

the King's Evil in the manner that the Witnesses speak of; but what was spoken, was spoken of another King, in relation to *Abimelech* King of *Egypt*, and not relating any way to the Disease they call commonly amongst us the King's Evil. Is it true, one of them does say (which is a Word that has obtained very much amongst some sort of People) that when he prayed for the King, he pray'd for his deliverance from evil Counsellors: And under these Words, evil Counsellors, and deliverance from them, we know what became of that so often mentioned Prince now, King *Charles* the First. Under that Pretence they would remove all his Friends from him; and when he was left alone, they could easily do what they pleased with him. Many, with pretence of great Pity and Zeal for the King, cry out, that all that they complain of, is not of what the King does; him they think to be a wonderful good Man; it is not he, but his evil Counsellors, that they reflect upon; and so we must fight against these evil Counsellors; and when we have laid them aside, and he stands alone, then it will be easy to serve him as they did his Father. Whatsoever the Pretensions of such Words are, we know what the Designs of the People, that made the same Pretence heretofore, came to; and, I pray God, that there are not the same Designs on foot still; nay, that that was not the Design of this Prayer of the Prisoner at the Bar.

Gentlemen, they give you a particular Account how he preached upon the 20th of *Genesis*; and they speak as to the 2d and 7th Verses of that Chapter, and what Discourse he had upon them. But truly, it is pretty strange (as *Mr. Rosewell* himself objected even to you of the Jury very well) can any one of you remember so exactly the Words that were spoken as these Witnesses have sworn? and truly he puts a very material Question: But then the Question turns t'other way; how come all your Witnesses to give such an exact Account; all except the second Man, who indeed did commit a Blunder or two, your Six Witnesses, even to the Texts of Scripture, to the very Phrases that were used, particularly to the Word *Tremendous*? they are all as exact as can be. It is strange that five People should agree in all the Circumstances; but why should it not be as much believable that three should have as exact a Memory as the other five? Nay, and I will tell you, what is pretty strange too, that these People must hear, and remember just what was said upon the 14th of *September*; but that which was said upon the Text the time before or after, that they cannot so well remember. It is plain, they have been dialoguing with one another; and it is plain, that some People can neither write, or read, nor remember, but how they shall be sure to serve the present purpose. That seems to carry an Objection in it on the other side, as the King's Counsel say; and it seems the more reasonable on Our side, why they should remember so exactly, as they have sworn; because (say they) that Day, when we came home, we called for Pen, Ink, and Paper, and set down these Words, the Substance of which we have now here sworn: So that that does shew you we had reason to remember, what we have testified against this Person. But what is yet greater than all this, it cannot be imagined (say the King's Counsel) that the Prisoner's Witnesses are so much to be believed, since they give no Account of what was spoken at any time before, nor any time since.

Then, Gentlemen, there is another Reason, says *Mrs. Smith*, I came on purpose to see who was at the Conventicle; tho' I had been at several Conventicles before, yet I never heard such Words spoken. Says *Mrs. Hilton*, I was glad to be gone: and tells you of her unwillingness to stay there, having never heard such Words spoken against the Government before; and therefore she set them down immediately as soon as they came home; and they went together to the *Bull and Mouth*, the *Quakers* Meeting near *Aldersgate* afterwards; and that that Day, or the Day following, they went to *Mr. Recorder*, and gave him an Account of what had past in their Knowledge. This is the Answer that is given by them to what the Prisoner's Witnesses say: But you are to weigh this Testimony of both Sides. For I must tell you, Gentlemen, tho' these Witnesses, that are for the Prisoner, are not upon their Oaths, yet they are as much under the Obligation of giving true Testimony, as they can be by Law; and you ought to have regard to their Testimony, how far it is consistent with Reason and with Truth. Some things they differed in; some things they heard in another manner; whether you believe such things may slip out of their Memories, or how that is, you are to consider of it. This, Gentlemen, is the first part of the Evidence that the Prisoner hath given for himself.

Next, Gentlemen, there is another part of the Evidence, and that is from the Fifteen Witnesses, one *Mr. Jolliff*, *Captain Cotton*, *Mr. Fipps*, *Mr. Veering*, *Mr. Hitchcock*, *Mr. Hinman*, *Mr. Wanly*, *Mr. Strong*, *Mr. Cutler*, *Mr. Mesum*, *Mr. Medham*, *Mr. W. Inmacott*, *Anne Broadhurst*, *Anne Manning*, *Isabella Dickeson*; all these were called to his Reputation, as to his Behaviour and Conversation towards the Government. They tell you, that they have known him a long time. It seems they frequented the hearing of him sometimes, when there was an Indulgence and a Dispensation for such Meetings, then they went to hear him, and then he used to pray for the King; and it has been observed, that, it may be, meeting with Favour and Kindness from the King and Government, he might be very well pleased with the King at that time; tho' that turned to the Prejudice of the Government (as we all know) But whether his Complexion altered towards the Government, when it was thought fit to restrain that Indulgence, that you have to consider. They say, they know nothing of Harm by him, and that may be true; no more do I; and I presume you do not; if you do, you will tell us. You and I pray God we had never heard of any thing of Harm come from him, with relation to the King and Government; but you have heard what has been testified by these Witnesses.

Then there came two Witnesses, that lived at *Sir Edward Hungerford's* when the Prisoner at the Bar lived there; one of them lived Ten Years there, the other Four. And they give you an Account, how he was used to pray (not according to the Common-Prayer) but he used to go to Church, and he did pray for the King very earnestly, and heartily, as they say; he came there in the Year 1654, and he continued there Seven Years, and they always looked upon him to be well-inclined to the Government.

Then you have an Account of three Servants that lived in the House; one lived four Years with him,

him, and that she frequently heard him pray for the King (for I would not willingly forget a Word that should make for the Prisoner's Advantage) she said he prayed as earnestly for the King as for his own Soul, with as much zeal and earnestness as he could do; this is what she says. And the second lived with him three Years, and she does remark particularly, that one time being in private in his own Closet, at Prayer by himself, she heard him very earnest in praying for the King: So that he would urge it as improbable, and unreasonable, to believe, that if he, in his private Family, and by himself, should so earnestly pray for the King (which was never intended to be heard by any body, and came to be thus heard by Accident) he should in Publick, before a great Congregation, utter such Words against the King and Government, as are pretended against him. This is the use he makes of that.

Then, Gentlemen, you have likewise afterwards, the Testimony of those two Witnesses that had been examined before, that is, Mr. *Atkinson*, and Mr. *Smith*; that whereas you seem to say, says he, I made a great Reflection upon the late King, and his present Majesty; it was so far from that, that I used to teach upon the 30th of *January*, and then to preach Obedience to the King, and to pray for the King, and make sharp Invectives and Reflections upon those that had been concerned in that horrid, barbarous Murder of the late King, of blessed Memory; so that I cannot be thought to encourage such Things as these, when I used to preach to my Auditory such Doctrine, as I now tell you of. This is the Substance of that part of the Evidence, as near as I can remember, and recollect; you have taken Notes, Gentlemen, your selves; you will be able for to make Observations, according to what Notes you have taken.

Then, Gentlemen, here are eighteen Witnesses, that he has called, to endeavour to persuade you to a disbelief, and gain a discredit as to the Witnesses that are produced against him. Now as to that, which was offered by the first Witness, *How*; that was but by Hear-say, he knows nothing of his own Knowledge; for my Brother Sir *Thomas Jenner*, he gives you an Account of all the Questions that he was asked about; that she never did say that she was present at the Conventicle, but that Mrs. *Bathoe* had confessed it to her; and upon that Confession she was convicted. Now, Gentlemen, it is a very untoward thing in this Matter, that Mrs. *Bathoe*, it is plain, used to have Conventicles, and she is the Widow of a Non-conformist Preacher, and this Woman was so far from saying, that she was there, that she only insisted upon it, that Mrs. *Bathoe* had confessed it to her. So likewise you have been told concerning that Business of Mr. *Hales*, the Conventicle at his House, on the 13th of *July*; it was so far from her swearing that Mr. *How* was there, that tho' he was mentioned, yet she refused before Sir *George Treby* to swear that there was any such Conventicle, or that he was the Man; she did not know the Man, and could not say any thing to him. And my Brother *Jenner* being convinced that there might be a Mistake, that there might be no such Conventicle at Mrs. *Bathoe's*, went as far as he could to retrieve it; but it seems it was past from him into the Clerk of the Peace's hands; I cannot say any thing to it: But if you are satisfied that there was no such Conventi-

cle at all, all that can be said, is, that the Old Woman belied her self; and my Brother *Jenner*, as to an accommodation between them, did resolve to do what he could, and promised to speak to the Clerk of the Peace: Not but that, for any thing yet appears, this Woman, that is here brought as a Witness against Mr. *Roswell*, did swear true, That that other Woman did confess to her, that there was such a Conventicle; they indeed have endeavoured to evince there was no such Conventicle. I must leave it to you; for nothing appears clear of the one Side, or the other.

Then, Gentlemen, as concerning her talking with, and about one *Games*; wherein you had an Account given you by one *Harvey*, and he advised to give Money, rather than to be troubled; but they would not give Money. Now, for that the whole Answer (that it may be given together) is that you know the Prosecutor, in these Cases, has a share out of the Penalties that are incurred by Conventicles; and tho' it may be that it was not so well done by such Informations to compound Penalties, yet it is no evil Thing: For if I will choose to inform, or not inform, there is a right in me to a Part of the Penalty arising from the Offence: And tho' it be not a commendable Thing, yet it is not a criminal Thing for me to compound it; for I do not observe that they are proved to be People that do use to go to Conventicles.

Then, Gentlemen, there is something to be observed concerning the Evidence of *Cartwright*: He comes and tells you, that he was by, and one of the Persons that went along with Mrs. *Smith* to several Places, in order to make Convictions of Persons for Conventicles; and she would have him swear such and such Conventicles, that she would dictate to him; and she promised, and offered to swear for the Conviction of Conventicles, when she was not there: And this was a great while ago; but no body heard a Word of it till now, and that when Mrs. *Smith* was engaged in this Prosecution against Mr. *Roswell*. Now when we meet with this sort of People, we ought to consider of the Nature of their Evidence. It is certainly a very improbable thing, that any Person should come and tell him, I will be guilty of Perjury, I will be forsworn for you, if you will be forsworn for me. It can hardly be believed that any body should say so to a Fellow, that you see is likely enough to detect any such thing, if it should be for his Advantage: And it had been his Duty (if he had been an honest Man) to have discovered this to a Magistrate immediately, and detected it, so as that the Villany should have been punished; not to come and serve a turn upon such a Trial, just as this is. And therefore Gentlemen, I do not like such accidental Witnesses, that seem to drop (as it were) out of the Clouds, and we can have no Account of them before. You have no satisfactory Reason how he comes in now to make this Discovery. Here you have several other Witnesses, that were before, that give some Account of her Behaviour in these Matters.

As to the Conviction that they talk'd of, upon the 13th of *July*, several Witnesses give you an Account of the Matter. First of all, it is very apparent by that Book that is produced, that there was a Conventicle the 13th of *July*, and it was at Mr. *Hudson's*; but indeed it was not at Mr. *Hales's*; and it is not alledged here by her that it

was so. And for that other, my Brother *Jenner* gives you an Account, that upon the Confession of Mrs. *Bathoe* there was a Conviction; but there was no such Conviction of *Hales* in the Case, but only of *Bathoe*; as appears by the Record, which hath been produced.

Then, Gentlemen, the next Question is concerning the Clerk of the Peace, and the Writing that they talk of; which makes nothing one way nor t'other. Then there are two Witnesses, *Drew*, and the other Man, that meet with this Woman, Mrs. *Smith*, in *Grub-street*, in order to make a Composition for Penalties for going to Conventicles; and they find out a Fellow that used to go to Conventicles, and they frighten him into a Composition, and so much, as they say, were paid perhaps, and he ought to have paid more: But it's plain, he used to go to Conventicles; and it's pretty odd that he should be picked up on a sudden there, on this side the Water, to discover these Practices, at the Instigation of the Prisoner at the Bar, who lives at such a Distance on t'other side of the Water.

Then, Gentlemen, as for Mrs. *Higgenfon*, I can only say this, she says nothing to the Purpose, that is either material for, or against the Prisoner; for she said, she knew nothing of her own Knowledge; and all that she did say, was but Hear-says and Reports, not by way of downright Accusation against the Person she was produced against. And, Gentlemen, you are to consider, that Hear-say and Report is no Evidence at all; but it must be what the Witnesses know, and say of their own Knowledge.

The next is a worthy Gentleman, Sir *John Talbot*, and as to whatsoever he said, or any of his Family told him, except he knows it of his own Knowledge, that's no manner of Evidence at all to take off the Credit of Mrs. *Hilton*. But what she her self did say (if it can be testified) is Evidence against her. If she confest that she had any Design, or was engaged in any Practice to betray the young Lady Sir *John Talbot* talks of, that indeed is a very evil thing. But whatsoever were the Apprehensions of others concerning her share in that matter, or any of the little things that they talked of, concerning Mistress *Hilton*, before she intermarried, it can signify but very little in this matter. And when we ask Sir *John Talbot* the Question, he cannot give any satisfactory account of it; for he says plainly, he had no Conversation with her. It seems it was not a Contrivance while she lived there for ten Years together; and it is pretty hard to imagine in such a Case, if she had been such an evil Person, as they would represent her, in that time, that it had not appeared, so far at least, as that she had been discharged the Service long before: For Sir *John Talbot* is a Person that cannot be thought to permit any thing of ill in his Family. But yet withal, he can't know all that passed, any more than any of you, of Irregularity in the Family. If indeed they had questioned any of the Servants, that were more conversant with her, and taxed her of any thing that was evil, then it had been a much more probable Exception; but to have Peoples Reputations blasted barely by Tittle-tattle, and Stories, after Persons are gone out of a Family, where they have lived for many Years. is a matter of very dangerous Consequence; and any Man in the World may be injured in his Credit, if such a Thing be permitted.

What Sir *John Talbot* speaks of his own Knowledge, that is Evidence, and we would hear it, and give all due regard to it: But what was spoken of concerning *Hilton*, before she was married; what the rest of the Servants said concerning her; or the general Reputation that she had in the Family; that's no Evidence at all.

Gentlemen, in the last place there is a Witness produced, one *Dillingham*; and she pretends that she is a Woman of a very ill Reputation; and that she would have hired her (as she would have it believed) to have sworn against several People. Now as to that, she would have done exceeding well to have made a Discovery of this before this Question; and it had been her Duty so to do; and not now to come, and drop in, just when this Question comes to be debated before you: That, Gentlemen, draws a Suspicion along with it, and a very great one: But I must leave the whole matter to you, which I do not question but you will examine, and look into, as well as you can. Thus I have offered the Evidence that has been given on the one side, and on the other, in point of Fact.

Now, Gentlemen, there are some Remarks made by the Prisoner at the Bar (as God forbid, but he should have the Advantage of whatsoever can be observed upon the Evidence given against him) that is, he makes a Difference between the Testimony of the one and the other of these Witnesses, about the 20th or 21st of *Genesis*; that the one said the 21st, the other the 20th. Now it is to be observed, as has been said, that she that said the 20th, which was the second Witness, said it was either the 20th or the 21st; and Mrs. *Smith* said it was so to the best of her remembrance; but it appears to be, and so I perceive, by all the Witnesses, upon the 20th; so that as to her it cannot be very material, because she does not swear positively either the one or the other.

Then, Gentlemen, there is another thing, that is, that she should talk of one *Weldy*, Captain *Weldy*, or Captain *Daniel Weldy*, when it seems his Name was not *Weldy*, but his Name was Captain *Daniel*; which I think can go no great way in the Case. She is not acquainted with the Man himself; she tells you one part of his Name right; describes the House in all the Parts of it; and speaks of the Circumstance of his being at Sea, and being prayed for by Mr. *Rosewell*; therein they do both agree: So that, tho' she apprehended that his Name might be *Daniel Weldy*, yet it is so far right enough that it was one Captain *Daniel*; and that is a very small minute difference, that will make little one way or other.

