour, your Mayor and Recorder, after Justice Keeling's Example, do frequently command them back, till they find those Bills

Mir. Justice according to their direction; which great abuse
cap. 5. Sect. of the Law, as *Horn* calls it, is not only one of
1. 134. the greatest Violences that is offer'd to our
Lives and Liberties, but also expressly against
the very Oath that those Justices take for the

18 Edw. 3. 3. Execution of that place of Trust, which saith,
Ye shall do even Law and Execution of Right to all,
Rich and Poor, without having regard to any Person; and that ye
give none Advice, nor Counsel to no man, great nor small; in no case
where the King is Party.

Cit. How comes it to pass, that these Judges (who so violate their Oaths, oppress the People, so illegally censure the Innocent, and condemn the Just) escape condign Punishment in all Ages, which is a due Reward for their Oppression and Injustice?

Stud. To call them Judges, is a Title beyond
Coke 2 Inst. 26. their Place or Commission; they are stil'd
Justices, according to their Office, which is
to

to see Justice done betwixt Party and Party, not to Fine and Imprison persons at their will and pleasure without a Jury; which practice of theirs is no more legal than evil Custom can make it; and which practice *A. Horn*, in his *Mirror of Justice*, reckons amongst the Abuses of the Law, they having no other Law, Ground or Authority for it, than some former Uses, or rather Abuses, acted by their Predecessors. And by the same Rule, in case the Jurors bring their *Habeas Corpus* for relief, the Recorder or his Council may offer *Keeling's* Fining of the Jury, altho' condemn'd in Parliament, to justify this latter piece of Injustice. After which rate, a Thief or a Robber may legally justify his Actions, because of his long Use, Custom, and frequent Practice: which Abuses the Justices at *Westminster* rarely dare or will punish, by reason (such Crimes advancing Prerogative) it may occasion a Frown or Rebuke from one or other Superior; forgetting, or else neglecting that Obligation that lies upon them, *Stat. 18. E. 3. 3.*
To deny no man Common Right by the King's Letters, nor none other man's, nor for none other cause: Nor delay Justice or Right to any Man, according to the Charter of Liberties.
9 H. 3. 29.
 And altho' many corrupt and faithless Executioners of Justice have escap'd their due Reward in all Ages, yet there are some who have receiv'd their Portion; as *Lambert*, in the Translation of his *Saxon Laws*, reports, *That King Alfred, the famous Compiler of our English Laws, executed many such.* Of which *Andrew Horn*, a worthy Author (in his *Mirror of Justice*, written in the time of *Edw. 1. cap. 5. sect. 1.* among the many Violences and Abuses offer'd to the Common Law, i. e. *The Common Right of the People of England*) gives a punctual account, saying, *It was an Abuse that Justices and their Officers (who kill People by false Judgment) were not destroy'd as other Murderers, which King Alfred caused to be done, who caused Forty Four Justices, in one Year, to be Hang'd as Murderers, for their false Judgments.* Amongst which, says the Author,

He Hang'd Cadwine, because that he Judg'd Hackwy to death without the consent of all the Jurors: And whereas he stood upon his Jury of Twelve Men, because part of them would have sav'd him; Cadwine (like your Recorder) remov'd those, and put others on the Jury, against Hackwy's consent.

So observe, It's said without the Consent of his Jurors, tho' Twelve Men had given a Verdict against him; for those who were put upon him against his Consent, were not his Jurors, by reason all, or any of those who were first sworn to try him, could not (by the Law) be remov'd, and others put in their places. This is a Case (save only in the Punishment of the

Justices) parallel to that of your Mayor and Recorder at the Old-Baily, London, 5 Septemb. 1670. who when one Jury of Twelve Men were sworn to try several persons call'd Quakers, and the Prisoners had accepted of them; they (*Cadwine* like) remov'd the first Jury, and forc'd other Jurors upon them against their consent, and by that means condemn'd them (like *Hackwy*) without the consent of their Jurors.

He Hang'd Seafool, because he judg'd Ording to Death for not Answering.

So it was Murder in a Justice to condemn a Person, before a Jury had try'd the Fact; which in this Case they could not do, the Prisoner not pleading to the Indictment.

He Hang'd Freburn, because he judg'd Harpyn to die; whereas the Jury were in doubt of their Verdict, (and the reason is given) because in doubtful Cases one ought rather to save than condemn.

Here's not only a Maxim for Jurors and Justices, rather (in doubtful Cases) to save than condemn, but a seasonable Caution to Justices of Assize and Sessions; who, not only when a Jury are doubtful, but when they are agreed to acquit, will menace and threaten them with Fines and Imprisonment, until they bring in a Verdict against a Prisoner, upon whom they purpose to pass a *Freburn's Judgment*.

He Hang'd Hale, because he sav'd Tristram the Sheriff from Death, who took to the King's use from another, Goods against his will, for as much as any such Taking or Robbery hath no difference.

He Hang'd Arnold, because he sav'd Boyliffe, who rob'd the People by colour of Distresses; whereof some were by selling Distresses, and some by Extortion of Fines: as if in Extortion of Fines, releasing of tortious Distresses (as under-selling such Distresses) and Robbery, there were difference.

How many Burglaries, Thefts and Robberies are daily committed by the Miscreants of our Age, under the Names of Informers, and other the King's Officers (like *Tristram* the Sheriff) by taking away Goods against the Will of the Owner, to the King's use (as they pretended) and by colour of Distresses, and selling and releasing Distresses, and Extortion of illegal impos'd Fines, against the Fundamental Laws, upon *England's* quiet, peaceable and religious, yet oppressed and abused Inhabitants; and the Justices of the Peace, not only like *Hale* and *Arnold*, save and secure them from condign Punishment, but abet and encourage them to such sore and grievous Oppressions: yet no relief upon the Oppressor's complaint, nor redress for these publick Grievances.

He Hang'd Oskitell, because he judg'd Cathing to Death by Record of a Coroner, without tryal of the Truth of the Fact by the Jury. So zealous was this King for the Execution of Justice, and tender

der of the Lives of his Subjects, *That* (as says the same Author) *he hang'd all the Judges, who had falsly sav'd a Man guilty of Death, or had falsly hang'd any Man against Law, or any reasonable Exception.*

And in lesser Offences, where they wrongfully griev'd any Man, or pass'd the Bounds of their Commision, or the Law, he disinherited and remov'd them, to the satisfaction of the People, establishing of sure upright Laws, maintenance of the honour of his Courts of Justice, and his perpetual Renown and Fame to future Ages and Generations.

Besides, *Hubert de Burgo*, in the 17th Year of E. 3. — *Spencers*, Father and Son; *Tresilian* and *Belknap*; *Sir William Thorpe* in 23 E. 3. *Empson* and *Dudley*, persons most famous for Tyranny and Oppression, left upon Record, that our Justices of later date, beholding their Ends, should avoid their Foot-steps. So altho some of your Fellow-Citizens, by reason of this Injustice and Oppression of your City-Recorder, Mayor, &c. have undergone the hardship of Imprisonment, yet they standing in the Gap against the introducing of an Arbitrary Government, they may live to see a due Reward rendred to their Oppressions, and enjoy the fruit of their Faithfulness to the Trust reposed in them; that is, Liberty and Freedom from Tyranny and Oppression: then, as says the Wise-man, *Prov. 21. 18. The Wicked shall be a Ransom for the Righteous, and the Transgressor for the Upright.*

Cit. Well, I acknowledg you have given me ample Satisfaction as to what is the Juror's Duty; and since I see that the *English-man's* Life, Freedom and Property, principally depends on the Faithfulness and Honesty of his Jurors, I shall endeavour to perform my Duty in that Office: and what my Assistance may avail to defend us against that Torrent of Violence, Usurpation and Oppression (which is overflowing all our Liberties) shall be freely tendred and given up for the good of this City and my Native Country.

Stud. Now (my Friend) you speak like an *English-man*, and as one that would faithfully serve your Country; and if you will take my advice, at leasure hours read your *Charter of Liberties*, and the *Fundamental Laws*, by which (as *Cook* says) you have a better Inheritance than by your natural Parents. Some of the most impartial Writers have been the said *Sir Edw. Cook* in his 2d, 3d and 4th Institutes; *Horn's Mirror of Justice*; *Lambert's Translation of the Saxon Laws*; as also, *The Tryal of W. P. and W. M.* lately printed: they are Books without difficulty to be had, and very worthy your perusal; wherein you may not only see the *English-man's* Rights and Liberties asserted, but

Tyranny and Oppression in all Ages (endeavouring to extirpate and violate our Laws, the equal Distributer of every man's Property) detected and laid open. These I would not have one true *English*-man want in his House; the consulting with which at vacant hours, will so accommodate and furnish him with the Knowledg and Understanding of his own inherent Rights and Liberties, that he may be able to defend, not only himself from Violence and Oppression, but also his Neighbours from Tort and Wrong.

Prov. 29. 7. *Cognoscit justus causam tenuium, improbus non animadvertit ut cognoscat.*

A Postscript.