Then, Gentlemen, he insists upon the difference between their Evidence about that Circumstance, whether it was all upon one entire Subject; or part one part of the day, and part the other. One of them says, it was not an entire Discourse; for that about the Rams-horns, and the broken Platters, and the Stone in a Sling, was after Two o'Clock, after the interval that had been, and the space of time between the Discourse of the King's Evil, and those other things; and therefore, says Mr. *Rosewell*, whereas she pretends that it was all spoken at the same time, just as it is laid in the Indictment, that cannot be; and so it appears upon his own Evidence. Now, says that Woman, I can't so well tell, whether it was Forenoon or Afternoon, and truly they might call it Forenoon, because they had neither eat nor drank; and

and says the Woman, we reckon that it's Forenoon till after we have dined; and she cannot tell whether it was in the Psalms, or whether it was upon the Chapter; but it was in that Discourse that he held that Day. She does generally apply it to the whole; and that in that Day's Discourse (all which time she stayed, till all was over) such Words did pass. You have heard the difference that is between the two Witnesses, and you will do well to consider of it, if you think there is any thing material in it.

Gentlemen, I must confess it carries a notable sort of Testimony in it, of which you are Judges, and will weigh it according as it ought to be weighed: *First*, That these People should luckily hit together concerning the King's Evil, and that there was such a Discourse as is laid in the Indictment about it, and of the Prophet's praying for the People for the Cure of the King's Evil, and then they should be immediately heal'd. And on the other side it is pretty strange (as he urges for himself) that that should be perverted, which he spoke concerning the Prophet's praying for the King, and thereupon his Hand being healed, whereby the Prophets have the Honour (as he says) some time by Prayer, of curing the King's Evil: So that something or other there is in the matter, that gives a mighty countenance to what the Witnesses speak. There is a certain sort of Occasion given (as one would say) for such Expressions, as they have testified, in his Discourses.

Then, when they come to talk concerning the Rams-horns, and the Platters, the Witnesses say, we heard nothing concerning Platters, much less of Pewter-Platters; no, it was broken Pitchers, and that was occasioned by, and had relation to a Text (says Mr. *Roswell*) about *Gideon*, how easily he discomfited the *Philistines* Army, and there was no such thing as any Discourse concerning the King, or the Government, or any relation thereunto; it was only a Phrase used by me in the Pulpit, to shew how great a matter might be done by little means. And so likewise concerning the Stone in the Sling, that being an occasional Instance too what great Miracles have been brought about by little Means and Circumstances: I have instanced in that (says he) how *David* killed *Goliath* with a Stone out of a Sling, and that our Saviour Jesus Christ cured the blind Man by a little spittle mingled with Clay. So that he would insinuate, that those Words that were spoken, were not with any such Intention as the King's Counsel would make it, and as the Indictment insinuates; but only in a common, ordinary Preachment, as Inferences from such and such Scriptures. And whether this that he talks of, was the Discourse he held at that time; or what the Witnesses speak, must be left to you; they having sworn it. And this, as I take it, is the Substance of the Evidence given by the one and the other side.

Then, Gentlemen, Mr. *Roswell* put the Question in the Morning, and he seemed to insist very much upon it in Point of Law, that the Discourses of a Madman cannot be Treason. It is true, that such Discourses cannot be Treason, if you take Madmen in the true sense that the Law commonly takes it. All Traitors, all Knaves, and Villains, are some way, and in some sense, Madmen; for no Person can act with any Reason in any such Affairs. Treason is not to be committed upon the foundation of

Reason. Therefore upon his asking of the Question of the Witnesses, what Reason there was for him to use such Expressions; I told him, you did it, according as the Indictment says, which is drawn according to the Prescripts of the Law, by the Instigation of the Devil; you did it, not only without Reason, but against Reason. But if the bare saying that it was against Reason, and that therefore a Man was a Madman, would serve the turn, there would be no Traitor, according to that Rule; because every Traitor would be a Madman. Every Traitor is a Madman; but every Madman is not a Traitor. A Madman, in our common Acceptation, is one that is captivated in his Senses, not one that is corrupt in his Will and Affections, which must be the Definition of a Traitor: So that the Argument, I must tell you, is fallacious. Every Man, that is depraved in his Mind and Affections, is a Madman, so as to be an Enemy to the Government, or to Mankind; but he is not such a Madman, as is commonly meant by that Word; one whose Words may be mistaken, because of some disorder in his understanding, so as to be excused from the Accusation of Treason. Therefore whatsoever consequence there may be of the Thing, I must tell you, all Men that talk after this rate, that this Person is accused to talk in his Pulpit, they are every one Traitors, and so Madmen; for every Traitor is a Madman: And if in Case Mr. *Roswell* be guilty, he is in that sense a Madman. It is true, in other things you find him a Man of very notable Understanding, a Man of a very great Insinuation, one that has a great deal of Knowledge in the Tongues, looked upon to be a very learned and ingenious Man, who was thought fit to be a Tutor to Sir *Edward Hungerford's* Children; and has had very many learned Discourses, and shewn himself to be a Man of very great Parts. Tho', if he be a Traitor upon this Evidence that is given, he is, *eo nomine*, a Traitor, and consequently a Madman, for preaching and publishing such Doctrine as this, that will not serve to excuse him from his Treason: But the rather, because he is a Man of so much Learning, it aggravates the Treason, as it must needs do to any Body in the World that considers it. For he under that pretence offering to preach his Doctrine, as Gospel-truths to ignorant People, it seems, 300 or more, of all Trades and Persuasions, whose Duty it was, according to Law, to have been then at Church; Men of strength and Ability of Body, as they appear to be, for the Service of the Government; for these People to be debauched into such Doctrines as these, of *standing to their Principles* against the Government; the more learned the Man is, the greater and blacker is the Crime of that Man that is guilty of it. God knows whether that be Mr. *Roswell's* Case, and you that are of the Jury are to try it: To do it under pretence of preaching the Gospel is the worst way of doing it that could be taken; to quote Scripture for Rebellion adds to the Crime; as it did to that of those black Villains that were concerned in the Murder of our late dread Sovereign, who has been so often mentioned; they were generally the Preachers of the late Times that contributed to that horrid Villany.

Gentlemen, it is notoriously known to you in this accursed late hellish Conspiracy against his sacred and most merciful Majesty, our Sovereign that

that now is (whom I pray God long to reign over us) those that had an hand in the Intention to destroy him, and his Royal Brother, were a great many of them Black-Coat Dissenters to the Church of *England*; and I cannot say I know any one Member of the Church of *England*, that had any hand in it at all. How many of them stand now convicted by Outlawry for that bloody Treason, I won't say all Parsons, but generally all of them Dissenters; and we know these are those base, profligate Villains, always made use of in these base Sinks of Rebellion. And they are the common Sewers of Faction; these Conventicles are, and of Treason and Conspiracy against the Government in Church and State. God be praised, we have a Religion that teaches us much better, a Religion established by the Laws of the Land, and with that decency of Worship, and Care of the Souls of Men, that may bring us all to Heaven, by the Grace of God, if we please to hearken to the Dictates of it, and to mind what is injoin'd us, our Duty by the Law; but when People are once deluded by the Insinuation of such false Teachers, and run into Faction and Discontent, then they'll soon run into Rebellion too. And I speak this, the rather to deter and give warning to other People, to have a care how they come near such Places, and such Practices, than to affect you.

Gentlemen, here you have had three Witnesses examined against the Prisoner, who stands accused for a Crime of High-Treason. I must confess, I have taken up a great deal of the Time; and a great deal of the Time was taken up before; but there's no Time too long, wherein a Question of so mighty Moment as this is, is to be decided: The Government, the Preservation of our King, the Preservation of our Religion, the Preservation of our Laws, are all concerned: For by the Destruction of our King, and of our Government, our Religion, and all that is near and dear to us in the World, will run a great Hazard, if not come to a total Destruction; and I am sure it did come near to it in a former Time, by this very sort of way. Therefore I injoin you, in the Presence of the Almighty God, let neither Displeasure, nor any sort of personal Animosity, in any thing, that has been contracted by hearsay from abroad, nor any Imaginations, that have been suggested here without proof, any way direct you in the consideration of this Cause against the Prisoner at the Bar: But go according to the Evidence, that has been here before you, on the one side and on the other side. For as on the one side you are not to be corrupted by common talk, or any Prejudice against a Party or a Faction; so are you not to be misled by any Affirmation, or Reflection, or Comment that the Prisoner has made or said for himself, other than what is supported by the Testimony of these Witnesses that he has produced, and whose Evidence is left to you to consider: For you must not be led by any Circumstances, or by Discourses, but what's sworn on the one side for the King, or testified on the other for the Prisoner. And therefore I can with all Freedom and Zeal for the Government, and all due Compassion to the Prisoner at the Bar (whom with all my Soul I am sorry to see accused, or indeed any Man, of such a Crime) leave this matter entirely upon the Evidence that has been given. And tho', I say, I am sorry to see him accus'd; yet such Transgressions are ag-

gravated now, when we live in an Age, wherein we have all Peace and Plenty, while the rest of our Neighbours are wallowing in their Blood round about us; some we have heard of, are brought to the Necessity of eating the most filthy and basest Animals, that never was designed for the Food of Man; I say, when all our Neighbours are groaning under the Miseries of War (blessed be God) we live and sleep quietly under our own Vines; we enjoy the Benefit of being Subjects to a gracious King; we enjoy the full extent of our Laws, which are sufficient to secure our Liberties and Properties; and no Man can be brought (no, not one of the meanest Subjects the King has) to such an untimely End, but by the true Methods of Justice.

He is to be tried by you, Gentlemen, who are Gentlemen of Quality of the County where the Fact is alledged to be committed; against whom he might have made his challenges and exceptions, if he had any reason, as he did against the others (according to the Liberty the Law allows him) without any reason. So that you stand indifferent between the King and the Prisoner at the Bar, to try this Cause, whether he be guilty, or not guilty of the Treason of which he stands accused. In case the late intended Rebellions and Insurrections had taken the designed Effect, according to the Doctrine preached in these Sermons, of standing to Principles, and overcoming Enemies; and what several of his brethren, who stand now accused of, and are upon Prosecution (and for ought I know every one of them might be actually engaged) I say, in case such a thing had been, there had been nothing but cutting of Throats; there had been no Justice for any Subject to have expected; no Methods, or Proceedings of Law; but Destruction would have come upon us like an armed Man.

Therefore, Gentlemen, as the Evidence has been long, so I hope you will give me your Pardon, that I have been the longer in insisting upon it; and, according to my best Understanding and Memory, I have given you the best Account I can, both of the Evidence for and against the Prisoner. You are Judges of the Fact; and I pray God direct you, and guide you and your Consciences, that the Truth may be discovered by your Verdict.

Mr. Rosewell. May a Loyal Subject speak, my Lord?

L. C. J. No, *Mr. Rosewell*; after the Jury are charged by the Court, you are not to say any thing. Swear an Officer to keep the Jury.

[Which was done.]

Then the Jury withdrew into the usual Room for such Purposes, to consider of their Verdict; and afterwards they returned into Court.

Clerk of the Crown. Crier, take the Appearance of the Jury.

Crier. Sir *George Sheers*.

Sir George Sheers. Here.

Crier. Vous avez *Sir George Sheers*, &c. —

[And so of the rest.]

Cl. of the Crown. Gentlemen, are you agreed in your Verdict?

Jury. Yes.

Cl. of the Crown. Who shall say for you?

Jury. Our Foreman.

Cl. of the Crown. *Thomas Rosewell*, Hold up thine Hand. [Which he did.] You of the Jury, look

look upon the Prisoner. How say you? Is he Guilty of the High-Treason, whereof he stands indicted, or Not Guilty.

Foreman. Guilty.

Cl. of Cr. What Goods or Chattels, Lands or Tenements, had he at the time of the High-Treason committed, or at any time since, to your Knowledge?

Foreman. None, that we know of.

Mr. Rosewell. Then the Lord have Mercy upon the Jury. My Lord, I humbly request this Favour, that they may be asked *separatim*, whether they be all of the same Opinion.

L. C. J. That's never done, *Mr. Rosewell*, unless there be any Difference suggested from amongst themselves.

Mr. Rosewell. I ask it in regard to them themselves; for I have heard many times the Jury go by the major part; and I would know whether they be all of that Opinion. Therefore I beg they may be asked that Question.

L. C. J. You must be contented, *Mr. Rosewell*; in case there were any difference, we should hear of it from amongst themselves.

Cl. of Cr. Then hearken to your Verdict, as the Court has recorded it. You say that *Thomas*

Rosewell is guilty of the High-Treason whereof he stands indicted; but that he had no Goods, Chattels, Lands or Tenements, at the time of the High-Treason committed, or any time since, to your Knowledge, and so you say all?

Omnes. Yes.

Cl. of Cr. Gentlemen, the Court dismisseth you.

L. C. J. Marshal, you must take him into your Custody, being now convicted.

Mr. Rosewell. My Lord, I would heartily beg, for the Jury's sake themselves, that that Question may be asked of them.

L. C. J. We must not indulge any Innovations. It is not usual. You may ask them, if you please; see whether they will answer you. We must go according to the Forms of Law.

Mr. Rosewell. Then, my Lord, if all these Gentlemens Estates were joined in one, I would not change Conditions with that Man of them, who should possess the Whole.

L. C. J. *Mr. Rosewell*, we must have no Reflections upon the Jury.

Then the Prisoner was taken away, and the Court broke up.

Die Lunæ 24 Nov. An. Dom. 1684. B. Regis.

Dominus Rex versus Rosewell.

THIS Day *Mr. Rosewell* being brought up to the Court, to receive Sentence, the Court proceeded as follows.

L. C. Just. Brother *Jenner*, have you any thing to move?

Mr. Serj. Jenner. My Lord, we wait upon the Prisoner at the Bar, to desire Judgment upon the Conviction that was here the other Day for High-Treason.

L. C. J. Against the Prisoner at the Bar do you mean?

Mr. Serj. Jenner. Yes, Sir.

L. C. J. Then call him to his Judgment.

Cl. of Crown. *Thomas Rosewell*, hold up thy Hand. [*Which he did.*] Thou hast been indicted for High-Treason, in compassing and imagining the Death of the King, and the Subversion of the Government: Upon that Indictment thou hast been arraigned: Upon that Arraignment thou hast pleaded Not Guilty: And for thy Trial thou hast put thy self upon God and thy Country; which Country has found thee Guilty. What hast thou to say for thy self, wherefore Judgment should not be given against thee, to die according to the Law?

[*Then he was made to kneel and rise again.*]

Mr. Rosewell. My Lord, I humbly hope that your Lordship will not give Sentence against me upon this Indictment, considering the Circumstances of it. I have, my Lord, protested to this honourable Court, in the Presence of the great God, the Searcher of Hearts, my Innocency in this Case; but I have been found Guilty by the Jury, on whom the Lord have Mercy. I do still protest my De-

testation and Abhorrence of the Fact, even in my very Soul; and I do humbly beg your Lordship and the Court to compassionate my present Condition; and, with humble Submission to your Lordship, I would enter into my Discourse upon that *Hypothesis*; for I would be still taken thus, even in this Conviction to deny the *Thesis*; that I ever was guilty of speaking such Words as are laid in the Indictment. But upon the *Hypothesis*, supposing that I were Guilty, I do humbly conceive that these Words, as they are laid, are not Treason. They are very foolish and ugly Words; and may be a very great Misdemeanor in Law (if true, which still I must over and over again insilt upon) but they are not Treason. And I beg your Lordship will do me the Favour to let the Indictment be read once more.

L. C. J. Ay, with all my Heart.

Mr. Rosewell. I humbly thank your Lordship; I desire it may be read in Latin.

L. C. J. Read it to him in Latin.

Surrey J. Juratores pro Domino Rege super Sacramentum suum presentant, &c.

[*The whole Indictment was read.*]

Mr. Rosewell. I humbly thank your Lordship. There are some things that I shall offer to your Lordship in Arrest of Judgment out of this Indictment; and I request your Lordship to hear me with Patience, being here for my Life. I pray Judgment may be arrested for these Causes: That there is not any Crime sufficiently set forth for your Lordship to give Judgment upon. My Lord, I humbly take it for granted, that in all Indictments of Treason there must be some particular

lar Matter of Treason assigned; and that it is not a sufficient Indictment in general, that a Man did intend to depose the King, or to raise Rebellion, without some *Overt-Act* positively asserted to be done by that Person; the general Intention being only an Inducement to the Charge. The special Matters that set forth the particular Acts of Treason, are those that make the real Charge, upon which the Court and the Jury are to proceed. Now, my Lord, if that special Matter, that is alledged, be insufficient, with an humble submission, tho' there be never so many such Sorts of Facts proved, and found by the Jury, the Party cannot be convicted of High-Treason: For, in this Case the Party has the same Advantage to except against the Particulars alledged, to prove the general suggested Treason, as against the general Treason itself. Now, with humble Submission, my Lord, again I say, that the Matter here suggested is insufficient, as will evidently appear by what I am going to offer to your Lordship.

The first and principal Objection that I have, is against the Innuendo's, which are so many, and so strange, in these Words that are alledged against me. These Innuendo's, my Lord, I say, are nought and void; and I presume that it will be allowed to me, upon reading of the Words by themselves, as bad and as foolish as they are. Without these Innuendo's there could nothing be made out of such Words as these are, neither Treason, nor any thing else.

Then, my Lord, in the second Place, laying aside the Innuendo's, I must insist upon the repugnancy and insensibility of the Words laid in the Indictment, being in *Latin*, and such *Latin*, as I believe your Lordship never saw; and upon these two Points, I desire that Judgment may be arrested, and I humbly pray Counsel may be assigned me to make them out in better Form.

L. C. J. What say you to it, Brother *Jenner*, and the King's Counsel?

Mr. Serj. Jenner. I cannot see that he has alledged any Objection, which here requires an Answer from any of us, that are of Counsel for the King.

L. C. J. Yes, Brother; Methinks he does.

Mr. Att. Gen. If he does pretend to object against any of the *Overt-Acts* alledged in the Indictment; your Lordship observes, this Indictment is upon the Statute of the 13th of this King, wherein Words are made Treason, if they intend any Hurt or Imprisonment to the King's Person. For his Objection as to the Innuendo's, he does not assign wherein they are repugnant, or insufficient. He does assign in particular, indeed, that it is insufficient, being a general Crime; which yet he does not say is not sufficiently laid; for it is said, that he did compass and imagine the Death and Destruction of the King: And, to effect that compassing and imagination, he did speak such and such Words, which by the Statute are made Treason, if they tend to attempt by Preaching or Writing any Imprisonment or Harm to the King's Person. Then for him to come to talk of *Standing to their Principles*, after he had spoken of *two wicked Kings together*, meaning the late King, and the present, and that *then we should overcome our Enemies*; what is that but Preaching in order to raise a Rebellion and Insurrection, tending to the Destruction of the King, and his Government? All this is laid in the Indictment; the Jury find it spoken maliciously, and with such an Intention as we have laid; and therefore we think that it is sufficient.

L. C. J. But, if I take the Gentleman right (for I tell you before-hand Justice must be done to all People impartially. The Crime is a very great Crime that he stands accused of; and the Jury have found him guilty of the Crime laid in the Indictment: But, if I take him aright) he does not say that Words are not sufficient to create a Treason, but the Words here, as they are laid in this Indictment, are not sufficient: And as I take it, there is no great difficulty in the Matter; but the Words would have been sufficient to have supported the Accusation, if they be well laid. But the Question is, Whether the Words, that you have laid here, be so positively affirmed to have been spoken by the Prisoner, and to relate to the Government, as they ought to be in an Indictment of High-Treason.

Mr. Att. Gen. That the Indictment must make out; and the Jury have found him Guilty, according to the Indictment.

L. C. J. But that is his Objection, they are not so in the Indictment.

Mr. Att. Gen. My Lord, they are laid as the Witnesses swore them; as your Lordship can't but remember.

L. C. J. That they are not positively affirmed, but only alledged under an *Innuendo*; that is, he spoke such and such Words, whereby he compared the King to *Jeroboam*, and the like; and we had two wicked Kings together, but if we would stand to our Principles, we should overcome our *Enemies*, *Innuendo* the King. The alledging of the Words spoken in the Indictment is positive, if there be sufficient Matter in the Words to make them applicable to the Government, so as to make it Treason. But if you only say, he spoke them, *Innuendo* so and so, that is not positive enough to make the Indictment good. I take it the Objection runs that way.

Mr. Rosewell. My Lord, I humbly thank your Lordship for explaining my meaning: It is so.

L. C. J. In an Action on the Case, if you say the Defendant spake such and such Words, if you do not lay it that he spoke them of the Plaintiff; *Innuendo*, The Plaintiff, in repeating the Words won't do. So here, if you had brought it in the Indictment, that having discourse of the late King and this King, he had spoken these Words, *We have now had two wicked Kings*, &c. you then had brought it home to him: But you do not lay it that it was spoken of them at all, but only in the *Innuendo*; whereas you ought to say first, That he spoke of the late King, and this King; and then said, *We have had two wicked Kings together*, *Innuendo* the late King, and this King.

Mr. Att. Gen. My Lord, I do not know how we could have done it better than we have done.

L. C. J. Look ye, we give no Opinion; but the Objection has Weight in it upon my Word. As I told you before, in common Cases an Action of the Case for Words, or the like, you must lay a Communication concerning the Plaintiff, or an *Innuendo* will not be a sufficient Averment of its being spoken of him. In an Action of the Case for Words, till within these Seven or Eight Years, they were obliged to lay a *Colloquium* of the Plaintiff, and of his Trade; and that to defame him, were spoken of him at such a time such Words, as that he was a Cheating Knave; where the Word Knave would bear an Action; a bare *Innuendo* would not do, that was not enough. But, now I confess,

confess, since Declarations are made a little more concise, you need only say *dixit de Quarente*, such and such Words without a *Colloquium*, but you must aver it to be spoken of the Plaintiff. I never thought it good in such a Case, to say of a Merchant he is a Bankrupt Knave (*Innuendo* the Plaintiff) unless he say he spoke of his Trade and Merchandise. So that the Objection does seem to carry very much Weight in it.

* *Mr. Solicitor*. My Lord, if your **Mr. Finch*. Lordship would give me leave, I would endeavour to answer the Case, as your Lordship has put it; for, my Lord, no doubt in all common Actions of the Case for Words, it must be averred that the Words were spoken *de Persona*, of the Plaintiff; but the first part of the Indictment, in this Case, shews that the Words must be spoken of the Person of the King and of the late King; for it says he did conspire the Death and Destruction of the King, and to depose him from his Government, and to manifest that traitorous, wicked Intention of his; *Ex intentione* he did speak these Words of the Government, *We have had two wicked Kings together*, meaning this King, and the late King.

L. C. J. If you had said so, that he spoke these Words of the King, you had answered my Objection; but the Conspiracy of the Death of the King being only a general Form for Treason, will not make good an Indictment of High-Treason; but you must shew some Acts or Words to evince and prove that that was his Intention; that he did either speak such and such Words, or did such and such Actions. It is not a good Indictment to prove that he did conspire, for he spoke such and such Words; but that to carry on his Conspiracy he did speak such and such Words of the Government, that must be positively alledged.

Mr. Solicitor. We do so, my Lord; for we say, *Et ad easdem nefandas prodiones, &c. perimplendas*, he spoke such and such Words, We have had two wicked Kings together, *Innuendo* this King and the late.

L. C. J. You have *Innuendo'd* it too much I do doubt; for all the Facts are laid under an *Innuendo*, without a positive Averment.

Mr. Att. Gen. My Lord, I think it is as fully laid, as it possibly could be.

L. C. J. Come, *Mr. Attorney*, if in Cases of common Actions for Words there be such Strictness required, ten times more ought there to be in an Indictment of Treason, where a Man's Life, and All, is so much concerned. I am not satisfied, I assure you, that this Indictment is well laid, though I give no Opinion; but in all Justice we ought to assign him Counsel to make out his Objection.

Mr. Att. Gen. All this, my Lord, is only in delay.

L. C. J. *Mr. Attorney*, *De vita Hominis nulla est cunctatio longa*. I think we ought to assign him Counsel, and the rest of my Brothers are of that Opinion too.

Mr. Att. Gen. Let them read Colonel *Sidney's* Trial, and the Indictment there, and they'll find it the same thing.

L. C. J. I cannot tell whether there are any such *Innuendo's* there, I believe not; but I know not if there were, if in case it had been moved in Arrest of Judgment, what the Court would have done then. But I think we ought to assign him Counsel to make out his Objection.

Mr. Solicitor. The very Fact that makes this Treason, is his stirring up Sedition and Rebellion

within the Kingdom; and we say, to effect it, he had these Expressions in his Pulpit, We have now had two wicked Kings together, meaning this King, and the late, who have suffered Popery to come under their Noses, but, if you will stand to your *Principles*, meaning the People, we shall overcome our Enemies, meaning the King, and Government.

L. C. J. Ay, but you do not say that he spoke these Words of the King: This you should have said at first, because the speaking of these Words is the very Overt-Act; and if he did not speak them of the King, which you ought to affirm, but only by way of *Innuendo*, that cannot, we think, be so good, nor sufficient.

Mr. Just. Withins. I take it that these are the main Words that are to maintain this Indictment of Treason; and the Question is, Whether they ought not to have been averred that they were spoken of the two Kings.

L. C. J. We do not give any Opinion, *Mr. Attorney*, but because there seems to be some reasonable doubt and weight in the Objection, we desire to have it argued, and therefore will assign him Counsel.

Mr. Rosewell. I humbly thank your Lordship.

L. C. J. We do think it fit to look into it, before we proceed any farther in a Case where a Man's Life is concerned.

Mrs Rosewell. I pray God to bless your Lordship.

L. C. J. Nay, you have no need to thank me; for I desire to do Justice to all Men.

Mr. Rosewell. But I desire to return my hearty Thanks to your Lordship, for explaining and making out what my unskillfulness in the Law would not permit me to do. God be your rewarder for it.

L. C. J. Well, who would you have to be your Counsel?

Mr. Rosewell. If your Lordship pleases, *Mr. Wallop*, *Mr. Pollexfen*, and *Mr. Thomas Bampfseild*.

L. C. J. Let them be assigned of Counsel for him. But, *Mr. Rosewell*, I think it is not improper for me, upon this Occasion, to take notice of this that is in my Mind, relating to your Affair, because I observe it is a Matter of great expectation, and so was at your Trial, and here is a great Croud of People now; that as this Fact is found, if the Indictment falls out to be a good Indictment, which is the Question that now depends before the Court, so that you come to have Judgment of High-Treason passed upon you, and to suffer according to that Judgment, what will become of these 400 People that were your Auditors at the time that these Words, that are thus found and adjudged to be Treason, were spoken? And I speak it for the sake of all Conventiclers, and Frequenters of such Meetings, as these are. If you, that are the Preachers, and Teachers, the Mouths of such Congregations, do utter Treason, and so they conceal that Treason, what a Condition are they in? what are they guilty of? Therefore if People will consider, they would do well to think, that when they go to such Places, they go at a great Peril; being to answer for Themselves, their Lives and Estates, upon the Prudence of the Expressions, to say no more, that come from the Teachers. I only put you in mind of this, because I would have all Standers-by, and the Auditory, which I see is very great, in mind, what Danger and Risque they run, in thus offending the Law.

Mr. Rosewell. My Lord, I do believe, that no one in the World, besides these Witnesses, that here were produced against me, can ever testify the least

disrespectful Word, spoken by me, of the late King, or of his present Majesty.

L. C. J. Well; when will you be ready, Gentlemen?

Mr. Pollexfen. My Lord, we desire to have as much time to prepare our selves, as we can.

L. C. J. Two or three Days time will serve.

Mr. Att. Gen. It is fit we should know what Points they intend to insist upon, that we may prepare to answer them.

L. C. J. Yes, yes, that must be, but I perceive his main Objection is, what I tell; let him

be brought by Rule hither, upon *Thursday*, because the Court may have time to consider of what shall be said on both Sides.

Mr. Rosewell. My Lord, these Gentlemen are Strangers to me, but I dare rely upon them, from the Character I have heard of them, that they will do me all the Justice that they can.

L. C. J. Well, they are assigned of Council for you. But I could not forbear giving that hint that I did, that this might be a warning to People, how they transgress the Law in going to such Meetings.

Die Mercurii, 26 Novembris 1684.

Rex versus Rosewell.

L. C. J. **M***r. Pollexfen,* have you any thing to move.

Mr. Pollexfen. My Lord, I have one Word to move for my self, and the others, that are appointed to be of Council for *Mr. Rosewell.* We think it our Duty to apply our selves to your Lordship for this Favour; that, to enable us the better to do our Duty for the Person, for whom we are assigned, your Lordship, and the Court would please to order that we may have a Copy of the Indictment. We do acknowledge, that it is not an usual thing to have Copies granted (tho' there be no express Law, that we know against it) in capital Matters, but where any Doubt does arise upon the Penning the Indictment, and Counsel is assigned, to enable them to do what is fitting for them to do for their Client, Copies of the Indictment have been granted; as particularly in the Case of *Fitzbarris*, in order to the Plea that he was to put in; and I my self was one of the Counsel at that time.

L. C. J. *Mr. Pollexfen,* I make no doubt in the World, it is in the Power of the Court to order a Copy of the Indictment, if they see Cause; but, if you remember (for you were of Counsel in that Cause too) it is not to be granted, because it is asked. For my Lord *Ruffel* had no Copy of the Indictment, tho' he insisted very much upon it: And it was in the Case of *Fitzbarris* granted, that he might particularly apply his Plea (if he had a mind to it) to the Indictment itself.

Mr. Pollexfen. My Lord, I do not desire a Copy of all the whole Indictment; but of so much thereof, as may be enough for us to know the Foundation upon which we are to go. I do remember we were called in, in my Lord *Ruffel's* Case, upon the Point of Challenge, for want of Freeholders; but that was not in the Point of the Indictment, and there I cannot see what we had to do with the Indictment; but here we must understand how it is laid really in the Indictment, that we may apply our Arguments to the Cause; and that I believe was never denied.

L. C. J. Look ye, if you speak to me privately, as to my own particular Opinion, it is hard for me to say, that there is any express Resolution of the Law in the Matter: But the Practice has been always to deny a Copy of the Indictment. And, therefore, if you ask me as a Judge, to have a Copy of the Indictment delivered to

you in a Case of High-Treason, I must answer you, Shew me any Precedents where it was done: For, there are abundance of Cases in the Law, which seem hard in themselves, but the Law is so, because the Practice has been so, and we can't alter the Practice of the Law, without an Act of Parliament. I think it's a hard Case, that a Man should have Counsel to defend himself for a Two-penny-trespas, and his Witnesses examined upon Oath; but if he Steal, commit Murder, or Felony, nay, High-Treason, where Life, Estate, Honour, and all are concerned, he shall neither have Counsel, nor his Witnesses examined upon Oath: But, yet you know as well as I, that the Practice of the Law is so; and the Practice is the Law.

Mr. Pollexfen. My Lord, we heard the other Day the Indictment read, and so may have some little Account of the Indictment; but we desire such a Copy as may enable us to argue as we ought to do, and as the Court will expect from us, being assigned by the Court.

Mr. Wallop. My Lord, if we should offer any thing that is not in the Indictment, it's all one as if we held our Tongues; and if we have only a loose Account of the Indictment, that may be as bad as if we had a false one: And therefore we desire, to the End that we may argue *ad idem*, that your Lordship will please to favour us, that we may have a Copy of so much of the Indictment, as upon which our Objections may be grounded.

L. C. J. *Mr. Pollexfen,* you may remember a particular Case, I have forgot the Name, but I believe you may remember it; where a Prisoner at this Bar desired to have the Indictment delivered to him to read, but it was denied him. It is hard, I confess, and so are many other things in the Law; but I am wonderfully tender of making Precedents: And therefore, if it has not been practised, I do not see how we can do it.

Mr. Just. Within. That is the usual Practice, my Lord; but it is in the Power of the Court sure to grant a Copy; or, at least of so much as is necessary for them to apply themselves to. There have been many Cases of Murders, where they have had Copies of the Indictment, in order to move in Arrest of Judgment, as this Case is.

Mr. Just. Walcot. But have there been any in High-Treason?

Mr. Just. Within. I do not take it that there

is any difference between the one Case and the other; they being both capital Crimes; and Counsel being assigned, they must know what they are to speak to.