THIS Impartial Account of these persons Tryals, with the Appendix of the Jury-man's Duty and Rights, had been earlier presented to thy view, but that the difficulty of a Printing-Press is such (by reason of their frequent Searching and Examination) that it's no easy matter to bring forth Truth to Light without Hazard. As the Author hath, on the one hand, avoided the Censure of a flattering Hypocrite (that with his Mouth destroyeth his Neighbour) so, on the other hand, the *Lash* of the Wise Man, *Prov. 24. 24. He that saith unto the Wicked, Thou art Righteous, him shall the People curse, Nations shall abhor him.*

What Violences and Oppressions may, at the rate of that Court's proceedings (against these Prisoners) be committed, not only upon the Citizens of *London*, but upon every Freeman of *England*, are apparent to the Judicious.

Have not such Arbitrary and Illegal Proceedings upon Jurors (the Staff of the *English*-man's Liberty) been condemn'd by the Commons of *England* in Parliament; and declar'd, *That they were of evil Consequence to the Lives and Liberties of the People, (which thing these Prisoners have sadly experienc'd) and that they tended to the Introducing of an Arbitrary Government?* Which no sober Man questions, yet no sufficient Caution to that Court.

O Wicked Times! O Miserable Age! What! Injustice avow'd, Oppression become familiar, yea Legal; Oaths of Jurors in publick Courts, solemnly made and taken in the Presence of God and Man, by a Bench of Justice absolv'd, or denying them to perform what they had enforc'd them to Swear? Must we by our Laws, under grievous Penalties, abjure the See
of

of Rome, and our Magistrates tread its steps in assuming the like Prerogative? And not only so, but commending their Idolatrous, Cruel, Tyrannical and Inquisitory Practices, upon sober and religious People; as *John Howel* the Recorder, frequently did that Sessions.

What's the end these persons aim at in their Judicature? It's too apparent, not (*salus Populi*) the Commonalties Good: What Religious Persuasion do they defend or stand for? In punishing Dissenters from the National Church, we know they commend the *Papists*, and spare the *Atheists*. Never were there any so wicked or cursed Betrayers of Right, Liberty, Justice or Religion in any Age, but they would pretend to be Patronizers of them: Yea, it's recorded, That the Thieves and Vagabond *Jews* getting power into their hands (a Presage and Fore-runner of the sore and lamentable Calamities that befel that People) chose themselves a High-Priest, and usurp'd Power in *Jerusalem*, to give Laws and oppress at pleasure: of whom *Josephus* thus writes, pag. 637. D. "But they us'd the Temple as a Castle and Defence for themselves against the People, and made the Sanctuary a place for them to exercise Tyranny in.

Consider well, and weigh the Actions of *S. Starling*, London's Mayor; *John Edwards* and *John Smith* its Sheriffs, the Head and Chieftains of the People's Oppressors, in enforcing their Officers, Serjeants and Servants, to be Informers and Prosecutors against the Innocent, by their Proclamations making peaceable people Rioters; and thereby not only to forfeit their Rights and Liberties, but these their Adversaries assuming Authority to demand what part of their Estate they shall think meet. And judg if these practices run not parallel to those of *Albinus*, President of *Judea*: which *Josephus* thus impartially relates; "Who was over all as a Tyrant, and a Prince of Thieves; and he us'd the help of his Guard to rob the meaner sort—Nay, he was not asham'd to proclaim it throughout the whole Country, Lawful for any one that would, to Rob and Steal, so that they would bring him a part of their Booty. Fol. 623. E. & F.

And altho he had (like these late Oppressors) Power for his Law, and Authority to enforce what he willed upon the People; yet the Divine Historian terms *Albinus* but a Tyrant, and his Actions Theft and Robbery.

Thus are poor *England's* quiet, peaceable and religious Inhabitants torn in pieces by those Sons of *Belial*; their Lives, Liberties and Estates made preys, to gratify their Lufts, Avarice, and Wills and Pleasures. And where do these Violences and Oppressions arise, but from the undervaluing and vilifying of our Good,

Votes Parl. Antient, Wholesom and Fundamental Laws, our
 11 Dec. 1667. great Charter of Liberties, the Preserver of our
 Lives, Freedom and Property?

However too many of the Minds and Spirits of our Country-
 men are besotted, through that Deluge of Vice and Debauche-
 ry, that has over-spread and cover'd the Face of our Land; sure
 we are, that the right Noble and Virtuous will ever have a high
 Esteem of those Laws, that were not only dear to our Ancestors,
 but famous throughout the World, for an equal Balance of Jus-
 tice, whereby every man's Right and Liberty might be weigh'd.

It's observable what that *Roman* Senator, *C. S. Saturninus* (a
 Lover of Vertue, Liberty, and wholesom Laws) declaims in the
 Senate: (saith he) "For to them that know what Vertue is, it
 " is no small Felicity to live one Hour in Freedom of Mind, and
 " in a free Country, govern'd by such Laws, which in times past
 " have made our Commonwealth to flourish——For in regard
 " of the present time, there is not any thing that we ought
 " more earnestly to effect, than to live vertuously; for only Ver-
 " tue is the thing that confirmeth Men in their Liberty.——I
 " know how great Mischiefs Tyranny do ordinarily breed in
 " a publick State; for they utterly extinguish all Vertue, and
 " deprive Free-men of that perfect Magnanimity that may be
 " in them, and teach both to Flatter and to Fear; for that
 " the Commonwealth is abandon'd, not to the Wisdom of the
 " Laws, but to the Fury of the intemperate Governors.

And complaining of *Julius Caesar's* Violation of that course of
 Law whereby the State was policed: (says he) "In subvert-
 " ing the Laws to his good liking, and himself to his particu-
 " lar desires, there is not any kind of Misery and Mischief
 " that hath not overthrown our City.

Whence we may observe and conclude, that all these horrid
 Oppressions and Violences, that have been in Ages past inflict-
 ed upon, and offer'd to any People, State or Commonwealth, they
 have naturally flow'd from the want of Vertue, or from the de-
 bauch'd Practice of the Magistrates, governing and judging the
 People by Will and Power, and not by establish'd Laws: which
 is the Case of these Prisoners, who yet lie in Durance at the
 Will of their cruel Adversaries; because, as one saith,

*Sepultum est jus in Regno, prava Voluntas,
 Vis & Violentia magis regnat quam Judicium.*

[The following Report of Mr. *Bushell's* Case, by that Great
 Man the Lord Chief Justice *VAUGHAN*, having a near Re-
 lation to the first (especially) of the foregoing Tryals, the Rea-
 der is here presented with it, on the Desire of some Gentlemen,
 who wish well to this Collection.]

Bushell's

Busbell's CASE.

THE King's Writ of *Habeas Corpus*, Dat. 9 die *Novembris* 22 *Car.* 2. Issued out of this Court, directed to the then Sheriffs of *London*, to have the Body of *Edward Busbell*, by them detain'd in Prison, together with the Day and Cause of his Caption and Detention, on *Friday* then next following, before this Court, to do and receive as the Court shall consider; as also to have then the said Writ in Court.

Of which Writ, *Patient Ward* and *Dannet Foorth*, then Sheriffs of *London*, made the Return following, annex'd to the said Writ.

That at the King's Court, of a Session of *Oyer and Terminer*, held for the City of *London* at *Justice-Hall* in the *Old-Baily*, *London*, in the Parish of *St. Sepulchres*, in *Farringdon-Ward* without, *London*, on *Wednesday* 31 die *August* 22 *Car.* 2. before Sir *Samuel Starling*, then Mayor of *London*, and divers other his Majesty's Justices, by virtue of his Majesty's Letters Patents under the Great Seal of *England*, to them, any Four or more of them, directed to enquire, hear and determine according to the Tenor of the said Letters Patents, the Offences therein specified: and, amongst others, the Offences of unlawful Congregating, and Assemblies within the Limits appointed by the said Commission within the said City, as well within Liberties as without. *Edward Busbell*, the Prisoner at the Bar, was committed to the Goal of *Newgate*, to be there safely kept under the Custody of *John Smith* Knight, and *James Edwards*, then Sheriffs of the said City, by virtue of a certain Order then and there made by the said Court of Sessions, as followeth.