L. C. J. I would know when ever a Copy was granted to enable the Party to move in Arrest of Judgment.

Mr. Just. Withins. My Lord, when there is a Motion in Arrest of Judgment, and Counsel is assign'd, that is a Thing they ought to know, how to demean themselves in their Arguments.

Mr. Pollexfen. My Lord, we submit it to you. We desire the Favour that we may acquit our selves as we ought to do, and as the Court (we know) expects from us.

L. C. J. As far forth as I could do, being in the Case of Life, I would indulge you: But I tell you, I am loth to be the Author of Precedents in Cases of this Nature, one way or other; especially in this Case, where I know you cannot but understand by what was spoken here t'other Day, what the Objection is, and where the stress of it lies: Every man at the Bar must needs understand it.

Mr. Pollexfen. My Lord, we know People have various Understandings; and the case is many times variously stated, not only in our Minds, but in our Books.

L. C. J. Well, we know you understand your selves well enough: And what we could grant, we would.

Mr. Just. Withins. It may be *Mr. Pollexfen* does it only to make way for an excuse, when he comes to argue, that he is not so well prepared as he should have been; but we know him well enough.

Mr. Pollexfen. But, my Lord, if we miss the Words of the Indictment, we hope your Lordship will not think us impertinent, in having made this Motion, which is for our Selves, not for our Client: And therefore, we hope you will pardon us, if in case we mistake; which we could have had no colour to have desired, if what we had to say, were guided by a true Copy of the Record.

No Copy was granted, nor Rule made.

Die Jovis, 27 Novembris 1684. B. Regis.

Dominus Rex versus Rosewell.

THIS Day *Mr. Rosewell* was brought to the Bar, and the Court asked the Counsel assign'd for him, what they had to say.

Mr. Wallop. May it please your Lordship, I am of Counsel with *Mr. Rosewell*, by your Lordship's Appointment; he being here a Prisoner now at the Bar. My Lord, I am informed (for I have not seen the Proceedings, nor heard the Indictment read) that it is an Indictment for treasonable Words; and many treasonable Words; and likewise, as I take it by Information, these Words are applied by divers Innuendo's; so that, for ought I can apprehend by what I am informed (which I must still keep to) it is so uncertain, insensible, involved, and intricate, that no safe Judgment, as I humbly conceive, can be given upon it.

My Lord, to consider these Words; First, if you please, I shall state them as discharged of the Innuendo's, and put them to your Lordship barely and nakedly, as they are in the Indictment, and as they were sworn, and are to be supposed by the Conviction to have been spoken. The Words are these, as they stand discharged of their Innuendo's: That *the People make a flocking to the King, under pretence of healing the King's Evil, which he could not do; but we are they to whom they ought to flock, because we are Priests and Prophets, that by our Prayers can heal the Dolours and Grievs of the People. We have had now two wicked Kings together, who have suffered Popery to enter under their Noses; who can be likened to no other Person, but the most wicked Jeroboam: And if they would stand to their Principles, he did not fear but they should overcome their enemies, as in former times, with Rams-horns, broken Platters, and a Stone in a Sling.*

These, my Lord, are the Words nakedly in

themselves; and these are said to be spoken in a Publick Assembly, where they were likely to do hurt to the Government. Thus, I say, they stand without any of the Innuendo's. Now, tho' your Lordship will have, and justly ought to have, a good Account given you of such Words as these, how they came to be spoken, even taking them as they stand discharged of the Innuendo's; yet I humbly conceive with Submission, they do not contain any intention of deposing or destroying the King, and so can have no treasonable intention in them: And then, your Lordship, I suppose, will likewise expect to have a good account of these Words, in another respect, how Words, which in the hearing of them barely and nakedly spoken, could not carry a treasonable Intention, I say, how it comes to pass that in the writing of them down in an Indictment, they become High-Treason.

My Lord, these Words, as they stand discharged of the Innuendo's, are loose, extravagant, insensible Words, sounding rather towards Phrenzy, than Treason. So that as they stand without further Explanation by an Innuendo, they are perfectly insensible, and one cannot tell what they refer to, or whom; and if the Words, *Ex vi termini*, without further Averment, contain no treasonable intention and meaning, and so consequently have no Treason; it may seem very difficult and hard to maintain, how, out of the Assembly, in which they were spoken, being put into Latin, in an Indictment, they should become Treason: They not being Treason at *Rotherbith*, where they were spoken; how they should be made Treason at *Kingston*, or here, where they are dressed up in another Form. Indeed, I know no way that it can be done, but by adding some other Words, by some other Hand. And, my Lord, I suppose it was

so done by those who framed this Indictment that is before your Lordship, by inserting, and adding this Multitude of Innuendo's.

But I suppose then, they that would insert these Innuendo's, must have a good Warrant to insert them: For if they are inserted without Warrant in Law, then it must be acknowledged to me that the Indictment is not good; and I humbly conceive it to be a Rule in Law, that no Innuendo can warrantably be inserted in an Indictment, Information, or Declaration, upon an Action of the Case for Words, unless the Defendant first himself be averred, and that directly, to have mentioned a Person in certain, to whom those Words may be referred; and it must not slide in by Supposition, but it must appear in the Body of the Discourse of the Defendant. And the Reason is evident in all Cases of Slander, and particularly in these of treasonable Words; for how could the Hearer understand whom the Preacher meant, or he that discoursed so and so; and so be influenced to Rebellion, unless he had named the Person of whom he spoke, as here, unless the Defendant had named the King, to whom the Words he spoke should be referred?

My Lord, the Treason of the Words is in stirring up Sedition and Rebellion; and if then the Words cannot terminate upon the King, and the Hearers could not collect that to be the Intention of the Speaker, these Words could not influence a People to Rebellion and Sedition. And according to this Rule, I conceive that most of the Innuendo's in this Indictment are not warrantable.

For, my Lord, as to the first Words, to take them in order, tho' I take it, that that is the most remote Matter from the Crime charged; yet let us strike off these Innuendo's as we go along, if we can. There it is *Quod Populus, &c. the People* (meaning the Subjects of our Lord the King) *keep a flocking to the King to cure the King's Evil, which he cannot do, &c.* Here the first Innuendo is *the People* (meaning the Subjects of our Lord the King) Now he had never before named the People of *England*, but the Innuendo fastens that meaning upon the Word (*People*). Which, with Submission, my Lord, is always a Sign of a naughty *Innuendo*; and it is without Warrant of Law; an endeavouring to give an original certainty to uncertain Words; which is more than the Office of an Innuendo will allow or warrant. I say, my Lord, it always bears a bad face, where Words first appear with an Innuendo, and have no certainty even in the Beginning of them, but by the Innuendo: that with Submission is to be rejected, the Innuendo not doing its proper Office, for which it ought to be used in Law: For *Populus* may intend any People, it may intend the *French People* flocking to the *French King* (and he does heal the King's Evil in the same manner; nay, pretends to it, as a sole Gift to him, his Predecessors, and Successors: But I only put that for an Instance) and all the Innuendo's, if you observe them, are of this Nature. The Words first appear without any light, but what these Suppositions give them, and therefore, I say, they are to be rejected.

But now, my Lord, I come to that which is more particular, *Nos habuimus nunc duos iniquos Reges insimul; We* (meaning the Subjects of the King) *have had two wicked Kings* (meaning King *Charles* the First, and this King) *together*. Now that we say is altogether void, for there was no mention of any Kings; wicked Kings or good

Kings, pious or bad, before in the Discourse; to which, according to the Office of an Innuendo, these Words are to be applied. My Lord Coke in his 4 *Rep. fol. 17. B.* has this Case:

John Jeames brings his Action against *Alexander Rutlech*, for speaking the following words concerning him, to one *John Bonner*. "Hang him (prædictum Johannem Jeames innuendo) he is full of the Pocks (innuendo the French Pocks) I marvel that you (prædictum Johannem Bonner innuendo) will eat or drink with him (prædictum Johannem Jeames innuendo) I will prove that he is full of the Pocks (innuendo the French Pocks) Upon a Motion in Arrest of Judgment, it was resolved by the Court, that in every Action of the Case for Slander, two things are requisite. First, That the Person who is scandalized be certain. Secondly, That the Words spoken be apparent Slander. The Office of an Innuendo is to design the same Person that has been named before: And is in Effect, instead of a *Prædict*. But it cannot make the Person certain, that was uncertain before. In the present Case, it was evident that the Plaintiff did speak the Words of the Defendant. But as to the second Thing, it did not appear that the Words spoken did mean the *French Pocks*; and Words are to be taken in *mitiori sensu*.

Mes si un dit a J. S. constat de persona, & action gist: Issint icy en le case al barre, quant le defendant & Bonner ad parlance del pl' donques quant le defendant dit hang him: La (innuendo) woyle denote mesme le person nosme deuant: Mes si le defendant sauns ascun parlance del plaintiffe ad dit, hang him, &c. La nul innuendo woyle aver fait le person certain. ¶ Quant al 2. si come (innuendo) ne poit faire le person certain que suit incertain deuant, issint un (innuendo) ne poit alter le matter ou sence des parols mesmes: Et pur ceo quant le defendant en le case al barre dit al plaintiffe: That he was full of the Pocks (innuendo the French Pocks) cest innuendo ne fait son proper office, car ceo contende a extender les general parols the Pocks ale French Pocks per imagination d'un entent que n'est apparent per ascun precedent parols, a que le innuendo referrer; Et les parols mesmes ferra prise in mitiori sensu.

And I humbly conceive this Book is a most pregnant Authority, that states the Matter truly, with a Judgment of Law, and the Reason of it; and all the Books that come after this, borrow their Light from what is laid down as the Rule

12.

Mich. 41. & 42 Reginz Eliz. en bank le Roy, enter John Jeames pl. & Alex. Rutlech def.

LE plaintiffe count que le defendant, & un John Bonner ayant conference de le plaintiffe; Le defendant dit del plaintiffe al dit John Bonner ceux parols; Hang him (prædictum Johannem Jeames innuendo) he is full of the Pocks (innuendo the French Pocks) I marvel that you (prædictum Johannem Bonner innuendo) will eat [B] or drink with him (prædictum Johannem Jeames innuendo) I will prove that he is full of the Pocks (innuendo the French Pocks) Le defendant plead non culpable, & fuit trowe pur le plaintiffe, & damages assigne: Et fuit move en arrest de judgement que les dits parols ne fueront actionable. Et fuit resolve que en chescun action sur le case per slanderous parols, deux choses sont requisite. ¶ 1. Que le person qui est scandalize soit certain. ¶ 2. Que le scandal soit apparent per les parols mesmes. Et pur ceo si un dit sauns ascun precedent communication, que l'un des servants de J. S. (il ayant divers) est un notorius Felon ou Traitor, &c. icy pur le incertaintie del person nul action gist; & un (innuendo) ne poit faire ceo certain: Issint si un dit generalment: I know one near about I S. that is a notorius Thief, ou tiels semblables. Mes quant le person est un soit nosme en certaine, come si dieux parlant ensemble de J. S. l'un dit, He is a notorius Thief: La J. S. en son count poit monstre qua la suit par lance de luy enter les deux, & que l'un dit de luy: He (innuendo prædictum I. S.) is a notorius Thief. Car le office de un innuendo, est a constater & designer mesme le person que suit nosme en certaine deuant: & en effect estoit en lieu de un (prædict) mes un (innuendo) ne poit faire person certain que suit incertain deuant: Car ferra inconvenient que actions ferra maintaine per imagination d'un entent que n'appiert per les parols sur que l'action est fondee, mes est tout incertain & subject al deceivable conjecture: Mes si un dit a J. S. Thou art a Traitor, &c. la, constat de persona, & action gist: Issint icy en le case al barre, quant le defendant & Bonner ad parlance del pl' donques quant le defendant dit hang him: La (innuendo) woyle denote mesme le person nosme deuant: Mes si le defendant sauns ascun parlance del plaintiffe ad dit, hang him, &c. La nul innuendo woyle aver fait le person certain. ¶ Quant al 2. si come (innuendo) ne poit faire le person certain que suit incertain deuant, issint un (innuendo) ne poit alter le matter ou sence des parols mesmes: Et pur ceo quant le defendant en le case al barre dit al plaintiffe: That he was full of the Pocks (innuendo the French Pocks) cest innuendo ne fait son proper office, car ceo contende a extender les general parols the Pocks ale French Pocks per imagination d'un entent que n'est apparent per ascun precedent parols, a que le innuendo referrer; Et les parols mesmes ferra prise in mitiori sensu.

of Law in this Case; as there are an infinite Number of them, which I shall not trouble your Lordship with particularizing; only just to name some of them. 5 Co. 20 Hob. 45. and 2 Cro. 126. Wherein they say, That altho' the Plaintiff be particularly named by a special Name; yet if the Declaration comes to name him in an Action of the Case for Words, at the first Appearance with an Innuendo, then that Innuendo is void; tho' his Name be expressly alledged in the very Words, yet they will reject that Innuendo, as not doing the proper Office of an Innuendo; and that Judgment shall be arrested, tho' the Jury found that the Party spoke such Words: And this is upon the Rule in 4 Co. before mentioned.

Now, my Lord, to apply this Rule in the 4th Report, to the Case before your Lordship, we say there was no mention at all before of any two Kings; nay, not of any King, in his Discourse, to which the Innuendo should refer; and the Innuendo being joined to the Words first spoken, without any Discourse laid concerning such a Person, or Averment to be spoken of such an one before, the Innuendo cannot give any certainty to that, which had no such original certainty; that being against the Office of an Innuendo, and so is to be rejected. And the meaning of the Books, and of that great Rule, which I first cited, is this, That the Defendant must himself, in his Discourse, first set up such a Light about the Words of the Person, concerning whom they are spoken, that the Intention of the Speaker may with ease be collected; then comes the Innuendo with a Beck or a Nod, as it were; and that Collection is to be the *nutus*, to shew who was meant; but it is not sufficient to give an original certainty, where such a certainty is not fixed before the Innuendo comes. The Defendant himself must set up such a Light as will carry the Intention to the End of the Discourse.

Then it is said, *Duos iniquos Reges*, in the Plural Number; meaning the late King Charles and his present Majesty; now King Charles the First was never pretended to be mentioned before; why then, according to that Rule, as to him the Innuendo signifies nothing at all; and then it must be taken in common understanding, *We have now had two wicked Kings together*, Innuendo, our Sovereign Lord the King that now is, against whom the Treason must be said to be committed: But this is very harsh, and insensible, and impossible; it is harsh in all respects, both of Grammar, and Reason, and Law; it is insensible, because it is impossible; and it is impossible, because you must else make two Kings to be one, or one King to be two, and the Innuendo must serve both ways; which I believe your Lordship will hardly undertake to do.

And besides, my Lord, there is another Inconsistency in these Words, *habuimus nunc*, that's contradictory; *habuimus* refers to the Time past, and draws one Way; *nunc* to the Time present, and draws another Way: and when there are such Inconsistencies and Incoherences, how can any Man make a Judgment in this Case, where the Life of a Man especially is concerned?

But, my Lord, if *habuimus* be that which being first shall take place, then these Words refer to any two Kings that we have had, under whom Popery hath been let in; and so we must run back from Harry the 8th, up to the Conquest, nay, beyond the Conquest to the Saxons and other former Kings, to the first that esta-

lished the Christian Religion, which was then subject to the Papacy. And it will be hard to construe them wicked Kings for so doing at that Time; as any Man's reading, that knows any thing of the History of *England*, will easily tell him. So that it is unintelligible and insensible, even that way; and, to be sure, if it be so, that we have had two wicked Kings together, referring so far back, it cannot at all concern the present King.

My Lord, I shall be short: I only state these things before you, and recommend them to your Lordship's Consideration. Then come these Words, which it seems are most relied upon, *if they would stand to their Principles, he did not question, but they should be able Inimicos suos vincere*, Innuendo the King and the Government. This is the most insensible, as I apprehend, of all; and it is in the fatallest part, it being there that the Treason must lie, if there be any. Now, my Lord, we first say, there is no mention at all of any Enemies throughout all the Words precedent; there is no Averment that the King was Enemy to any body, or any body to him; and therefore the Innuendo, for this reason, is to be rejected; and the rather, in that it makes the King and his Subjects to be Enemies one to another; which is an Imputation that ought not to be admitted; and I dare say, will not be by your Lordship. Therefore in this Case, to put such a Sense in such a Weighty Matter, being a Matter of Fact, upon such Uncertainties without any further Averment of the Intention and Meaning of the Speaker to be so and so; and without any thing but such Innuendo's, is very hard: For now perhaps the Jury only from this Innuendo were persuaded that all these things pointed upon the King and the Government; and did take it that the Law was so; that the Words intended as much: Then do they give their Verdict of a Matter that was never averred, and for want of an Averment could never be put in issue, so that the Party could have a Trial, whether he were guilty as the Indictment says.

My Lord, I shall cite no Books more than I have done. I humbly conceive that putting that great Rule in the Book I first mentioned, and the Reason of the thing together, and the subsequent Authorities that I have cited; and they stand so fair and clear to avoid this Indictment, that to trouble your Lordship further were to embroil the Case; therefore I shall say no more out of the Books. But the Rule is a firm, reasonable, undeniable Rule, which must rule all Cases that come under the Reason of it. And I never heard that Book was ever contradicted; but all subsequent Judgments were agreeable thereunto.

Mr. *Just. Withins*. What Folio is it, Mr. *Wallop*, in the 4th Rep.?

Mr. *Wallop*. Folio 17 B.

Mr. *Just. Holloway*. It is——'s Case, is it not?

Mr. *Wallop*. Yes, Sir. My Lord, I have strip'd the Words of the Innuendo's. You will not, I am sure, put, nor can an Innuendo put such a Violence or Force upon Words, as to make them Treason, when in themselves they have no such Meaning. Innuendo's are to follow the Meaning of the Words as they lie in the Record, and not to draw the Meaning of the Words after the Innuendo; for you will never (especially in a Case of Life) press Words, or strain them to speak more than willingly they mean

mean or intend. It is not the practice of the Law so to do, to make any such Stretches. *Quinimis emungit, elicit sanguinem*, he that wrings the Nose too hard, will draw forth Blood; that is the Rule of that great Lawyer, my Lord Coke, who applies that Saying to the forced Straining of Words beyond what in themselves they naturally and easily will bear. And it is plain that God is not well pleased with such Emunctions: Nor does the Law of the Land at all allow it, but absolutely forbids it, for the Law of *England* speaks thus, *In dubiis & generalibus, benignior sensus est preferendus*, in all dubious, uncertain, and general Cases, the most benign and candid Interpretation is to be taken: So that if there should be a doubt about these Words, what Sense they be taken in, the Law of *England* does injoin your Lordship to take the Way that lies on the right hand, and make the most favourable construction, that can be of them. We say then, the Words, as I conceive, standing quite otherwise, and without the Innuendo's, are insensible, at least uncertain, to what they should be applied, or to whom, and then if there should be a Doubt, though indeed in one respect, I think there is none, yet if there should remain a Doubt, I say, your Lordship and the Court are to take that, which is the most mild and gentle way of construing these Words.

My Lord, I shall not trouble your Lordship further in the matter, for I think it is seen by its own Light, and these few Touches, that I have given of that general Rule, as applied to the particular Case before your Lordship: And I do not question, but they will be applied by your Lordship and the Court in their Consideration of the Case: Therefore I lay it at your Lordship's Feet, and humbly pray, that the Judgment may be arrested.

Mr. *Pollexfen*. My Lord, I am assigned by the Court to be of Counsel for Mr. *Rosewell*, the Prisoner at the Bar, and therefore humbly desire your Lordship would please to spare me a Word of the same Side with Mr. *Wallop*. The Case, that is, this Part of the Indictment, hath been put, according to what our Information is, right by Mr. *Wallop*, but because there may be many Words in the Indictment, and there are so, some of a higher Nature than others, therefore I beg leave to put the Words distinctly as they lie, and I shall endeavour, with Submission to your Lordship, to shew what Words are in themselves Treason, and what are not Treason, tho' they may be a great Misdemeanour, and highly punishable by the Law, and by the Court.

My Lord, though the Statute of the 25 *Edw.* 3. does provide, that for the Convicting of any for Treason, there shall be an Overt-Act, yet I do not hold, nor do I think, but that there may be Words that are an Overt-Act, and consequently Treason within that Statute; but then what sort of Words these are, is that which I would humbly offer to your Lordship to discourse of: For, my Lord, it plainly appears that Words in themselves, that are very evil and wicked, yet are not Treason, nor are to be punished by virtue of that Statute of the 25 *Edw.* 3. As in one *Cro.* 117. & 125. *Hugh Pine's* Case. The Words there spoken by *Pine* are most evil and wicked Words, yet by all the Judges of *England* they are agreed not to be Treason.

But, my Lord, for a further Determination of this Point, what Words are Treason, and what not, give me leave to mention the Statute of 13 *Car.* 2. which I understand to be the Statute upon which

the Prisoner is indicted, and the two Branches of that Statute: for the first tells what is Treason, and the second what is not Treason, but only Misdemeanour; and that second Branch of the Statute says, that if any person shall maliciously, and advisedly publish, or affirm the King to be an Heretick, or a Papist; or that he endeavours to introduce Popery, or maliciously and advisedly by Writing, Printing, Preaching, or expressly Speaking, publish, utter, or declare any Words, Sentences, or other Things, to stir up the People to hatred or dislike of the King's Person, or the established Government; then he is disabled to have or exercise any Place, or Office, civil or military, and be liable to such further Punishment, as by the common Laws or Statutes may be inflicted in such Cases; by which, I take it, the meaning to be Fine and Imprisonment, or bodily Punishment; but not the Punishment that is appointed to the Judgment of High-Treason, or loss of Life or Member.

Mr. *Att. Gen.* My Lord, I humbly crave your Lordship's Judgment whether this shall be permitted, that the Counsel should enter into such a Discourse as this. The Question, I take it, that your Lordship appointed to be spoke to, is, Whether this Indictment as to Form be sufficient for your Lordship to give Judgment upon? But Mr. *Pollexfen* is going into that which is a far greater Point; whether these Words abstracted from all their Innuendo's are Treason, or no. My Lord, the Prisoner did not move that in Arrest of Judgment? and whether your Lordship expects any such thing should be spoken unto, that was not moved or stirred by him, I must submit it to you. The Jury found that these Words were spoken with an intent to depose the King. Whether that your Lordship will permit it to be argued whether such Words are Treason in their own Nature, is of quite another Consideration.

Mr. *Pollexfen*. Good Mr. Attorney, Pray, spare us. We come to shew that if in their Nature they import not Matter of Treason, then the Innuendo's cannot help them, so as to make Treason of them.

Mr. *Att. Gen.* Truly, my Lord, I did not understand that it was your Lordship's Pleasure the Counsel should have liberty to argue any such thing as whether the Words be Treason, being found to be spoken with such an Intention; but whether these Innuendo's have sufficiently been laid to maintain the Indictment in point of Form.

Mr. *Pollexfen*. If you leave out the Words Innuendo'd, then sure we may speak to the Words themselves.

L. C. J. Look you, Mr. Attorney, either you mistake Mr. *Pollexfen*, or I do: For I take it, that he is entering into the Consideration of these Words, as they are laid in the Indictment; that are uncertainly laid, so as that they will not support an Indictment of Treason.

Mr. *Att. Gen.* My Lord, he is arguing, that if they were spoken of the King, yet they would not be Treason.

L. C. J. Will he say so? I dare say, he will not.

Mr. *Att. Gen.* He is arguing upon the Statute, what Words are Treason, tho' spoken of the King, and what not; which I take it, is not the Question now.

Mr. *Sol. Gen.* My Lord, We humbly offer it to your Lordship, whether it be according to your

your Lordship's Rule and Intention, that he was to argue whether the Words were Treason; or only whether the Form of the Indictment, as to the Innuendo's, was good and sufficient.

L. C. J. Taking the Words to be sufficiently set forth in the Indictment, and found by the Jury to be spoken of the King, especially the last Words: Do you think we would suffer that Question to be debated, whether they were Treason or not? God forbid. I will not sit here to hear that Question at all, so much as made or put, I'll assure you. I took him not to argue at all any thing that way.

Mr. Pollexfen. Pray, my Lord, hear me; I am going only to this; for I would not offer any thing beyond what is fit for me to offer, and for the Court to hear: But this we say, That the Words, the effective Words, are not so sufficiently laid in this Indictment, as to make them amount to Treason, I am only going to that.

L. C. J. Ay; that's the stinging Part of the Question, and so I understood him before.

Mr. Pollexfen. My Lord, I only mentioned that of the Statute, that there were two Sorts of Words there taken notice of; to shew that I thought these Words were not within that Branch that is said to be Treason.

L. C. J. Well, go on.

Mr. Pollexfen. I will keep my self to the first Clause of the Statute; for what I mean, is this, That if these Words come not within that first Branch, which makes the Treason, then your Lordship cannot give Judgment upon this Indictment. Fortho', my Lord, it may be these Words are extraordinarily ill, and being spoken or preached, may have an ill Sense or Meaning with them; yet I would observe to your Lordship, there are other Penalties and Punishments provided for some sort of Words, than there are for others.

But then, my Lord, let us consider the Words of the first Branch of this Statute. If so be any Person does compass the Death, or bodily Restraint, or other harm to the King's Person, or to deprive the King, or levy War against the King, &c. And this compassing and imagination does express by Printing, Writing, Preaching, or malicious and advised Speaking, they shall suffer Judgment of High-Treason. Now then, all that I would come to, is this, that this same treasonable Printing, Writing, Preaching, or Speaking, must be of such Words as shall intend the Death, bodily Hurt, Restraint, or Imprisonment of the King's Person, or levying of War.

My Lord, having said this, the next thing is to come to the Words themselves, and to take them as they are in themselves without the Innuendo's, and see what the natural Sense of them will be: And we'll take them in the natural Order as they are laid in the very Indictment, and found by the Jury.

The first Passage of them is *quod Populus, &c.* (meaning the People of England, the Subjects of our Lord the King) *made a flocking to the King* (meaning our said Lord the King that now is) *to cure the King's Evil, which he could not do; but we are they to whom they should come, being Priests and Prophets, that by our Prayers can heal the Grievs of the People.* Now, my Lord, with humble Submission, it is plain that as to these Words, they have not in themselves any tendency to Treason at all, whatsoever Reflection they may make upon the King; they are the Words of a Priest

magnifying his own Office, and his Power with God Almighty; but they do not come up (I think) to this Crime, for which the Prisoner at the Bar stands accused.

Then the next Words that follow, are these, *Nos habuimus nunc duos iniquos Reges insimul, qui permiserunt Romanam superstitionem intrare in eorum conspectu, &c. and who can be liken'd to none, but wicked Jeroboam.* My Lord, these, I do acknowledge, are very wicked and bad Words, especially if they must be applied as the Indictment has set them forth, to the late King, and his present Majesty: Yet these very Words (under favour) will not amount to the Charge of High-Treason. They deserve very severe Punishment; but they seem not to come up to any thing of an Intention, or compassing, or designing the Death, bodily Hurt, or Imprisonment of the King; or the levying War against him. This I speak, my Lord, with Submission, and I believe your Lordship may be of the same Mind.

But then, my Lord, the next Words that follow, are the Words (I suppose) that are rely'd upon, to make out this Accusation; *Quod si ipsi starent ad fundamentalia, ipse non timebat, &c. That they should overcome their Enemies, as in former Times, with Rams-horns, broken Platters, and a Stone in a Sling.* These, my Lord, seem to be the Words in which the Crime consists. Now, my Lord, if these Words in themselves are so uncertain, or such as do not tend or relate to the present King, or the present Government, to stir up Sedition or Rebellion against them, then they will not be Treason, because they do not so relate.

Now, my Lord, these Words, if you take them alone without the former Clause, *Nos habuimus nunc duos iniquos Reges insimul, &c.* closed with the Innuendo, that he meant the late King, and this, I see not possibly how they can be said to relate to the present King and Government, to make them Treason within this Act. Which way can it be? if they would stand to their Principles, they should overcome their Enemies: How can they be intended to be meant of the King, and his loyal Subjects? Then let us consider the Words that go afore, whether they will help any thing or no; *habuimus nunc duos iniquos Reges insimul.* These Words of themselves, stripped of the Innuendo, do not express what two Kings are meant by them. If you take the Words strictly, that *We have had two Kings now together, insimul*; as the Word signifies, it must be two Kings at one and the same time: But take it in the English Phrase (as perhaps they would have it turned into English) *We have had now two wicked Kings together* (meaning the late blessed Martyr, and his now Majesty) then it must be, *We have had now two Kings successively*; but it is a strange thing to render such Latin into such English, which seems to be, in the Nature of the Words themselves, such as will bear no such Sense or Construction as that. And then, the *qui permiserunt Romanam superstitionem intrare in eorum conspectu*; if the first Words do not in themselves express what Kings were meant, these Words that follow can give no manner of certainty to them at all: For, here's not so much as any Innuendo; nor can the Words that follow them (*qui assimilari possunt, &c. which can be liken'd to none but wicked Jeroboam*) in any sort, shew any certainty to whom the Words are to be applied, or illustrate whom the Speaker meant.

But now that which is the next Clause, is the worst

Clause of all, *Sed si ipsi starent ad fundamentalia, &c.* *Ipsi* in all ordinary Construction of Speech in all Language, being coupled to the former Words (and so I think the Rule in the Grammar is, and will be read by any reasonable Person that reads) must refer to the next Antecedent. And then who are *they*, that are last spoken of? It must be the two wicked Kings, let them be who they will, that were meant by those wicked Kings; for there is no other Person that does intervene, as spoken of, to whom they should be referred. The former Words are spoken in the first Person, and plural Number; *We have had*, speaking in the Name of himself, and they that were his Auditors, and then to come with *ipsi*, after he had mentioned two Kings, who had suffered Popery to come in, and were to be likened to *Jeroboam*, changes the Form of the whole Speech. It should seem, according as it is laid in the Indictment, to run thus, and then I desire your Lordship to consider the Sense and Grammar of them; *We had now two wicked Kings together, who have suffered Popery to come under their Noses, we cannot compare them to any but wicked Jeroboam: And if they would stand to their Principles, then he did not doubt but they should overcome their Enemies, as in former times, &c.* Why then, if *ipsi*, according to Grammar, and ordinary reading, being a relative, must refer to that which went last before, there is nothing in all the Sentence before, but, *We*, that is, he and the People that heard him, and the two Kings that he spoke of; and the two Kings being last spoke of, it must in all Grammar I say, and Sense, be understood of the Kings. Then let us see, what Sense we can make of it; *We have had two wicked Kings, that have permitted Popery under their Noses, that they can be compared to none but wicked Jeroboam: and if they stand to their Principles, he did not fear but they (the Kings) should overcome their Enemies.* In all ordinary and fair reckoning, I cannot see how they can mend it, but the *Ipsi* must refer to the *Reges*; and the *Eorum fundamentalia, ipsorum Regum*, if you take these Words, as they do lie; and if they have any Sense or Meaning at all in them, this is the proper and natural Sense and Meaning of them.

For it is pretty hard to apply the *Nos habuimus nunc duos iniquos Reges* to the *ipsi qui starent ad fundamentalia*. In all Probability he spoke it thus, if it continued on in a Discourse, which I can say nothing to, being only to speak to the Words as they are laid in the Indictment, *and if we do but stand to our Principles, I do not doubt but we shall overcome our Enemies as formerly, &c.* But *ipsi* is a Variation of the Person, and, according to all Grammatical Construction, we know how it must be expounded. The other seems to be the natural reading of the Words, but the Indictment has not pursued them, but has made them instead of that, to be quite Nonsense, supposing them to have been spoken as the Jury have found them.

But, my Lord, if they do not well bear that Sense, which I think they should properly and naturally bear, if they had been right laid, the Question then is, whether we can make these Words, as they are laid, to bear any such Sense, as the King's Council, by their Innuendo's, have placed upon them; that is, *if they*, meaning his Auditors, *should stand to their Principles, then they should overcome their Enemies*, meaning the King and his loyal Subjects. Truly, my Lord, I cannot see how that can be, how *Ipsi* should be *we*; I and mine Auditors should stand to their Principles.