Ordinatum est per Curiam hic quod Finis 40 Marcarum separatim ponatur super Edwardum Busbell, and other Eleven persons particularly nam'd, and upon every of them, being the Twelve Jurors then and there sworn, and charg'd to Try several Issues then and there joyn'd between our Lord the King and William Penn and William Mead, for certain Trespasses, Contempts, unlawful Assemblies and Tumults, made and perpetrated by the said Penn and Mead, together with divers other unknown persons, to the Number of Three hundred, Unlawfully and Tumultuously assembled in Grace-Church-street in London, to the Disturbance of the Peace whereof, the said Penn

and *Mead* were then indicted before the said Justices. Upon which Indictment the said *Penn* and *Mead* pleaded they were not Guilty, for that they the said Jurors, then and there the said *William Penn* and *William Mead* of the said Trespasses, Contempts, unlawful Assemblies and Tumults, *contra Legem hujus Regni Angliæ, & contra plenam & manifestam Evidentiam, & contra directionem Curie in materia Legis hinc de & super præmissis eisdem Furatoribus* versus præfatos *Will. Penn & Will. Mead* in Curia hic aperte datam & declaratam, de præmissis iis impositis in Indictamento prædicto acquieverunt in Contemptum Domini Regis nunc legumque suarum & ad magnum Impedimentum & obstructionem Justitiæ, necnon ad malum exemplum omnium aliorum Furatorum in consimili casu delinquentium. Ac super inde modo ulterius ordinatum est per Curiam hic quod præfatus *Edw. Bushell* capiatur & committatur Gaolæ dicti Domini Regis de Newgate, ibidem remansurus quousque solvat dicto Domino Regi 40 Marcas, pro fine suo prædicto, vel delibera'us fuerit per debitum Legis cursum. Ac eodem Edwardo Bushell, ad tunc & ibidem capto & commisso existente ad dictam Gaolam de Newgate, sub Custodia præfat. *Johannis Smith & Jacobi Edwards* ad tunc *Vic. Civitatis Lond. prædict.* & in eorum Custodia in Gaola prædict. existente & remanente virtute Ordinis prædict. iidem *Johannis Smith & Jacobus Edwards*, postea in eorum exitu ab Officio *Vic. Civitatis Lond. prædict.* scilicet 28 die Septembris Anno 22. supra dicto eundem Edwardum Bushell, in dicta Gaola dicti Domini Regis ad tunc existentem, deliberaverunt nobis præfatis nunc Vicecomitibus Civitatis prædict. in eadem Gaola salvo custodiendum secundum tenorem & effectum Ordinis prædictæ. Et quia prædictus Edwardus nondum solvit dicto Domino Regi prædictum finem 40 Marcarum, nos iidem Vicecomites Corpus ejusdem Edwardi in Gaola prædicta hucusque detinimus; & hæc est Causa Captionis & Detentionis præfati Edwardi, cujus quidem Corpus coram præfatis Justitiariis paratum habemus.

The Writ of *Habeas Corpus* is now the most usual Remedy by which a Man is restor'd again to his Liberty, if he have been against Law depriv'd of it.

Therefore the Writ commands the Day, and the Cause of the Caption and Detaining of the Prisoner, to be certify'd upon the Return; which if not done, the Court cannot possibly judg whether the Cause of the Commitment and Detainer be according to Law, or against it.

Therefore the Cause of Imprisonment ought by the Return to appear as *specifically* and *certainly* to the Judges of the Return, as it did appear to the Court, or person authoriz'd to commit; else the Return is insufficient, and the Consequence must be,

That either the Prisoner, because the Cause return'd of his Imprisonment is *too General*, must be discharg'd: whenas if the

Cause

Cause had been more particularly return'd, he ought to have been remanded; or else he must be remanded; when if the Cause had been particularly return'd, he ought to have been discharg'd: Both which are Inconveniencies not agreeing with the Dignity of the Law. (There is a specious Exception to this Rule, but doth not materially vary it, as shall appear.)

In the present Case it is return'd, That the Prisoner being a Juryman among others, charg'd at the Sessions-Court of the *Old Baily*, to try the Issue between the King and *Penn* and *Mead*, upon an Indictment for assembling unlawfully and tumultuously, did *contra plenam & manifestam evidenciam* openly given in Court, acquit the Prisoners indicted, in contempt of the King, &c.

The Court hath no knowledg by this Return, whether the Evidence given were full and manifest, or doubtful, lame, and dark, or indeed Evidence at all material to the Issue; because it is not return'd, what Evidence in particular, and as it was deliver'd, was given. For it is not possible to judge of that rightly, which is not expos'd to a man's Judgment. But here the Evidence given to the Jury is not expos'd at all to this Court, but the Judgment of the Court of Sessions upon that Evidence is only expos'd to us; who tell us it was full and manifest. But our Judgment ought to be grounded upon our own Inferences and Understandings, and not upon theirs.

It was said by a Learned Judge, *If the Jury might be fined for finding against manifest Evidence, the Return was good, tho it did not express what the Evidence particularly was, whereby the Court might judge of it, because returning all the Evidence would be too long.* A strange Reason! For if the Law allows me Remedy for wrong Imprisonment, and that must be by judging whether the Cause of it were good or not, to say the Cause is too long to be made known, is to say the Law gives a Remedy which it will not let me have, or I must be wrongfully imprison'd still, because it is too long to know that I ought to be freed. What is necessary to an end, the Law allows is never too long. *Non sunt longa quibus nihil est quod demere possis*, is as true as any Axiom in *Euclid*. Besides, one manifest Evidence return'd had suffic'd, without returning all the Evidence. *But the other Judges were not of his mind.*

If the Return had been, That the Jurors were committed by an Order of the Court of Sessions, because they did *minus juste* acquit the Persons indicted:

Or because they did *contra Legem* acquit the Persons indicted:

Or

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Or because they did *contra Sacramentum suum* acquit them.

The Judges cannot, upon the present; more judg of the legal Cause of their Commitment, than they could if any of these Causes, as general as they are, had been return'd for the Cause of their Commitment. And the same Argument may be exactly made to justify any of these Returns, had they been made, as to justify the present Return; they being equally as legal, equally as certain, and equally as far from possessing the Court with the Truth of the Cause: And in what condition should all Men be, for the just Liberty of their Persons, if such Causes should be admitted sufficient Causes to remand Persons to Prison?

To those Objections made by the Prisoner's Council against the Return, as too general;

1. It hath been said, That *Institutum est quod non inquiretur de discretione Judicis.*

2. That the Court of Sessions in *London* is not to be look'd on as an *Inferior Court*, having all the *Judges Commissioners*. That the Court having heard the Evidence, it must be credited: that the Evidence given to the Jury of the Fact, was clear and not to be doubted.

As for any such Institution pretended, I know no such, nor believe any such, as it was apply'd to the present Cause: But taking it in another, and in the true sense, I admit it for truth; that is, when the King had constituted any man a Judg under him, his Ability, Parts, and Fitness for his Place, are not to be reflected on, censur'd, defam'd, or vilify'd by any other Person, being allow'd and stamp't with the King's Approbation, to whom only it belongs to judg of the Fitness of his Ministers.

And such scandalous Assertions or Inquiries upon the Judges of both Benches is forbidden by the Statute of *Scandalum Magnatum*, 2 R. 2. c. 5. Nor must we upon supposition only either admit Judges deficient in their Office, for so they should never do any thing right; nor on the other side, must we admit them unerring in their Places, for so they should never do any thing wrong.

And in that sense the Saying concerns not the present Case.

But if any Man thinks that a Person concern'd in Interest by the Judgment, Action, or Authority exercis'd upon his Person or Fortunes by a Judg, must submit in all or any of these to the imply'd Discretion or Unerringness of his Judg, without seeking such Redress as the Law allows him; it is a Persuasion against *Common Reason*, the *received Law*, and *Usage both of this Kingdom, and almost all others.*

If a Court Inferior or Superior hath given a false or erroneous Judgment, is any thing more frequent than to reverse such Judgments by Writs of false Judgment, of Error, or Appeals, according to the Course of the Kingdom?

If they have given corrupt and dishonest Judgments, they have in all Ages been complain'd of to the King in the Star-Chamber, or to the Parliament.

Andrew Horn in his *Mirror of Justices*, mentions many Judges punish'd by King *Alfred* before the Conquest for corrupt Judgments, and their particular Names and Offences; which cou'd not be had, but from the Records of those times.

Our Stories mention many punish'd in the time of *Edward the First*. Our Parliament Rolls of *Edward the Third's* time, of *Richard the Second's* time, for the pernicious Resolutions given at *Nottingham Castle*, afford Examples of this kind. In latter times the Parliament Journals of 18 and 21 *Jac.* the Judgment of the Shipmony in the time of *Charles the First*, question'd, and the particular Judges impeach'd. These Instances are obvious, and therefore I but mention them.

In Cases of Returns, too general upon Writs of *Habeas Corpus*, of many I could urge, I will instance in two only.

One *Astwick* brought by *Habeas Corpus* to the King's Bench, was return'd to be committed *per mandatum Nicolai Bacon militis Domini Custodis magni Sigilli Angliæ virtute cujusdam Contemptus in Curia Cancellar. facti*; and was presently bail'd. 9 *Eliz. Moore* fol. 839.

One *Apsley* Prisoner in the *Fleet*, upon a *Habeas Corpus*, was return'd to be committed *per considerationem Curie Cancellar. pro contemptu eidem Curie illato*; and upon this Return set at liberty. 13 *Jac. Moore* fol. 839.

In both these Cases no Inquiry was made, nor Consideration had, whether the Contempts were to the Law-Court or equitable Court of Chancery; either was alike to the Judges, lest any man should think a difference might arise thence.

The Reason of discharging the Prisoners on those Returns, was the generality of them being for *Contempts* of the Court, but no particular of the Contempt express'd, whereby the King's Bench could judg whether it was a Cause for Commitment or not.