But setting that aside, come we then to the main Words: *He did not fear but they should overcome their Enemies.* The great force of these Words lies in the word *Enemies*. What is meant by *Enemies*? For all the rest without that, would not signify any great Matter, with Submission to your Lordship, as I think: And therefore here comes the great Burden, and that which is the sharp Sting of all this Indictment. And to make *Enemies* to signify the King and his Subjects, my Lord, is a very wonderful Innuendo, as I believe ever was attempted to be made. So it seems to me, with Submission to your Lordship; the word *Enemies* itself is a Word of so large Comprehension, that it reaches to a great Part of the World. God knows Mankind is so very unhappy, as that every one hath very many, and too many *Enemies*. Who is not an *Enemy*? A Man scarce knows; its well if he does. And this is a thing that's mighty hard, that so general a Word should have so heinous a particular Application.

There then rests the Burden of the Case, whether *Inimicos* should signify the King, and his loyal Subjects. If in the natural Grammar, the former Words of *Ipsi starent ad fundamentalia*, be, as I have shewn, to be referred to the *duos Reges* as the last Antecedent, then it must mean, that the *duo Reges* would overcome their *Enemies*, and then there is no hurt in all these Words, but whatsoever was spoken is very commendable, and very allowable: But if you would take it otherwise, I see not how it can be done without the greatest Strain in the World of so general a Word, to make *inimicos* mean the King and his Subjects.

Now, my Lord, let us see how they intend to help it out, and that is, by these Innuendo's. The Nature of an Innuendo hath been already opened to your Lordship, by *Mr. Wallop*. I shall not repeat any thing of that which was said before, for that I cannot take to be any Service to the Prisoner at the Bar, to take up your Lordship's time in Repetitions. The Books have been cited, and Reason itself will direct to that, for must not a Man be convicted by his own Words, as well as punished for them? It is not sure the skill of the Clerk to put in an Innuendo, or of any one else, that shall be construed to make my Words to have any other Sense, than I that spake them, intended them in. If the Words are not clear, why then they cannot affect the Auditory, so as to have any evil Influence upon them, to incite them to Sedition or Rebellion; for sensible Words must influence sensible Men: But Words that are insensible, can have no Influence at all upon rational Creatures. Then shall an Innuendo make that an Offence, which without it was not an Offence; especially so great an Offence as that of High-Treason? Surely not.

Besides, my Lord, all our Books are against making any such Construction. *Roll's Abr. 1. Part 84.* There is a whole Bead-Roll of them to prove, that Innuendo's will not help, where the Words in themselves have any Incertainty in them. The bare setting down the Words with Innuendo's are not an Averment sufficient to maintain an Action, or an Indictment. The Cases there are indeed upon Actions of the Case for Words, which in reason are under the same Rule.

For, my Lord, there are two Ways to apply Words, that are uncertain, to bring out the true Intent and Meaning of them, to whom they are to be applied; the one is by a *Colloquium* precedent, and where there is a *Colloquium* precedent of such Mat-

ter as will lead in the Sense of the Words, which without it were not to be understood, there the laying that *Colloquium* makes the Words come to be sensible, and there is this Reason for it, whenever that's done, the *Colloquium* must come in Evidence, and must be proved: But I never yet knew an Innuendo offered to be proved. Another Way is this, where Words are laid in a Declaration with an Averment precedent to be spoken of such a Person, then the Words, with an Innuendo after that Averment, shew sufficiently what is meant by them. If so be scandalous Words are spoken, as to say, *Thy Landlord, your Brother, your Master, your Servant, your Son, is a Thief*, or the like: In these Cases the Words in themselves do not express the Man of whom the Scandal is raised, but they give such a Denomination of the Man, that may by the Hearers be sufficiently known. Why then in that Case, if in the Declaration it is averred that the Plaintiff was his *Landlord*, was his *Brother*, was his *Master*, was his *Servant*, was his *Son*, and that these Words were spoken of him, and thereby it comes to be made apparent to the Court what is meant, and who is meant, that is well, and all that must be proved to the Court upon Evidence, or the Action cannot be maintained. By such means as this it is made plain and demonstrable, that there can no Doubt remain, either with the Court or the Jury, to whom the Injury is done, and of whom the Scandal is uttered. And these are the only two Ways that ever I could observe were allowed to be sufficient to maintain any such Action: And there the Innuendo comes very properly in to assist the Averment, or the *Colloquium*.

But now, my Lord, here in this Case, here's nothing of that kind but only a bare Innuendo, that such and such were meant, without either a *Colloquium* that there was a Discourse concerning such and such Persons, or an Averment that the Words were spoken of the Persons.

My Lord, I cannot tell what Precedents they will offer to your Lordship of former or later times. We have had but a very little time to look into it, and have not that recourse to the Precedents on the Crown's side that the King's Counsel have. But, my Lord, for Precedents that may have past *sub silentio*, without having the Question stirred, I suppose, will not be allowed by you: Lordship, and the Court, as Precedents against us. But I think there will be no Instance given where-ever any such thing came in question, that ever Judgment was given against the Defendant.

My Lord, this seems to be the Sense and Nature of the Words as they are laid in this Indictment, stripped of the Innuendo's, and your Lordship knows what a Case we have now before you. We are in the Case of the Life of a Man, which is much favoured in Law; and if there be any doubt or uncertainty, your Lordship will lean rather towards the favourable Side, and if, according to the Rules of Law, Words to make Men criminal shall not be strained, or forced beyond their plain, natural meaning, sure they shall not to make a Man capitally so: For the greater the Crime is, the greater Consideration the Court will have to see that there be no strained, forced Constructions to bring the Life of a Man in danger: And therefore I humbly pray that Judgment may be arrested.

Mr. Att. Gen. May it please your Lordship, I am of Counsel in this Case for the King: and notwithstanding any thing that has been said, I do conceive, that there is High-Treason well alledged

in this Indictment, of which the Prisoner is found guilty, against whom I must demand your Judgment. My Lord, there is a great difference in this Matter; that is, whether the Words are Treason, as they were spoken by him, and whether or no this Treason, admitting it to be Treason, be well disclosed by this Indictment: For, my Lord, I think to preach in a Publick Assembly, that *we have had two wicked Kings together, who have permitted Popery to come under their Noses*, and then to go on with it to *Stand to their Principles* (for so the Words are laid in this Indictment) *and they should overcome their Enemies, as in former times, with Rams-horns, broken Platters, and a Stone in a Sling*, is a very high Aggravation of such Words. And, my Lord, if you remember the Evidence, as I doubt not you do, it was all spoken in a Publick Assembly, before 4 or 500 People, and they were spoken without any Words intervening whatsoever. These were the only Words that were spoken relating to this Matter: So that these must carry their own pregnant Sense with them, of exciting the People to stand to their Arms against the wicked Kings, or else they are of no signification. And thus they are laid in the Indictment, and found by the Jury to be spoken positively to stir up the People against the King, to depose him, and to raise Rebellion within the Kingdom. This, I say, is positively affirmed, and laid down in the Indictment. But now, whether or no these Words are in point of Form so laid, that the Court must understand them with relation to the King and Government, and as an Argument to stir up the People, is the Question: For if they be so, then they are well laid, to support this Conviction of Treason.

Now for that, my Lord, I would only first say, they must either import Treason in themselves, or they do not. If they do import Treason in themselves, no Addition of the Person concerning whom they were spoken, as that they were spoken of the King, will mend the Case, or make it better. Tho' it be laid never so much to be spoken of the King, and that be never so much averred, yet if it be not spoken to disturb the Government, or to raise Rebellion and Insurrection, the adding a thousand times that it was spoken *de domino Rege*, would not avail. They confess they have no Precedents to produce, and I believe truly they have not: And so they only go by way of Argument, taken from Actions upon the Case for Words: Whereas there is a great Disparity in the Case between Actions of the Case for Words, and Informations or Indictments for Words that are Criminal or Capital, and I know if they will look into the Precedents that are in Print, in the Entries, and in the Reports of Informations or Indictments, they will find it is never, or very seldom, or rarely done, it being looked upon as to no Purpose, or as perfect Surplusage, to lay that such or such a thing was spoken, *de domino Rege, de Gubernatione*. But in Criminal Cases, and not Capital, it is commonly thus, of which there are multitudes of Instances: That such a one being of an ill Mind, to raise Commotion in the Kingdom, and stir up Sedition, spoke these and these Words. This was the constant Form in your Lordship's time, as your Lordship can remember, in the Informations that were, or the Indictments of Persons that had spoken Words relating to the Duke of York. I can remember when your Lordship used to say, *Never consult me, but follow the ancient Precedents*, which I dare undertake to say are all thus, and so I shall shew by and by, it has been in Indictments of Treason:

son: And tho' perhaps one or two might at any time be otherwise drawn (of which yet we can find none) yet, this hath been the constant Form for any thing that I can find, and it is of very great Consequence to say at this time of Day, That what has for 100's of Years together been the constant Practice, and way of Indictments and Informations, is not good, it were to turn all things *topsy turvy*, and to make great confusion in Prosecutions, and the Practice of the Law, in Criminal Matters. I shall therefore shew your Lordship that here is such a certainty as the Law does require, and as is usually practised, and that the Words in themselves are such, that they must have relation to what we have laid down in the Indictment, and to nothing else.

But then they do lay down this for a Ground, which I think I may grant them very easily, and yet it will signify nothing to what they mean; I would wipe off all these Innuendo's, leave them out of the Case, for I never expect any help from them at all; and then I do agree that an Innuendo without a strong, urgent Averment that the People which hear the Words spoke, and the Court that are to pass Judgment upon them, shall say forcibly appears from the Words themselves, who was meant, and what was meant, will not support the Indictment, nor has the Verdict fortified it at all.

But they tell you in Actions of the Case, if *John-a-Stiles* be called a *Bankrupt*, if he will bring an Action against the Party that spoke these Words, he must aver, and affirm, that they were spoken *de Querente*, of that particular Person that doth bring the Action; and so it is, the Law is so, and the Reason's plain, because there are many *John-a-Stiles's* perhaps, and the Plaintiff that brings the Action is but one; and therefore, if he does not show that the Discourse was of that *John-a-Stiles*, who brings the Action, is is uncertain who was meant, and cannot be supported by a bare Innuendo. But I take it in these Cases, wherever the precedent Averment is necessary, there must be a distinct Proof of that Averment, as if *John-a-Stiles* be called Bankrupt (in the Case I mentioned) and he brings his Action, and avers the Discourse to be *de Querente*; and he calls Witnesses, who prove the Words to be spoken, that the Defendant did say *John-a-Stiles* was a Bankrupt; and the Court demands this Question of the Witnesses, But do you know what *John-a-Stiles* the Defendant meant? and he shall answer, No, we only heard the Party say, *John-a-Stiles* is a Bankrupt: It is apparent that Evidence will not support the Action; for that Averment must be proved, that he that brings the Action was intended, and that there was a Discourse concerning him. There must be, I say, the Proof of the Averment to make up that certainty of the Application of the Words, which the Law requires. And therefore, in what Case soever it be, if the Words be the only Proof, or if the Words carry sufficient in themselves; to shew of whom they were spoken, it is ridiculous to say there must be an Averment that they were of such a one; because Words cannot prove themselves.

For, my Lord, where-ever Words by strong and pregnant Intendment do carry Slander, and of such a particular Person, there the Books are express that there needs no Averment, that they were spoken of such a one; as in the Case of *Fleetwood* and *Curle*, *Hob. 267.* which is a Rule for all Cases upon Actions of the Case for Words. *Sir Miles Fleetwood* being Receiver of the Court

of Wards, brought an Action of the Case against *Curle*, for that he (having Speech with one *Whorewood*) did speak of the Plaintiff these Words, *Mr. Deceiver* (Innuendo the Plaintiff) had deceived and cozened the King, &c. He did there alledge the Words to be spoken of the Plaintiff. In that Case, upon Not Guilty pleaded, it was found for the Plaintiff, and it was moved in Arrest of Judgment, that it did not appear by the Words spoken, that they were spoken of the Plaintiff: For, *Mr. Deceiver* had no Propriety to that purpose; and the Innuendo would not make it certain, when it appeared to the Court, that the Words would bear no certainty, tho' he did alledge the Words to be spoken of the Plaintiff in that Case; because there may be many Deceivers, or Receivers, and he must prove it particularly spoken of himself. But then the Book is express, that after a Verdict, tho' he did not aver it was spoken of him in his Office, yet Judgment should be given for the Plaintiff, because there is a pregnant, violent, certain Sense, that may lead the Court and Hearers to take it so to be meant, and cannot be otherwise imagined; and therefore the Court will not imagine it. As if a Man spoke of an Attorney, that he is a Knave, and spoke not of his Practice; why then the Action won't lie: But if he be named an Attorney in the Declaration, and the Hearers knew him to be an Attorney; in that Case, it was ruled not necessary to have any such Averment; for the Words themselves did import it in the Original Case, that it was spoken of him in his Office, by the Word *Deceiver*; that having an Allusion and ironical Resemblance to the Name of his Office; and in the other Case, because the Hearers knew him to be an Attorney.

So, my Lord, upon these Grounds, Judgments have gone in those Cases, which they themselves do so much rely upon; Actions for the Case for Words; wherever the Words import pregnantly such a Sense, there does not need such an Averment. But, I shall shew that in Informations and Indictments this cannot be necessary, and the Reason seems plain: For here, as we have laid it, and as the Truth is, we all know it, there is but one King, and one Government; and when Words are laid to be spoken to excite Commotions, or Rebellions, or Insurrections, they are but external Declarations of the Mind; the Treason that he is charged with, that is inward, it is the Thoughts that are Treason. But it is true, the laying that alone, that he did so compass and imagine, without some outward Declaration, would not be good in an Indictment, any more than the outward Declaration without the inward Intention. But the Treason is, that he did imagine to raise Rebellion and War within the Kingdom, to stir up the People against the King, and to depose the King, and bring him to Death, and deprive him of his Crown and Dignity; and then goes the Indictment on, and says, to the end that he might effect this Treason, he spoke such and such Words, which by that new Law (that *Mr. Pollexfen* mentioned) will amount to Treason in Speaking, as well as Writing. I say, it is positively charged in the Indictment, that he did thus and thus speak to stir up the People to Rebellion and War against the King; and then come the Words. If indeed any collateral Words be spoken, which in their own Nature import not a Tendency to incite and stir up the People against the King, it would be naught with Innuendo's; and so it would be, if there were

were twenty Averments. But I think that this is as strong an Averment as can be (what we all know to be true) that there is but one King, and one Government. And then he spoke the Words in a Publick Assembly, *We have had so and so, and if they would do so and so*; which carries forcibly and pregnantly this Sense, that it cannot be intended to be spoken against any one else, but against the King and the Government; especially now after the Verdict, when the Jury find that he did all this to raise up the People against the King. All the Discourse is in it self pregnantly and forcibly tending that way.

My Lord, we are now upon the Form of the Indictment. Put the case there are many idle Expressions in it, as I may grant there are; yet, if the greatest part import Treason, Sedition, and Rebellion, and are laid to be done to incite the People to Rebellion, and so found by the Jury; then the Indictment is well laid, and Judgment must be given for the King. The first Words are highly derogatory to the King, and must be understood to be spoke of him. If the Prisoner had thought these Words would not have been Treason, if he had demurr'd in the Case, by that, as the Jury find it now here, he would have confess'd it to have been spoken of the King; for it is said, He spoke it to the People, and he spoke it of the People of *England*; and to say that *Populus* may mean the King of *France's* People, as Mr. *Wallop* would have it, certainly no Man can think that: For when he speaks in *English*, to an *English* Auditor in a Publick Assembly, *That the People make a flocking to the King*, how can that King mean the King of *France*? And how can the Word *People*, by any Intendment, but a very foreign and strange one, be interpreted to mean that the *French* People should come over hither, for to be cured of the King's Evil, when (as he himself says) the *French* King claims such a Power? No, That does fix it particularly upon our own King.

Pray, let's consider then, what possibly can the Intendment of these Words be, that follow, *We have had now two wicked Kings together*? as for that Objection of the Word *insimul*, that it means together at one time, that sure can have very little in it, it being to be taken according to common understanding in our Dialect; and in *English*, to say we have had now two wicked Kings together, every one will understand it, we have had them one after another, because we have but one King at a time.