And was it not as supposable, and as much to be credited, That the Lord Keeper and Court of Chancery did well understand what was a Contempt deserving Commitment, as it is now to be credited, that the Court of Sessions did understand perfectly what was full and manifest Evidence against the
Persons

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Persons indicted at the Sessions? and therefore it needed not to be reveal'd to us upon the Return.

Hence it is apparent, that the Commitment, and the Return pursuing it, being in it self too general and uncertain, we ought not implicitly to think the Commitment was, *re vera*, for cause particular and sufficient enough, because it was the Act of the Court of Sessions.

And as to the other part, That the Court of Sessions in London is not to be resembled to other Inferior Courts of *Oyer and Terminer*, because all the Judges are commission'd here (which is true) but few are there at the same time, and as I have heard when this Tryal was, none of them were present. However Persons of great Quality are in the Commissions of *Oyer and Terminer*, thro the Shires of the Kingdom, and always some of the Judges; nor doth one Commission of *Oyer and Terminer* differ in its Essence, Nature, and Power from another, if they be general Commissions; but all differ in the Accidents of the Commissioners, which makes no Alteration in their Actings in the eye of Law.

Another fault in the Return is, that the Jurors are not said to have acquitted the Persons indicted against full and manifest Evidence, *corruptly, and knowing the said Evidence to be full and manifest against the Persons indicted.* For how manifest soever the Evidence was, if it were not manifest to them, and that they believ'd it such, it was not a *finable Fault*, nor deserving Imprisonment; upon which difference the Law of punishing Jurors for false Verdicts principally depends.

A Passage in *Bracton* is remarkable to this purpose, concerning Attainting Inquests.

Bracton, l. 4. c. 4. f. 288. b. Committit Jurator perjurium propter falsum Sacramentum ut si ex certa Scientia aliter juraverit quam res in veritate se habuerit, si autem Sacramentum fatuum fuerit, licet falsum, tamen non committit perjurium, licet re vera res aliter se habeat quam juraverat, & quia jurat secundum Conscientiam, eo quod non vadit contra mentem. Sunt quidam qui verum dicunt mentiendo, sed se perjerant—quia contra mentem vadunt.

The same Words, and upon the same occasion *Fleta, l. 5. c. 22. f. 336. n. 9. are in effect in Fleta: Committit enim Jurator perjurium quandoque propter falsum Sacramentum, ut si ex certa Scientia aliter juraverit quam res in veritate se habuerit secus enim propter factum quamvis falsum.* And lest any should think that these Passages are to be understood only of *Jurymens* Perjuries in *foro Conscientie*, it is clearly otherwise by both those Books, which shew how by the discreet Examination of the Judg, the Error of the Jury not wilful, may be prevented and corrected, and their Verdict rectify'd.

And

And in another place of *Bracton*, in the same Chapter: *Judex enim sive Justiciarius ad quem pertinet Examinatio si minus diligenter examinaverit, occasionem prebet perjurii Juratoribus.* And after,

Et si examinati cum justo deducantur errore dictum suum emendaverint, hoc bene facere possunt, ante judicium & impune, sed post judicium non sine pœna. *Bracton, l. 4. f. 289. a.*

After these Authorities, I would know whether any thing be more common than for two Men, Students, Baristers, or Judges, to deduce contrary and opposite Conclusions out of the same Case in Law? And is there any difference, that two Men should infer distinct Conclusions from the same Testimony? Is any thing more known than that the same Author and Place in that Author, is forcibly urg'd to maintain contrary Conclusions, and the Decision hard which is in the right? Is any thing more frequent in the Controversies of Religion, than to press the same Text for opposite Tenents? How then comes it to pass, that two Persons may not apprehend with Reason and Honesty what a Witness, or many say, to prove in the Understanding of one plainly one thing, but in the Apprehension of the other, clearly the contrary thing? Must therefore one of these merit Fine and Imprisonment, because he doth that which he cannot otherwise do, preserving his Oath and Integrity? And this is often the Case of the Judg and Jury.

I conclude therefore, That this Return, charging the Prisoners to have acquitted *Penn* and *Mead* against full and manifest Evidence first, and next without saying that they did know and believe that Evidence to be full and manifest against the indicted Persons, is no cause of Fine or Imprisonment.

Of this mind were ten Judges of eleven. The Ch. Baron Turnor gave no Opinion, because not at the Arguments.

And by the way I must here note, That the Verdict of a Jury and Evidence of a Witness, are very different things in the Truth and Falshood of them. A *Witness* swears but to what he hath heard or seen, generally or more largely to what hath fallen under his Senses: But a *Juryman* swears to what he can infer and conclude from the Testimony of such Witnesses, by the Act and Force of his Understanding, to be the Fact inquir'd after; which differs nothing in the Reason, tho much in the Punishment, from what a Judg, out of various Cases consider'd by him, infers to be the Law in the Question before him. Therefore *Bracton*:

Et licet Narratio facti contraria sit Sacramento & Dicto precedenti, tamen falsum non faciunt Sacramentum licet faciunt fatuum Judicium,
quia

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quia loquuntur secundum Conscientiam, quia falli possunt in Judiciis suis, sicut ipse Justiciarius. Bract. f. 289. a.

There is one Objection which hath been made by none, as I remember, to justify this general Return, I would give answer to.

A Man committed for *Treason* or *Felony*, and bringing an *Habeas Corpus*, hath return'd upon it, that he was committed for *High Treason* or *Felony*: and this is a sufficient Return to remand him, tho in truth this is a general Return. For if the specific Fact, for which the Party was committed, were express'd in the Warrant, it might then perhaps appear to be no *Treason* or *Felony*, but a *Trespas*; as in the Case of the Earl of *Northumberland*, 5 H. 4. question'd for *Treason* in raising Power. The Lords adjudg'd it a *Trespas*; for the Powers rais'd were not against the King, but some Subjects.

Why then by like Reason may not this Return be sufficient, tho the Fact for which the Prisoners stood committed, particularly express'd, might be no Cause of Commitment?

The Cases are not alike; for upon a general Commitment for *Treason* or *Felony*, the Prisoner (the Cause appearing) may press for his Tryal, which ought not to be deny'd or delay'd. And upon his Indictment and Tryal, the particular Cause of his Imprisonment must appear; which proving no *Treason* or *Felony*, the Prisoner shall have the benefit of it. But in this Case, tho the Evidence given were not full nor manifest Evidence against the Persons indicted, but such as the Jury upon it ought to have acquitted those indicted; the Prisoner shall never have any benefit of it, but must continue in Prison, when remanded, until he hath paid that Fine unjustly impos'd on him, which was the whole end of his Imprisonment.

We come now to the next part of the Return, viz. *That the Jury acquitted those indicted against the Direction of the Court, in matter of Law openly given, and declar'd to them in Court.*

The words, *That the Jury did acquit against the Direction of the Court in matter of Law*, literally taken, and *de plano*, are insignificant, and not intelligible; for no Issue can be join'd of Matter in Law, no Jury can be charg'd with the Tryal of Matter in Law barely, no Evidence ever was or can be given to a Jury, of what is Law or not; nor no such Oath can be given to, or taken by a Jury, to try Matter in Law, nor no Attaint can lie for such a false Oath.

Therefore we must take off this Vail and Colour of words, which make a shew of being something, and in truth are nothing.

If the meaning of these words, *finding against the Direction of the Court in Matter of Law*, be, That if the Judg having heard the Evidence given in Court (for he knows no other) shall tell the Jury, upon this Evidence, the Law is for the Plaintiff or for the Defendant, and you are under the pain of Fine and Imprisonment to find accordingly, then the Jury ought of duty so to do. Every man sees that the Jury is but a troublesome Delay, great Charge, and of no use in determining Right and Wrong, and therefore the Tryals by them may be better abolish'd than continu'd: Which were a strange new-found Conclusion, after a Tryal so celebrated for many hundreds of years.

For if the Judg from the Evidence shall by his own Judgment first resolve upon any Tryal what the Fact is; and so knowing the Fact, shall then resolve what the Law is, and order the Jury penally to find accordingly: what either necessary or convenient use can be fancy'd of *Juries*, or to continue Tryals by them at all?

But if the Jury be not oblig'd in all Tryals to follow such Directions if given, but only in some sort of Tryals (as for instance, in Tryals for criminal Matters upon Indictments or Appeals) why then the Consequence will be, tho not in all, yet in Criminal Tryals, the Jury (as of no material use) ought to be either omitted or abolish'd: which were a greater mischief to the People, than to abolish them in Civil Tryals.

And how the Jury should in any other manner, according to the Course of Tryals us'd, find against the Direction of the Court in Matter of Law, is really not conceivable.