And then, my Lord, if the latter Words were left out, with submission, I conceive upon the Authorities that are in our Books, these Words would have been Treason upon the Statute of 25 *Edw.* 3. For, my Lord, in a publick Assembly of People, which is an unlawful Assembly, as this was, to speak such Words of the King, would be Treason. For put the case he had collected a number of armed Men at *Hounslow-Hearth*, and there exhorted them to stand together; that the King was a wicked Prince, and had misgovern'd himself in the Administration of the Government; I think that would be Treason within the Law. By the new Statute, to say the King is a Papist, plainly is a *Præmunire*; but to say the King is a wicked King, and has misgovern'd himself in introducing Popery; that's a step further than what the Act makes a *Præmunire*; for these are Words to stir up the People against the King, especially preached in a publick Assembly.

Then, my Lord, you'll take all these Words together; first, after he had drawn away that great Authority, and great Power that the God of Heaven hath given to the King, in curing the King's Evil, and declared him to be a wicked Prince, by suffering Popery to come under his Nose, and that he was to be compared to none but wicked *Jeroboam*; and then, to exhort the People to stand to their Principles, and he did not doubt, but they should overcome their Enemies, what can be plainer Treason? For it is plain, that he did speak to the People, to the Congregation; and that can never be understood otherwise by the Court, nor by the Hearers. For that Interpretation, that the King should overcome his Enemies, it is foreign and ridiculous, and not to be imagined by any body, that has either Sense or Reason about them.

But, my Lord, I shall leave all this (the Jury having now found it) to shew what Precedents we could prepare for your Lordship; how things of this Nature have been used to be drawn: For we have made, for the little time we had, as good a Search as we can; and I have found several: And indeed, I cannot find one otherwise, than as this is. And for late Informations, and Indictments, if you examine the Clerks that now are, they'll tell you, that there is not one otherwise: But that if it be said to be done with an intent to raile Rebellion or War against the King, or Sedition, or the like; and then say, he spoke such and such Words, that is sufficient. But I will shew your Lordship some ancients Precedents, some few which will shew how the Practice was heretofore.

The first is 3 *H. 8. Rot.* 17. in the Indictment against my Lord *Grey*, of High Treason; after the general Charge of machinating the Destruction and Death of the King, and Subversion of the Government; it is said there, that *Proditorie* he did speak these Words, *That the King's Grace should be driven out of the Realm, and the Prince's Grace should never succeed.* And it is not averr'd that these Words were spoken of the King, and of the Prince; nor was there any need it should be averr'd; for the Words plainly import they were spoken of them, and the laying it, that it was to raise Sedition within the Realm, was sufficient to make them High-Treason.

Then the next is my Lord *Cobham's* Case, 2 *Jac. Sessio.* 1ma; for it is one of the great Records that lie in the Chest, amongst the *Arcana*. But by the Book in the Office, we have a Copy of it; but there is the Record in the Chest, and there it is, *Posteaque 12 die Junii, ultimo præterit. ac diversis aliis diebus & vicibus, tam postea quam antea, dixerunt, &c.* (for there are other Defendants) *Proditorie* *there will be no good till the King* (meaning our Sovereign Lord the King) *and all his Cubbs* (meaning the Children of our said Lord the King) *were quite taken away, &c.* I leave out the General Charge of the Machination and contriving of the Death of the King; but to the intent to effect that Treason, such Words were spoken without any Averment, that they were spoken *de Rege*. There was no mention of the Progeny of the King before; or that the Cubbs that were spoken of, were the King's Children; neither would the Words *Regalis Progenies* answer the English Word *Cubbs*; which was a Word abusively mentioned by him. But in that Case it was held to be a good Indictment; and Sir *Walter Raleigh* was condemned upon it.

Another is *Williams's Case*; and that's very like our Case in the first Part; that is, the first Words insisted upon are laid positively to be spoken of King *James*, by an Innuendo. *Pasch. 17. Jac. Rot. 40.* there, after the *Machinans & intendens, &c.* it is laid, that he such a Day of *September, Proditorie devisavit* a treasonable Book, called *Balaam's Ass*; wherein there are such and such Passages applied to the King by the Innuendo. There is nothing said of that, to be spoken of the King, *de Rege*; but the Words of the Book carrying their own plain Sense and Meaning in them, that they must be intended of the King, and the Government, that was sufficient to maintain the Indictment; and he was executed. The Innuendo's are not material. If it can have no other Sense, that is enough to maintain the Indictment.

My Lord, in *Fitzbarris's Case*, which your Lordship and all the Court remember; part of the Libel related to the Duke of *York*, by the Letters *D. of Y.* and sometimes only called by the Letter *Y.* and the King himself by the Letters *Ch.* And the Innuendo is, meaning our Sovereign Lord the King; and there is nothing averred in that Case, and indeed there can be nothing averred; for by the Import of the Thing it must have that Sense.

Colonel *Sidney's Case*, my Lord, you'll find to be the same: There's no Averment; but the Words of the Libel are brought in with an Innuendo.

And you have another Indictment at *Salop, 31 Car. 2.* One *Pitt* was indicted of High-Treason, and convicted for these Words, '*If the King should hang or banish any of the Papists, his Throat shall be cut.*' This is laid in the same Form in the Indictment, as we have it here in our Case. If you please it may be read that he did *advise, proditorie*, speak such and such words, *if the King*, meaning our Sovereign Lord the King, without any previous Discourse of the King, or saying it was spoken *de Rege, should hang or banish any of the Papists (quasdam personas male dispositas, &c. innuendo) his Throat shall be cut.* He was convicted, I say, and I think was executed, tho' I cannot directly tell that: But this is the Record of his Conviction.

So I take it, it is, with Submission, that the Precedents go all along, both in Criminals that are not Capitals, in Indictments, and Informations; and also in Indictments for High-Treason. The charging the Words to be spoken to stir up Sedition and Rebellion within the Kingdom, without the help of any Averment whatsoever, is sufficient; that is a strong Implication that they are spoken of the King and Government.

And, my Lord, as to these Words they could not be laid otherwise, than they are in this Indictment; for this is all that the Persons that are the Witnesses swore was spoken. Your Lordship remembers it, it was so, when they were here, they could swear no more. So that to have averred that he spoke to them *de Rege & Gubernatione*, would have put a Proof upon us, that our Witnesses would not have come up to. We must have proved a Discourse of the King and Government, and a swearing of the Words would not have been a Proof of that. The Jury has found that this was done to stir up Sedition, and to levy war; therefore, I conceive, according to the constant

course of the Precedents, there is no need of any Averment; but the words are well laid, and well proved, and he well convicted.

To say, that Enemies is a very general word, and that we have Enemies of all sorts, and that therefore a bare Innuendo cannot make it mean one more than another, is odd in this Case: For I would fain have any Man assign me what sort of Enemies he could be thought to mean, in such a Discourse; he could not mean spiritual Enemies; because the Instruments that they were to be destroyed with, were carnal Weapons, broken Pitchers, and a Stone in a Sling. These are not fit for overcoming spiritual Enemies; but they must be such Enemies, as can be destroyed by such Instruments, Carnal Enemies, that are to be vanquished by outward Force. And then what Enemies can such a publick, unlawful Assembly have, but the Government? All that are of their own Side and Party are none of their Enemies. And it cannot be taken distributively, that every particular Man has his Enemy, that's a foreign Understanding: But when he spoke to the Congregation in a Conventicle, that they *should overcome their Enemies*, being so unlawfully assembled, that must be the Government. And had he not told you before, who were the Enemies that he plainly meant? He had said, that the King was a wicked Man; and according as he represented him, an Enemy to God and Man by introducing Popery into the Kingdom. And you are to consider the Time when, and the Place where these Words were spoken. We know that in these Conventicles it has been the constant Cry, that we should be all over-run with Popery, and the like: And therefore, that is considerable in the Case.

My Lord, I make a great Difference between words spoken in private, and words spoken in a great and large Assembly. It is the same Thing as if it had been spoken at the Head of an Army; especially when People meet contrary to the Laws of the Land in Defiance of the Government, and gather together in such great Multitudes; and have such Discourses and Opinions broached amongst them. I cannot see truly, how it is possible to have been better laid, being sworn directly as it is laid; and especially being found to be all spoken to disturb the Government, and to raise Sedition and Rebellion. Therefore I must submit it to your Lordship; and pray your Judgment against the Prisoner for the King.

Mr. Sol. Gen. My Lord, I beg leave to add one Word on the same Side. That which I shall apply my self to, is to shew that this is a very good Indictment, in the Form of the Indictment, and that upon this Matter which the Prisoner is proceeded against; for it could not be better.

My Lord, the Fact charged upon the Prisoner is as Mr. Attorney has opened. These Words were spoken in a Conventicle, *The People make a flocking to the King to cure the King's Evil, which he cannot do, &c.* These are the Words upon which the Prisoner was committed: These are the Words upon which he is proceeded against; and these are the Words which have been found against him. And, my Lord, more Words than these are not alledged to be spoken by the Prisoner, nor proved to be spoken by him at his Trial upon this Indictment. Therefore, if these

Words

Words are High-Treason, this is a good Indictment in Substance, if it prove so too in Form. And whether these Words are not themselves Treason, I shall not now speak, but shall only go to shew, as I said, that it is a good Indictment in Point of Form. For these Words are his Crime, as spoken in that Conventicle; and the only Crime of which he was accused, and of which he is found guilty.

Now, my Lord, let us see how the Indictment is. He is charged with compassing, imagining, and intending to raise Rebellion, and levy War in the Kingdom, and to depose the King; and to bring the King to Destruction: That is the Charge of High-Treason, in the Kind of it. Now, as that is the Charge, it is of absolute Necessity to alledge an Overt-Act, which must be proved too; and if there be not an Overt-Act, the Indictment is naught. Well then, the Treason is compassing the Death of the King, and intending to raise Sedition, and levy War. What is the Overt-Act charged upon him? Why, to bring such his wicked Purposes to pass, he did traiterously speak, publish, and utter [*the Words of the Act of Parliament, in 13 Car. 2.*] in an unlawful Assembly, in the Presence of divers of the King's Subjects, these Words that I repeated before to your Lordship.

Now, my Lord, I ask; are these Words Treason in themselves, or are they not? If they are Treason of themselves, then the Indictment is certainly good in Form, without saying, that he spoke the Words of the King, or of the People of England, Subjects of the King. For either they do import that of themselves, or they do not. If they do import it of themselves, the saying that he did speak them of the King, and of the People, would have been impertinent and idle, because it is a thing manifestly plain of it self. If they do not import this of themselves; then had it been charged, that they were spoken of the King and of the People, this must have been proved.

To go on then, my Lord: If it must have been proved, it must have been proved either by the Words themselves, or by something else. If it were to be proved by the Words themselves; why then it returns to the old Question, and we need not alledge it. If it were to be proved by something else, then the Fault is not in the Indictment, but it must be want of other Matter than what our Witnesses would prove; which, I am sure, would have been a very great Fault in us to have drawn upon our selves. But if the Words import of themselves the Meaning to be of the King, and of the People of England; then it is plain they make the Treason of themselves, and there requires no Averment.

As now, for Instance, my Lord, to change the Words a little, to illustrate the Case; as suppose it had been charged in the Indictment, that to bring his wicked Purposes forth to effect, he did speak these Words in such an Assembly, *Procure to your selves Arms, and make your selves ready by such a Day, and go to Whitehall, and kill the King*; would any Man have said here, that it was necessary that we should say in the Indictment that he *dixit de Populo, vel de Rege*, so and so? No certainly, it is not necessary, because the Words plainly import their own Meaning.

So here in this Case; if the Words themselves necessarily import to be spoken of the King, it

is as impertinent here to say, *dixit de Rege, dixit de Populo*, as in that Case; because it is no more than what they necessarily and naturally import of themselves: Which shews that this Averment, that they would have, is absolutely immaterial; and, if it had been charged, would have required some other Proof than the Words themselves. And so the Fault cannot be, as they would alledge, in the Form of the Indictment; but in the Substance of the Words, that they do not import in themselves such a Meaning. And therefore, I think, with Submission, I have maintained the Form of this Indictment, beyond all Contradiction; and, notwithstanding all their Objections, it is a very good Form without the Words *dixit de Rege, vel de Populo*.

As Mr. Attorney said, it is necessary, my Lord, in Actions on the Case for Slander, to aver, *dixit de querente*, because he must ascertain the Person of whom the Words are spoken, to be the very Plaintiff; for there may be divers of the same Name: And you must always, upon a Record, ascertain the Person, to entitle the Plaintiff to the Action: But where Words are pregnant, and full of themselves, there needs no Averment in such a Case; which, without such Pregnancy would be necessary, and, if not done, the Action would fail. As in that Case that was cited by Mr. Attorney of Sir Miles Fleetwood; if it had been that the Words were, *Sir Miles Fleetwood has deceived the King*, it would not have born an Action, unless it had been averred to have been spoken of him as of *cozening* the King in his Office: Because generally to say a Man has *cozened* the King, will not bear an Action, it is so loose. But, when he says, *Mr. Deceiver*; the Ironicalness of that shall not excuse him, but rather demonstrate both who, and what he meant; that it shall be applied to him, as doing it in his Office. And, being so, it must necessarily be understood to be a very great Slander; and then it needs no Averment. So says the Book.

So that where Words are plain and full, even in an Action on the Case, there requires no Averment: But in Indictments, they being for Offences against the Government, the very ancient Forms used will govern the Case, as well as the Reason and Nature of the thing; that no one can be meant, by such sort of Words, but the King and the Government: And, for that I rely upon the Precedents that have been cited, that the Forms were always thus. The Precedents, with humble submission, where the Overt-Act laid in the Indictment, is by Words spoken, that it is said, *dixit de Domino Rege, &c.* there is not one that does ever carry it so, but the Forms are constantly in the same Manner with this that is now before your Lordship, without such Averment, as carrying plain Surplusage, to aver that which the Words necessarily import.

To say, my Lord, in this Case, as we hear it objected on the other Side, That these Forms passed *sub Silentio*, and no such Objection was ever made, I say, that is no Objection to our Indictment; for the Argument sure turns the other way; because the Forms have been constantly in this Manner that ours is, therefore it is assigned, that what they offer, is no Objection at all; for, doubtless, in so long a tract of Time, when so many learned Men sat on the Bench, and so many learned of the King's Counsel attended the King's Courts, and so many Persons have been indicted,

indicted, tried, and suffered upon such Indictments, who would have saved their Lives, no doubt, if they could, by making such Advantage of such an Exception; that is a strong Argument, that it was never thought an Exception. So that, besides the Reason of the thing, the Precedents are all with us, which hath always been accounted a good Argument.

My Lord, a great many of us remember the Indictments of latter Times; particularly that of Colonel *Sidney*: Tho' there is another Overt-Act laid in that Indictment too, yet that is nothing to this Case. If there be but one Overt-Act laid in the Indictment, it must be proved by two Witnesses; but if there be several Overt-Acts laid in the Indictment, and one is proved by one Witness, and the other by another Witness, that is sufficient to maintain the Indictment. In Mr. *Sidney's* Case there was to one Fact but one Witness; and therefore it was necessary to lay another Overt-Act, which was proved by other Witnesses. And one Overt-Act comes to this point that's now in Question before your Lordship. It is in this Form directly, without any Averment that the Words were spoke or written *de Rege* or *de Regimine*, but that the Book contained so and so: And the Thing it self speaks it self of whom it was meant. If therefore the Words in that Case, being proved, were necessarily to be applied to the Government of *England*, there need no Averment: No more does there here.

My Lord, not to trouble your Lordship further in so plain a Case, the Precedents being thus, and it being known to be the constant Practice in point of Form, I would fain know what they would have had us done. The Witnesses swear these are the Words, and there are no more, how then can we frame a better Indictment, than upon the Words that they swear were spoken? My Lord, we pray your Judgment for the King.

L. C. J. Well, have you done on both Sides?

Mr. Attorney. Yes, my Lord.