True it is, if it fall out upon some special Tryal that the Jury being ready to give their Verdict, and before it is given, the Judg shall ask whether they find such a particular thing propounded by him? or whether they find the Matter of Fact to be as such a Witness or Witnesses have depos'd? And the Jury answer, they find the Matter of Fact to be so; if then the Judg shall declare, the Matter of Fact being by you so found to be the Law, is for the Plaintiff, and you are to find accordingly for him:

If notwithstanding they find for the Defendant, this may be thought a *finding in Matter of Law against the Direction of the Court*; for in that case the Jury first declare the Fact, as it is found by themselves; to which Fact the Judg declares how the Law is consequent.

And this is ordinary, when the Jury find unexpectedly for the Plaintiff or Defendant, the Judg will ask, *How do you find such a Fact in particular?* And upon their Answer he will say, then it is for the Defendant, tho they found for the Plaintiff,

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Plaintiff, or *e contrario*, and thereupon they rectify their Verdict.

And in these Cases the Jury, and not the Judg, resolve and find what the Fact is.

Therefore always in discreet and lawful Assistance of the Jury, the Judg's Direction is Hypothetical and upon supposition, and not positive, and upon coercion; viz. *If you find the Fact thus* (leaving it to them what to find) *then you are to find for the Plaintiff; but if you find the Fact thus, then it is for the Defendant.*

But in the Case propounded by me, where it is possible in that special manner, the Jury may find against the Direction of the Court in matter of Law, it will not follow they are therefore finable; for if an *Attaint* will lie upon the Verdict so given by them, they ought not to be fined and imprison'd by the Judg for that Verdict: For all the Judges have agreed upon a full Conference at *Serjeants Inn* in this Case. And it was formerly so agreed by the then Judges, in a Case where Justice *Hide* had fined a Jury at *Oxford*, for finding against their Evidence in a Civil Cause: *That a Jury is not finable for going against their Evidence, where an Attaint lies.* For if an *Attaint* be brought upon that Verdict, it may be affirm'd and found upon the *Attaint* a true Verdict, and the same Verdict cannot be a false Verdict; and therefore the Jury fined for it as such by the Judg, and yet no false Verdict, because affirm'd upon the *Attaint*.

Another Reason that the Jury may not be fined in such a Case, is, because until a Jury have consummated their Verdict, which is not done until they find for the Plaintiff or Defendant, and that also be entred of Record; they have time still of Deliberation, and whatsoever they have answer'd the Judg upon an *Interlocutory Question* or *Discourse*, they may lawfully vary from it, if they find Cause, and are not thereby concluded.

Whence it follows upon this last Reason, *That upon Trials wherein no Attaint lies, as well as upon such where it doth, no Case can be invented, wherein it can be maintain'd, that a Jury can find in Matter of Law nakedly against the Direction of the Judg.*

And the Judges were (as before) all of opinion, That the Return in this latter part of it is also insufficient as in the former, and so wholly insufficient.

But that this Question may not hereafter revive, if possible, it is evident by several Resolutions of all the Judges, That where an *Attaint* lies, the Judg cannot fine the Jury for going against their Evidence or Direction of the Court, without other Misdemeanour.

For

For in such case, finding against, or following the Direction of the Court barely, will not bar an Attaint; but in some case the Judg being demanded by, and declaring to the Jury what is the Law, tho he declares it erroneously, and they find accordingly, this may excuse the Jury from the Forfeitures; for tho their Verdict be false, yet it is not corrupt, but the Judgment is to be revers'd however by the Attaint, for a Man loseth not his Right by the Judges mistake in the Law.

Ingersalls C.
Cr. 35 El. f.
309. n. 18.

Therefore if an Attaint lies for a false Verdict upon Indictment not Capital (as this is) either by the Common or Statute Law, by those Resolutions, the Court would not fine the Jury in this Case, for going against Evidence, because an Attaint lay.

But admitting an Attaint did not lie (as I think the Law clear it did not) for there is no Case in all the Law of such an Attaint or Opinion, but that of *Thirnings*, 10 H. 4. Attaint 60 and 64. for which there is no Warrant in Law, tho there be other specious Authority against it, touch'd by none that argu'd this Case :

The Question then will be, Whether before the several Acts of Parliament which granted Attaints, and are enumerated in their order in the Register, the Judg by the Common Law in all Cases might have fined the Jury finding against their Evidence, and Direction of the Court, where no Attaint did lie, or could so do, yet if the Statutes which gave the Attaints were repeal'd.

If he could not in Civil Causes before Attaints granted in them, he could not in Criminal Causes upon Indictment (wherein I have admitted Attaint lies not) for the Fault in both was the same, *viz. Finding against Evidence and Direction of the Court*, and by the Common Law; the Reason being the same in both, the Law is the same.

That the Court could not fine a Jury at the Common Law, where Attaint did not lie (for where it did, it's agreed he could not) I think to be the clearest Position that ever I consider'd, either for Authority or Reason of Law.

After Attaints were granted by Statutes generally; as by *Westminster the first, c. 38. in Pleas Real*; and by *34 Ed. 3. c. 7. in Pleas Personal*. And where they did lie at Common Law (which was only in Writs of Assize) the Examples are frequent in our Books of punishing Jurors by Attaint.

But no Case can be offer'd either before Attaints granted in general, or after, that ever a Jury was punish'd by Fine and Imprisonment, by the Judg, for not finding according to their Evidence,

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Evidence, and his Direction, until *Popham's* time ; nor is there clear proof that he ever fined them for that Reason, separated from other Misdemeanour. If Juries might be fined in such case, before Attaints granted, why not since? For no Statute has taken that Power from the Judg. But since Attaints granted, the Judges resolv'd they cannot fine where the Attaint lies, therefore they could not fine before. Sure this latter Age did not first discover, that the Verdicts of Juries were many times not according to the Judges opinion and liking.

But the Reasons are, I conceive, most clear, that the Judg could not nor can fine and imprison the Jury in such cases.

Without a Fact agreed, it is as impossible for a Judg or any other to know the Law relating to that Fact, or direct concerning it, as to know an Accident that hath no Subject.

Hence it follows, that the Judg can never direct what the Law is in any Matter controverted, without first knowing the Fact ; and then it follows, that without his previous Knowledge of the Fact, the Jury cannot go against his Direction in Law, for he could not direct.

But the Judg, *quâ* Judg, cannot know the Fact possibly, but from the Evidence which the Jury have ; but (as will appear) he can never know what Evidence the Jury have ; and consequently he cannot know the Matter of Fact, nor punish the Jury for going against their Evidence, when he cannot know what their Evidence is.

It is true, if the Jury were to have no other Evidence for the Fact, but what is depos'd in Court, the Judg might know their Evidence, and the Fact from it, equally as they ; and so direct what the Law were in the Case, tho even then the Judg and Jury might honestly differ in the Result from the Evidence, as well as two Judges may, which often happens.

But the Evidence which the Jury have of the Fact, is much other than that: For,

1. Being return'd of the Vicinage, whence the Cause of Action ariseth, the Law supposeth them thence to have sufficient Knowledge to try the Matter in Issue (and so they must) tho no Evidence were given on either side in Court ; but to this Evidence the Judg is a stranger.

2. They may have Evidence from their own personal Knowledge, by which they may be assur'd, and sometimes are, that what is depos'd in Court is absolutely false ; but to this the Judg is a Stranger, and he knows no more of the Fact than he hath learned in Court, and perhaps by false Depositions, and consequently knows nothing.

3. The Jury may know the Witnesses to be stigmatiz'd and infamous, which may be unknown to the Parties, and consequently to the Court.

4. In many Cases the Jury are to have View necessarily; in many by consent, for their better Information; to this Evidence likewise the Judg is a Stranger.

5. If they do follow his Direction, they may be attainted, and the Judgment revers'd for doing that which if they had not done, they should have been fined and imprison'd by the Judg, which is unreasonable.

6. If they do not follow his Direction, and be therefore fined, yet they may be attainted, and so doubly punish'd by distinct Judicatures for the same Offence, which the Common Law admits not.

A Fine revers'd *in Banco Regis* for Infancy *per inspectionem & per testimonium del. 4. fide dignorum*. After upon Examination of divers Witnesses in *Chancery*, the suppos'd Infant was prov'd to be of Age *tempore finis levati*; which Testimonies were exemplify'd, and given in Evidence after *in Communi Banco*, in a Writ of Entry in the *Quibus* there brought. And tho it was the Opinion of the Court, That those Testimonies were of no force against the Judgment in the *King's Bench*, yet the Jury found with the Testimony in *Chancery* against direction of the Court upon a Point in Law, and their Verdict after affirm'd in an Attaint brought, and after a Writ of Right was brought; and Battel join'd.

7. To what end is the Jury to be return'd out of the Vicinage whence the Cause of Action ariseth? To what end must Hundredors be of the Jury, whom the Law supposeth to have nearer Knowledg of the Fact, than those of the Vicinage in general? To what end are they challeng'd so scrupulously to the Array and Pole? To what end must they have such a certain Freehold, and be *probi & legales Homines*, and not of Affinity with the Parties concern'd? To what end must they have in many Cases the View, for their exacter Information chiefly? To what end must they undergo the heavy Punishment of the Villanous Judgment, if after all this they implicitly must give a Verdict by the Dictates and Authority of another Man, under pain of Fines and Imprisonment, when sworn to do it according to the best of their own knowledg?

8. A Man cannot see by another's Eye, nor hear by another's Ear; no more can a Man conclude or infer the thing to be resolv'd by another's Understanding or Reasoning: and tho the Verdict be right the Jury give, yet they being not as-

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sur'd it is so from their own Understanding, are forsworn, at least *in foro Conscientia*.

9. It is absurd, a Jury should be fined by the Judg for going against their Evidence, when he who fineth knoweth not what it is, as where a Jury find without
14 H. 7. f. 29. Evidence in Court of either side; so if the
per Vavasor in Jury find upon their own knowledg, as the
Camer. Scac. Course is, if the Defendant plead *solvit ad*
without contra- *diem* to a Bond prov'd, and offers no proof.
dition Hob. The Jury is directed to find for the Plaintiff
f. 227. unless they know Payment was made of their own knowledg according to the Plea.

And it is as absurd to fine a Jury for finding against their Evidence, when the Judg knows but part of it; for the better and greater part of the Evidence may be wholly unknown to him; and this may happen in most Cases, and often doth, as
in *Grave's* and *Short's* Case.

Grave vers. Error of a Judgment in the *Common Bench*.
Short, 40 El. The Error assign'd was, The Issue being whe-
Cro. f. 616. ther a Feoffment were made? And the Jurors being gone together to confer of their Verdict, one of them shew'd to the rest an Escrow *pro petentibus*, not given in Evidence by the Parties, *per quod* they found for the Demandant, upon Demurrer adjudg'd no Error; for it appears not to be given him by any of the Parties, or any for them, it must be intended he had it as a piece of Evidence about him before, and shew'd it to inform himself and his Fellows; and as he might declare it as a Witness that he knew it to be true. They resolv'd, if that might have avoided the Verdict, which they agreed it could not, yet it ought to have been done by Examination, and not by Error.

That *Decantatum* in our Books *ad questionem facti non respondent Judices, ad questionem Legis non respondent Juratores*, literally taken is true. For if it be demanded, what is the Fact? the Judg cannot answer it: If it be ask'd what is the Law in the Case, the Jury cannot answer it.

Therefore the Parties agree the Fact by their pleading upon Demurrer, and ask the Judgment of the Court for the Law.

In Special Verdicts the Jury inform the naked Fact, and the Court deliver the Law: and so is it in Demurrers upon Evidence, in Arrest of Judgments upon Challenges, and often upon the Judges Opinion of the Evidence given in Court, the Plaintiff becomes Nonsuit; when if the Matter had been left to the Jury, they might well have found for the Plaintiff.

Byt

But upon all general Issues ; as upon *Not Culpable* pleaded in Trespass, *Nil debet* in Debt, *Nul tort*, *Nul Disseisin* in Ailize, *Ne disturba pas* in *Quare impedit*, and the like ; tho it be matter of Law, whether the Defendant be a Trespasser, a Debtor, Disseisor, or Disturber in the particular Cases in Issue ; yet the Jury find not (as in a special Verdict) the Fact of every Case by it self, leaving the Law to the Court, but find for the Plaintiff or Defendant upon the Issue to be try'd, wherein they resolve both Law and Fact complicately, and not the Fact by it self ; so as tho they answer not singly to the Question what is the Law, yet they determine the Law in all Matters where Issue is join'd and try'd in the principal Case, but where the Verdict is Special.

To this purpose the Lord *Hobart* in *Needler's Case*, against the Bishop of *Winchester*, is very apposite——*Legally it will be very hard to quit a Jury that finds against the Law, either Common Law or several Statute Laws, whereof all Men were to take knowledge, and whereupon Verdict is to be given, whether any Evidence be given to them or not. As if a Feoffment or Devise were made to one in perpetuum, and the Jury should find Cross either an Estate for Life, or in Fee-Simple against the Law, they should be subject to an Attaint, tho no Man inform'd them what the Law was in that Case.* Hob. f. 227.

The legal Verdict of the Jury to be recorded is finding for the Plaintiff or Defendant : what they answer, if ask'd, to Questions concerning some particular Fact, is not of their Verdict essentially, nor are they bound to agree in such particulars ; if they all agree to find their Issue for the Plaintiff or Defendant, they may differ in the Motives wherefore, as well as Judges in giving Judgment for the Plaintiff or Defendant may differ in the Reasons wherefore they give that Judgment, which is very ordinary.

I conclude with the Statute of 26 H. 8. c. 4. *That if any Jurors in Wales do acquit any Felon, Murderer, or Accessary, or give an untrue Verdict against the King, upon the Tryal of any Traverse, Recognisance, or Forfeiture, contrary to good and pregnant Evidence, ministred to them by Persons sworn before the King's Justiciar ; That then such Jurors should be bound to appear before the Council of the Marches there, to abide such Fine or Ransom for their Offence, as that Court should think fit.*

If Jurors might have been fined before by the Law, for going against their Evidence in Matters Criminal, there had been no cause for making this Statute against Jurors for so doing in *Wales* only.

Objections out of the Antient and Modern Books.

8 *Aff. pl.* 35. 1. A Juror kept his Fellows a Day and a Night without any reason or assenting, and therefore awarded to the *Fleet*.

This Book rightly understood is Law, *That he staid his Fellows a day and a night without any reason or assenting*, may be understood, that he would not in that time intend the Verdict at all, more than if he had been absent from his Fellows, but wilfully not find for either side. In this sense it was a Misdemeanour against his Oath, *for his Oath was truly to try the Issue*: which he could never do, who resolv'd not to confer with his Fellows.

34 *E. 3. Bra. Title Jurors,* n. 46. And in this sense it is the same with the Case 34 *E. 3.* where *Twelve* being sworn and put together to treat of their Verdict, one secretly withdrew himself, and went away, for which he was justly fined and imprisoned; and it differs not to withdraw from a Man's Duty, by departing from his Fellows, and to withdraw from it, tho he stay in the same Room, and so is that Book to be understood.

But if a Man differ in Judgment from his Fellows for a day and a night, tho his Dissent may not be as reasonable as the Opinion of the rest that agree, yet if his Judgment be not satisfy'd, one disagreeing can be no more criminal, than four or five disagreeing with the rest.

41 *Aff. p.* 11. 2. A Juror would not agree with his Fellows for two days, and being demanded by the Judges, if he would agree, said, he would first die in Prison; whereupon he was committed, and the Verdict of the eleven taken. But upon better Advice, the Verdict of the eleven was quash'd, and the Juror discharg'd without Fine; and the Justices said, the way was to carry them in Carts until they agreed, and not by fining them. And as the Judges erred in taking the Verdict of the Eleven, so they did in imprisoning the Twelfth. And this case makes strongly, that the Juror was not to be fined who disagreed in Judgment only.

Much of the Office of Jurors, in order to their Verdict, is *Ministerial*, as not withdrawing from their Fellows after they are sworn, not withdrawing after Challenge, and being try'd in before they take their Oath, not receiving from either side Evidence, after their Oath, not given in Court, not eating and drinking before their Verdict, refusing to give a Verdict, and the like; wherein if they transgress, they are finable: but the Verdict it self, when given, is not an Act Ministerial, but Judicial, and according to the best of their Judgment, for which they are not finable, nor to be punish'd but by Attaint.

3. The Case of 7 R. 2, Title *Corona Fitz* 108. was cited where, upon Acquittal of a common Thief, the Judg said, the Jury ought to be bound for his good Behaviour during his Life: But saith the Book, *quere per quel ley*, but that was only *gratis dictum* by the Judg; for no such thing was done, as binding them.

4. *Bradshaw* and *Salmon's* Case was urg'd, where *Hob. f. 114.* a Jury had given excessive Damages upon a Tryal in an Action of Covenant, and the Court of Star Chamber gave Damages to the Complainant almost as high as the Jury had given upon the Tryal. But the Jury who gave the Damages were not question'd, *Tho*, saith the Book, *they might have been, because they receiv'd Briefs from the Plaintiff, for whom they gave Damages, which was a Misdemeanour*; but the express Book is, That the Jury could not be punish'd by Information for the excessive Damages, but only by Attaint, therefore not for their false Verdict without other Misdemeanour; which answers some other Cases alledg'd.

Nor can any Man shew (tho it was said) that a Jury was ever punish'd upon an Information either in Law or in the Star Chamber, where the Charge was only for finding against their Evidence, or giving an untrue Verdict, unless *Imbracery, Subornation, or the like were join'd.*

5. It was said, a Perjury *in facie Curie* is punishable by the Judg; and such is it, if Jurors go against their Evidence. Perhaps a Witness may be punish'd for Perjury *in facie Curie* (which I will not maintain to be Law) but a Jury can never be so punish'd, because the Evidence in Court is not binding Evidence to a Jury, as hath been shew'd.

6. Some Records were cited of Fines *pro concealamento*; no doubt it is an Article inquirable in every *Oyer* and *Terminer*, and one Jury may find it upon another.

7. *Brayne's* Case was urg'd, but the Jurors were there fined for a manifest Combination to delude the Court, by agreeing upon two Verdicts, and concealing the latter, if the Court would be satisfy'd with the former.

8. *Wharton's* Case reported by two Reporters. *Yelverton* saith, That the Judges, whereof *Popham* was one, and a Privy Counsellor, were very angry, and fined the Jury for their Verdict and finding against Direction.

In those Reports that pass under the Name of *Ney's*, the same Case is reported with this, *That the Judges conceiv'd the Jury had been unlawfully dealt with to give that Verdict*; which if true, the fining was lawful, and the Case therein reported short by *Yelverton*.

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9. *Wagstaff's Case* in the *King's Bench* lately was the same with the present Case; but by the Record it is reasonable to think the Jurors committed some fault besides going against their Evidence, for they were unequally fined.

But however, *all the Judges having upon this Return resolv'd, that finding against the Evidence in Court, or Direction of the Court barely, is no sufficient Cause to fine; the Jury answers all these Cases, if not answer'd before.*

Lannoys C. 10. There remains *Southwell's Case* reported *Moore, f. 730.* by *Leonard*; some Cases out of the Court of Wards in *Lannoy's Case* reported by *Serjeant Moore, f. 730.* where Jurors were sent to the *Fleet*, or threatened to be sent, for not finding Offices according to the Direction of the Court.

1. An Inquest of Office is not subject to an Attaint.

2. It neither determines any man's Right, nor doth any Party put any Tryal upon them.

3. They are only to find naked Matter of Fact, as the Books are of *3 H. 7. f. 10. b.* and *2 H. 4. f. 5. a.* but principally an Office for the King is in many Cases as necessary, as an Entry for a common Person, without which he can never come by or try his Right, nor can the King without an Office know whether he hath a Right to a Ward, a Mortmain, or the like. And as it is an Injury to hinder a Man from his Entry, whereby his Right may be try'd, so it is not to find an Office for the King whereby his Right may be try'd; which concludes no Man, but enables the King to a Tryal of his Right; and in truth, is only a finding of Matter of Fact, and no more.

Therefore perhaps it may be an Offence, as of a Witness refusing his Testimony, not to find an Office for the King, when clear proof is made of the Matter of Fact; but if proof be not made at all, or be altogether doubtful, or that the Matter be Matter of Law, the Inquest may find an *Ignoramus*, which a Jury upon a Tryal can never do. But of this I shall say no more, it concerning not the Case in question.

Precedents. That the Court of *Common Pleas* upon *Habeas Corpus* hath discharg'd Persons imprisoned by other Courts upon the Insufficiency of the Return only, and not for Privilege,

§ *Jac. Sir A. Roper's Case, 12 Rep. Sir W. Chansey's Case, & Ed. Thicknes Ca.*

Sir Anthony Roper committed by the High Commission Court, discharg'd absolutely in the *Common Pleas* as unlawfully committed and detain'd, without any mention of Privilege.

• *George*

George Milton imprison'd for Contempt, scandalous words of the Court, and convicted of Drunkenness; the Cause resolv'd insufficient, and therefore *demittitur a prisona*, and the Goalers discharg'd of him; but he gave Bail to attend the Pleasure of the Court.

Elizabeth Ash committed by the High Commission *pro Lencinia*, in like manner discharg'd; the Cause being insufficient to detain her in Prison, or to hinder her from the Privilege of that Court, but no other mention of Privilege, put in Bail. 4 Car. 1.

Richard Hayes, for refusing to do Penance as injoin'd, committed by the High Commission, the Cause judg'd insufficient to commit, but gave Bail as before; he demanded a *Habeas Corpus* by reason of Privilege. 7 Jac.

But it is to be observ'd, That Privilege lies only where a Man is Officer of the Court, or hath a *Prior Suit* in the *Common Pleas* depending, and is elsewhere arrested to answer, and molested that he cannot prosecute his Suit; he is then privileg'd justly, and without wrong, because his Prosecutor elsewhere might have sued, if he pleas'd, in the *Common Pleas*.

All Privilege is either for Officers, Clerks, or Attorneys of the Court not to be sued elsewhere; or for Persons impleading or impleaded having priority of Suit in the *Common Pleas*, arrested or sued in other Jurisdictions; or for the menial Servants of such Officers.

These Privileges are not detrimental to any, because whoever hath occasion to sue an Officer, or any other having Priority of Suit, as before, is not restrain'd to sue them in the *Common Pleas*, but is restrain'd from suing elsewhere. *And this is the true Privilege of the Court.*

And the way of enjoying this Privilege, was by Writs of Privilege to supersede the Proceeding of other Courts against such who had the Privilege of the *Common Pleas*, as is yet ordinary in the Cases of Attorneys, Officers, and Clerks.

And in such Writs the Cause of Privilege is mention'd; and as to their menial Servants, if not true, may be travers'd. As 22 H. 6. 38. Debt was brought against Baron and Feme, and a *Supersedeas* out of the *Chancery* was cast for the Baron as menial Servant to an Officer of *Chancery*; whereupon the Plaintiff said it was contain'd in the Writ that the Husband was menial Servant to R. J. del *Chancery*, whereas he was not his menial Servant; 21 H. 6. f. 20. 22 H. 6. f. 38. 34 H. 6. f. 15. Vid. Dyer 12 Eliz. f. 287. pl. 48. Vid. the *Supersed. for Clerks of the Court, and for Attorneys anciently, and their great Difference, Reg. Jud. f. 84. a. and*

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But now Attorneys and thereupon Issue was taken: but Query are involl'd as well of the Officers appearing of Record in the as Officers. Court, may be Travers'd.

Hence it follows, Tho Proceeding in other Courts against a person privileg'd in *Banco* might be superseded, yet it was when the Matter proceeded upon in such Courts might as well be prosecuted in the *Common Bench*: But if a privileg'd Person in *Banco* were sued in the *Ecclesiastical Courts*, or before the High Commission, or Constable, or Marshal, for things whereof the *Common-Pleas* had no Cognizance, they could not supersede that Proceeding by Privilege. And this was the antient Reason and Course of Privilege.

1. Another way of Privilege, by reason of Suit depending in a *superior Court*, is, when a person impleading or impleaded, as in the *Common Bench*, is after arrested in a Civil Action or Plaint in *London*, or elsewhere, and by *Habeas Corpus* is brought to the *Common-Pleas*, and the Arrest and Cause return'd. If it appear to the Court, that the Arrest in *London* was after the Party ought to have had the Privilege of the *Common-Pleas*; he shall have his Privilege allow'd, and be discharg'd of his Arrest, and the Party left to prosecute his Cause of Action in *London*, in the *Common-Pleas*, if he will.

2. If the Cause of Imprisonment return'd be a lawful Cause, but which can't be prosecuted in the *Common-Pleas*, as Felony, Treason, or some Cause wherein the *High-Commission*, *Admiralty*, or other Court, had power to imprison lawfully; then the Party imprison'd, which did implead, or was impleaded in the *Common Bench* before such Imprisonment, shall not be allow'd Privilege, but ought to be remanded.

3. The third way is, when a Man is brought by *Habeas Corpus* to the Court; and upon return of it, it appears to the Court, that he was against Law imprison'd and detain'd, tho there be no Cause of Privilege for him in this Court, he shall never be by the Act of the Court remanded to his unlawful Imprisonment; for then the Court should do an Act of Injustice in Imprisoning him, *de novo*, against Law. Whereas the Great Charter is, *Quod nullus liber Homo imprisonetur nisi per legem terra*. This is the present Case, and this was the Case upon all the Precedents produc'd, and many more that might be produc'd; where upon *Habeas Corpus* many have been discharg'd and bail'd, tho there was no Cause of Privilege in the Case.

This appears plainly by many old Books, if the Reason of them be rightly taken; for insufficient Causes are as no Causes

ses return'd; and to send a Man back to Prison for no Cause return'd, seems unworthy of a Court.

If a Man be impleaded by Writ in the *Common-Pleas*, and is after Arrested in London upon a *Plaint*, there upon an *Habeas Corpus* he shall have Privilege in the *Common-Pleas*, if the Writ upon which he is impleaded bear Date before the Arrest in London, and be return'd, altho the Plaintiff in the *Common-Pleas* be *Nonsuit*, *Essoin'd*, or will not appear, and consequently the Case of Privilege at an end before the *Corpus cum Causa* return'd: but if the first Writ be not return'd, there is no Record in Court that there is such a Defendant.

9 H. 6. 54, 58.

Br. n. 5. 14 H. 7.

f. 6. n. 19. 9 E. 4.

47. n. 24. 12 H.

4. f. 21. n. 11. Br.

The like where a Man brought Debt *in Banco*, and after for the same Debt arrested the Defendant in London, and became *Nonsuit in Banco*; yet the Defendant upon a *Habeas Corpus* had his Privilege, because he had Cause of Privilege at the time of the Arrest. 14 H. 7. 6. Br. Privilege n. 19.

The like Case 9 E. 4. where a Man appear'd *in Banco* by a *Cepi Corpus*, and found Mainprise, and had a Day to appear in Court; and before his Day was arrested in London, and brought a *Corpus cum Causa in Banco Regis*; at which Day the Plaintiff became *Nonsuit*, yet he was discharg'd from the Serjeant at London, because his Arrest there was after his Arrest *in Banco*, and consequently unlawful. 9 E. 4. f. 47. Br. Privilege 24. and a Man cannot be imprison'd at the same time lawfully in two Courts.

Coke Mag. Chart.

f. 53. & 55.

The Court of *King's Bench* cannot pretend to the only discharging of Prisoners upon *Habeas Corpus*, unless in Case of Privilege, for the *Chancery* may do it without question.

And the same Book is, That the *Common-Pleas*, or *Exchequer*, may do it, if upon the Return of the *Habeas Corpus* it appear the Imprisonment is against Law.

An *Habeas Corpus* may be had out of the *King's Bench* or *Chancery*, tho there be no Privilege, &c. or in the Court of *Common-Pleas* or *Exchequer*, for any Officer or Privileged person there: upon which Writ the Goaler must return by whom he was committed, and the Cause of his Imprisonment; and if it appeareth that his Imprisonment be just and lawful, he shall be remanded to the former Goaler: but if it shall appear to the Court, that he was imprison'd against the Law of the Land, they ought by force of this Statute to deliver him; if it be doubtful, and under Consideration, he may be bail'd.—
The *King's Bench* may Bail, if they please, in all Cases; but the
Common

Mic. C. 2. Coke

f. 55.

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Common Bench must remand, if the Cause of Imprisonment return'd be just.

The Writ *de Homine replegiando* is as well returnable in the *Common-Pleas* as in the *King's Bench*.

All Prohibitions for incroaching Jurisdiction, issue as well out of the *Common-Pleas* as *King's Bench*.

Quashing the Order of Commitment upon a *Certiorari*, which the *King's Bench* may do, but not the *Common-Pleas*, is not material in this Case.

1. The Prisoner is to be discharg'd or remanded barely upon the Return, and nothing else, whether in the *King's Bench* or *Common-Pleas*.

2. Should the *King's Bench* have the Order of Commitment certify'd and quash'd before the Return of the *Habeas Corpus*, or after, what will it avail the Prisoners? they cannot plead *Nul tiel* Record in the one Case or the other.

3. In all the Precedents shew'd in the *Common-Pleas*, or in any that can be shew'd in the *King's Bench* upon discharging the Prisoner by *Habeas Corpus*, nothing can be shew'd of quashing the Orders or Decrees of that Court that made the wrong Commitment.

4. It is manifest where the *King's Bench* hath upon *Habeas Corpus* discharg'd a Prisoner committed by the *Chancery*, the person hath been again re-committed for the same Cause by the *Chancery*, and re-deliver'd by the *King's Bench*; but no quashing of the *Chancery*-Order for Commitment ever heard of.

5. In such Cases of re-commitment, the Party hath other and proper Remedy, besides a New *Habeas Corpus*; of which I shall not speak now.

6. It is known, That if a Man recover in Assize, and after in a Re-disseisin, if the first Judgment be Revers'd in the Assize, the Judgment in the Re-disseisin is also Revers'd. So if a Man recover in Waste, and Damages given, for which Debt is brought, (especially if the first Judgment be Revers'd before Execution) it destroys the Process for the Damages in Debt, tho by several Originals. But it may be said, That in a Writ of Error in this kind, the Foundation is destroy'd, and no such Record is left.

But as to that in *Drury's Case* 8 Rep. *Drury's Case*, an Outlawry issued, and Process of *Capias* upon the Outlawry, the Sheriff return'd *Non est inventus*; and the same Day the Party came into Court,

Court, and demanded *Oyer* of the Exigent, which was the Warrant of the Outlawry; and shew'd the Exigent to be altogether uncertain and insufficient, and consequently the Outlawry depending upon it to be null. And the Court gave Judgment accordingly, tho the Record of the Outlawry were never Revers'd by Error; which differs not from this Case, where the Order of Commitment is Judicially declar'd illegal, tho not quash'd or revers'd by Error; and consequently whatever depends upon it, as the Fine and Commitment doth; and the Outlawry in the former Case was more the King's Interest, than the Fine in this.

The Lord Chief Justice deliver'd the Opinion of the Court, and accordingly the Prisoners were discharg'd.

Phenix XIII.

An Apology or Defence of William the First of Nassau, Prince of Orange, &c. in answer to the Proclamation against, and Proscription of him by the King of Spain.

To which is prefix'd the said Proscription at length, with several Letters and Declarations of the Prince of Orange, &c. relating thereunto.

The Copy of a Letter written by the King with his own Hand, to the Prince of Orange.

I Have with great Affection receiv'd your Letter of the 27th of *May*, and since that other which you writ unto me the 14th of *June*: And by that which I have written to my Sister, you have been able to understand the small Occasion that you have to think that which you write unto me in that Letter of the 27th of *May*, but rather the contrary. Also it is certain, that you should much deceive your self to think, that I would not have all Confidence and good Opinion of you: And albeit some certain one should mean to perform a contrary Duty towards me; yet this should remain,

that

K. Philip's Letter to the Prince of Orange. 431

that I would not be so light, as to give credit thereto, having so great Experience of your Loyalty and Services. Wherefore you need not trouble your self therewith, but stay your self upon the Letters, which heretofore I have written unto you in this behalf, and upon your own Deeds, but at no hand rest upon that which some Enemies (it may be of my Service, and of your good Estate) would endeavour to cause you to understand: Touching the Liberty you demand, to leave off your Charges and Offices, it grieveth me, that your particular Affairs and Businesses are in such Terms and State as you say: And I cannot but tell you, that the Affairs of those Countries, standing in such sort and manner as they do, it is not reason that such persons, as yours is (to whom I trust, and upon whom I stay my self) should abandon and forsake the same, specially I my self being so far off from the said Countries: yea rather it were reason, that those that are in their own Houses, should speedily provide for, and help this present necessity, and employ themselves upon that whereunto they are bound, as ye have presently done, in going to *Antwerp*, whereby I have receiv'd great Contentment and Joy; and am very well assur'd, that ye will there do whatsoever shall be most convenient for my Service, and for the quietness and peace of the said Town and Country, and for the avoiding of the Disorders that shall arise there. Which thing also I hope of you, and I know that ye will not declare your self to be any other, than such a one as ye have heretofore declar'd your self to be, all your life long. And to the end ye may perceive, that I do deal freely with you, I will not cease to advertise you, that there hath been in these Quarters a great Rumor concerning this; to wit, that your Brother hath been found to be a dealer in those things that are done there. And because I cannot cease much and often to think of this matter, I charge you strictly diligently to consider, how it may be remedied and redressed, that it proceed no further, and look that you do effectually perform it: and if it seem good unto you to remove, for a few days, your Brother far from you, do so. From the Forest of *Segovia* the first of *August*.

Subsigned

P H I L I P,

And written upon the Back-side

To the Prince of Orange,

And seal'd with the King's Seal.

A

A Proclamation and an Edict in Form of a Proscription, made by the Majesty of the King our Lord, against William of Nassau, Prince of Orange, as the chief Captain and Disturber of the State of Christendom, and especially of these Low-Countries; by which every one is authoriz'd to hurt him and to kill him, as a publick Plague; with a Reward to him that shall do it, and shall be assisting and aiding thereunto.

PHILIP, by the Grace of God, King of Castile, Leon, Aragon, Navar, Naples, Sicilia, Majorca, Sardinia, of the Isles, Indies, Firm Land, and of the Ocean-Sea; Archduke of Austria, Duke of Burgundy, Lothier, Brabant, Lemburg, Luxenburg, Gelderland and Milan; County of Hapsburg, Flanders, Artois and Burgundy; Palatine both of Haynault, Holland, Zealand, Namure and Zutphen; Prince of Suave; Marquis of the Holy Empire; Lord of Friseland, Salines and Malines, and the City, Towns and Country of Utrecht, Overysse and Groningen, and Governor in Asia and Africa. To all those that shall see these present Writings, Greeting.

It's known to all the World, how the late Emperor of most Excellent Memory, Charles the Fifth, my Lord and Father, whom God absolve, hath favourably handled and dealt with William of Nassau, for the Succession of the late Rene of Chaalon, Prince of Orange his Cousin: and how from that time forward, even from his first Age, he hath (altho he were a Stranger) greatly advanc'd him; which thing we our selves also have always successively continued, and daily augmented more and more; having made him first of our Order, afterward our Lieutenant-General in the Government of Holland, Zealand, Utrecht and Burgundy; and withal, of our Council of State, bestowing upon him sundry Benefits and Honours; whereby both by reason of the Oath of Fidelity and Homages, which he hath likewise made unto us, because also of the Fees, Pensions, Lands and Lordships, held of us in divers our Countries and Provinces, he was greatly subjected, and bound to obey us; to keep and hold his Faith given, and to procure the Good and Profit