L. C. J. Truly for my part, I think this is a Case of great Consequence on the one side, and on the other. I hear it's said there are abundance of Precedents in the Case, some have been mentioned, and it is necessary we should look upon these Precedents, before we deliver any absolute Opinion. But, truly I must say, Mr. Attorney's Precedents have with me very little weight. And, I must differ from Mr. Attorney in another Thing: For if in case the last Words were out of the Case, of *standing to their Principles, and overcoming their Enemies*, do you think, that because it is said in the fore part of the Indictment, that he intended the Death of the King, and to raise Rebellion, and therefore said, there were two wicked Kings, who suffered Popery under their Noses, and were to be likened to *Jeroboam*; that that would be a good Indictment for High-Treason? Then it were plain the Act of Parliament, 13 *Car. 2.* was made to no Purpose. For tho' I doubt not in the least, words may be an Overt-Act of High-Treason, in compassing the Death of the King, upon the Stat. of 25 *Edw. 3.* I make no Difficulty in the World of that: So was my Lord *Cobham's* Case, and so were the Cases in *Harry the Eighth's* Time, ' *We will drive the King out of England*, or any thing of that Nature: I say, that would be an Overt-Act sufficient to bring a Man within the Compass of the Statute of 25 *Edw. 3.* because those are express words tending to the Death and

Destruction of the King, the deposing him and depriving him; and they call him the King. But, if a Man comes and says, That such a one with a Purpose and Intent to destroy the King, said these words, That *the King could not cure the King's Evil*; that's not such an Overt-Act, as to make good an Indictment of High-Treason. And to say, that the King introduces Popery under his Nose into the Kingdom; why it's a very high Crime, but it is prescribed by the Act of Parliament to be prosecuted only as a Misdemeanour, and punished by *Præmunire*. If you look into that Statute, you will find which way the words shall have a Tendency, that are to convict a Man of Treason; that is, that tend to the Imprisonment, bodily Harm, Death, or Destruction of the King, or raising Insurrection, and Rebellion; or levying War within the Kingdom, that is High-Treason. But words, that do not necessarily tend to any such thing; as to say the King is a *Papist*, introduces Popery, is *Popishly affected*, Phrases that some People delight in; that has a peculiar Punishment appointed to it by this Act. And this is all taken care of, to shew the Judges how they should proceed, being careful of leaving it loose, in so great a Case as High-Treason. And the Parliament seems to be the more careful in it, because they make the treasonable words such an offence, during the King's Life only. Now, as Mr. Solicitor puts the Case by way of Illustration in other words; I make no difficulty, but to bid Men prepare Arms, and go to *Whitehall*, and kill the King, would be rank downright Treason. Would any Man in the World doubt to aver, that that were an Overt-Act? No man living would. But if I will say, that to compass and imagine the King's Death, he bid them rise up and go to *Whitehall*, and they should overcome their Enemies, does that import the King? There's no necessity of that. The King cannot be said to be an Enemy, unless it be plainly declared by the Party himself who he meant. And then to say, How could it be made better? No doubt of it, it might easily be made better, if it had been considered of. For if you had come and averred, that these Words were spoken concerning the King, and the People of *England*, certainly it would have made it more certain. I don't bind my self now in my Opinion, by what I now tell you; but I am only breaking the Matter. If you had said, that he said, If we will stand to our Principles, we shall destroy them, I think it had made the Case stronger ten times; but you have not so done. Indeed, I am not so fond in my Imagination, as the Counsel for the Prisoner seem to be; That *we have had two wicked Kings together, who have suffered Popery to come under their Noses*; that therefore we must run it up to King *Ethelbert*, and I don't know who; no, that plainly, in common *English* speaking, means two Kings successively; and it must be made a strange, forced Construction, if we should interpret it, that he did not speak these Words of the late blessed Martyr, and his present Majesty. And because *Enemies* is in the Plural Number, therefore to make it Nonsense, because one is destroyed, if the words had been well laid, as they might, therefore it could have no relation to him that was left, I say, would make a strange forced Construction. That might be well enough, if the words had been properly laid. But when you

you come to speak of Enemies, innuendo the King and his Subjects? how can that possibly be? For you had talked of no body before that they are said to have a Displeasure to; and therefore, without saying that the King is an Enemy, to say, *Stand to your Principles, and you shall destroy your Enemies*, innuendo, *The King, is*, I doubt, to stretch it a little too far. But, whereas I have put the words, how I think they should have been laid; says Mr. Solicitor, the Truth is, they were not so spoken, as you would have them laid; but they are laid, as they were spoken, and as they were sworn; and that's a Point of Fact to be left to the Jury, whether they aimed at the King and Government, or not. Do you think that an Answer? for it would be the same Argument in an Action of the Case for Words: Where it's plain it must be *dixit de querente*, you do so, and so. My Declaration must aver it, and I must prove it too. If I do not say it, tho' I prove it, that won't maintain the Action; if I do say it, and not prove it, it will not maintain the Declaration; all's naught: and what is there more in this Case? If you had said it, that would have directed the Jury plainly, upon finding the words as laid in the Indictment, to have found what was the Intention of the Party by these words. These are things (I must confess) that wonderfully weigh with me. It is in a Case of a capital Offence, where the Life of a Man is concerned. If the Precedents have all gone so, there is some weight in that: But if the Precedents be only such, as you have spoken of, Words directly telling who is meant, they have no manner of likeness to the Words in this Indictment, because there they could never import any thing else.

In the next place, I am stumbled at another thing, Mr Attorney, and that is, the difference of the Persons in one part of the Words, and t'other. You have begun in the first Person Plural, *We have had two wicked Kings together*, and as the Latin Words are, *Nos habuimus nunc duos iniquos Reges insimul*, but afterwards you say, and if they, *Ipsi*, will stand to their Principles, he did not doubt but they should overcome their Enemies. It had been best to have laid them, as (certainly in common understanding) they must be believed to be spoken, *If you or we will stand to our Principles*; and then the very Innuendo would have been more sensible and applicable.

Mr. Sol. Gen. But, my Lord, it was sworn so by the Witnesses, that he said, *If they*.

L. C. J. The words say he preached, *We have had*, that is he, and the Congregation assembled, and then it is afterwards turned to *they*. I make no difficulty in the World, but that *we have had two wicked Kings together*, was intended of the late King and this; and if it had been alledged, that afterwards he had said, *We shall overcome them*, and a Jury had found that these words were spoken with such an Intention, as is laid in the Indictment, it would have been Treason. But both in Grammar and Reason, when you come to say, and *si ipsi*, &c. pray, to whom should that relate? What's the English of *ipsi*? Is it *we* or *they*? If it be *they*, in the third Person, there are no third Persons spoken of, but the two Kings, and they are the last Antecedent. For my part, it does stumble me, it is a thing of great Consideration. I speak not, as I said, to bind my self in Opinion, but I think, if ye had put the word *Nos* instead of *Ipsi*, it had come nearer to the Understanding of Men, both in Grammar

and Sense. For I exclude my self, and them I speak to, if I put it in the third Person, and your Innuendo (I said) can no way help it.

Mr. Att. Gen. Truly, my Lord, I did not think that that did rest upon your Lordship at all, as any Objection.

L. C. J. It does rest, I assure you, Mr. Attorney.

Mr. Sol. Gen. If we had done otherwise, we should not have laid it as the Truth is, and the Latin does not alter the Case, for the word spoken was *They*.

L. C. J. Ay, but certainly he said (no doubt) *You or We*, if you will stand to your Principles, it's Nonsense else.

Mr. Sol. Gen. My Lord, I take that to be well enough, for here are three Sentences. The first is, *That the People make a stocking to the King, &c. Quod Populus, &c.* The next is, *Quod nos habuimus, &c.* And then the third is, *Quod si ipsi*. Now *Quod* governs the particular Sentence, and it being a particular Sentence by it self, with humble Submission, it is good in Grammar, and in Sense too.

L. C. J. Suppose you were to speak it in English. Mr. Solicitor, suppose you were to speak it, *Now we have had two wicked Kings together, who have suffered Popery to come in under their Noses* (meaning the late King and this) there perhaps the Innuendo is sensible, and, no doubt of it, then he must mean them: But to say, *If they will stand to their Principles, they shall overcome their Enemies*, pray to whom does that *they* relate?

Mr. Sol. Gen. My Lord, with humble Submission, you put the Case of an entire Speech, made in the Person of the Preacher, and the Congregation, and as the Words were spoken all at one time. I would make it an entire Speech too, but it seems to be several Sentences, and therefore that differs the Case. For taking it that these are three distinct Sentences, they might be spoken in a several manner by varying the Person, and so they were sworn. And suppose he had only spoke the last Words, an Indictment for this in the third Person had been a good Indictment: And if it had been charged in that Case, *Quod dixit & asseruit, quod si ipsi, &c.* and then in Evidence, come and prove these Words, would not that have been good?

L. C. J. Truly, I think, Mr. Solicitor, if the Indictment for these last Words alone had been in the third Person, it is a Question whether that might have been a good Indictment, if you had come in Evidence, and proved, that he had said of the King and Government, *If you will stand to your Principles, you shall overcome your Enemies*. Tho' I deliver no absolute Opinion of that, because there ought (I think) to have been an Averment, that they were spoken of the King, and the People.

Mr. Sol. Gen. In an entire Speech (my Lord) there the Relative must be applied to the last Antecedent, according to Grammar.

L. C. J. And I think it must be taken to be an entire Speech, and you lay it in the Indictment to be so, and then the Relative must go to the last Antecedent, or else Dr. Busby (that so long ruled in *Westminster-School*) taught me quite wrong, and who had tried most of the Grammars extant, and used to lay down that as a positive Rule in Grammar, that the Relative must refer to the next Antecedent.

Mr. Just. Withins. Mr. Solicitor, if you make it several Speeches, then it's ten times worse, for then the latter Part is so uncertain, without an A-

verment of whom the Words were spoken, that sure it can never be made good.

Mr. Sol. Gen. Suppose it had been *Ulterius dixit*, would that have made it a distinct Sentence? If it would, our Proof it may be was, that it was an entire Speech, but yet consisting of several Sentences, and must have the common understanding, as to their relation one to another.

Mr. Att. Gen. This Objection of *quod ipsi*, &c. was not moved by the Prisoner at the Bar, and therefore we did not expect to speak to it.

L. C. J. It is started here now by the Counsel. And it is a Question truly with me, whether this can be any way sensibly applied, as you would have it. Surely the Innuendo can never make it good.

Mr. Att. Gen. My Lord, I say fling all the Innuendo's out of Doors, the Words in themselves will do it.

L. C. J. Why then we must see whether it be a good Indictment in point of Form, or rather in point of Substance, as you have laid these Words, without saying they were spoken *de Rege*. It is a Question of great Weight and Concernment, both to the King, and to the Prisoner, and therefore we must take good time to consider of it, before we deliver a settled Opinion. But, *Mr. Solicitor*, you very well remember that *Staley's Case* was otherwise. For, tho' the Words were, the King of *England* is a *Tyrant*, &c. yet there it is said, and expressly averred, that he spoke the Words *de Rege*.

Mr. Att. Gen. Could Colonel *Sidney* have moved in Arrest of Judgment this, that the Prisoner now starts? No, he could not sure. He might have moved for a new Trial—

L. C. J. Certainly (*Mr. Attorney General*) that Case comes not up to this. Where the Words import in themselves that the King is meant, or any way circumstantially, it does necessarily imply they could be meant of no one else, and that would be good without the Averment. Which was the Case of Colonel *Sidney*, where the Matter declared in the Libel was plainly down-right relating to the Government, that *if he did so and so he must renounce his Crown*, and the like. How can that be applied to any but the King? *The People of England have committed the Kingdom to his Power*, &c. Why, how can it be interpreted that any Body else is meant?

Mr. Att. Gen. When will your Lordship please to give Judgment?

L. C. J. *Mr. Attorney*, we will consider of it. It is usual, in Cases of less Difficulty than this, to take time of Consideration. I do not say, but that looking upon the Precedents, perhaps I may alter my Opinion, and therefore do not speak this to bind my self: But we will consider of it.

Mr. Att. Gen. I look upon it that the Government is greatly concerned in this Matter, more than ten such as the Prisoner at the Bar.

L. C. J. It is true, *Mr. Attorney*, the Government is greatly concerned, and the Prisoner is greatly concerned, for his All is at Stake. I do say a good Indictment might have been made, I am sure.

Mr. Sol. Gen. This is the best we could make, for we had no Proof to make out any Averment, because these were all the Words he said.

Mr. Att. Gen. After the Jury have found the Words as laid in the Indictment, was it ever asked of a Jury, *These Words were spoken of the King, or they were not, but you have not said that they are spoken of the King, for it is not laid in the Indictment? Would that ever vitiate the Verdict?*

L. C. J. *Mr. Solicitor*, pray, would you have us give Judgment, that the Jury could not find that the Words were spoken of the King?

Mr. Pollexfen. The Jury have not found that they were spoken of the King, for there is no such thing averred.

Mr. Att. Gen. Nor they have not found them to be not spoken of the King. But they have found them to be spoken to stir up Sedition.

Mr. Solicitor. We are never bound by Law to aver *that*, that we cannot prove. And therefore I put all upon that *Dilemma*; Either the Words import of themselves to be spoken of the King, or they do not. If they do not, if we had said, *dixit de Domino Rege*, it must have been proved, and that would have been to have left it to the Jury whom he did mean. And if they be not self-evident, God forbid the Jury shall be charged to find out such a Meaning, but if they are self-evident, they need no Averment.

Mr. Just. Holloway. Truly, we think it may be good Evidence to a Jury, and it is every Day done in Cases of Actions for Words. It is left to the Jury to consider whether he meant the Plaintiff, *John a-Stiles*, or any other: And the Evidence is helped by this, or that circumstance, where the Words do not naturally import it.

Mr. Just. Walcot. I do think that the Averment that these Words were spoken of the King, is a Point of Fact that ought to be averred, and proved. Might not the Jury in this Case have found that they were not spoken of the King? If they had found that, why, they would have acquitted him, if they had found they were, and you had not alledged it, why then they had found more than the Indictment would lead them to.

L. C. J. Well, this is only by way of Discourse, not that we bind our selves by our present Opinion. We must look upon it. We will not give our Judgment suddenly in a Case of this Nature.

Mr. North. Will your Lordship please to spare me one Word?

L. C. J. Ay, Sir, let every Man be heard, in God's Name.

Mr. North. My Lord, as to this Objection, *quod ipsi* relates to the two wicked Kings spoken of just before, that cannot be: For you take notice that these Words of the two wicked Kings relate to the late King, and to the present, as the Indictment says. One of the Kings is dead, so that you cannot understand it to be of the two Kings, that should overcome their Enemies, and therefore it must be the People. This *Populus* being a Noun of Multitude, and taken in the Plural Number, *Ipsi* will very well relate to it.

L. C. J. *Mr. North*, the Argument turns both Ways upon that, and certainly he did not express himself after that rate. It is so loose a hung-together Indictment, as truly I have scarce seen. For my Part, I would know how it come to pass, that we should not have as much Certainty in Indictments, as we have in Actions upon the Case?

Mr. Att. Gen. My Lord, there must be Certainty in all Cases, and we think there is Certainty enough in this for your Lordship to give Judgment upon.

Lord Ch. Just. *Mr. Attorney*, I believe if you sat in our Places you would not think so. All our Books require greater Certainties in Indictments, than in Actions on the Case: Nay, in Causes of this Nature, we are bound by our Law Books, to be of Counsel for the Prisoner, which we are not

in Civil Causes, where the Prisoner may choose his own Counsel. And we have not one Act of Parliament to help the defect of forming Indictments, as we have in Civil Actions, but still in all the Statutes made in *Jeofails*, there is an Exception of capital Offences, to shew that our Ancestors would not help Uncertainties or Insufficiencies in Form, where the Life of a Man was concerned. This seems to carry a great Consideration with it.

Mr. Att. Gen. My Lord, I was very willing and desirous your Lordship should assign the Prisoner this learned Counsel, because we did suppose they would have produced some Precedents of a better Form than this: But they have cited none.

L. C. J. And you have cited never such a Case as this, *Mr. Attorney*. And if we can find no other like Case, we must be governed by the Reason of the thing.

Mr. Att. Gen. My Lord, we hope you will expedite it, for the sake of the Government.

L. C. J. Certainly, I think it is very uncertain who are meant by *Enemies*, it may be *Mr. Solicitor*, *Mr. Attorney*, it may be the Court, no body knows who it is: For every body knows, that to Preachers in Conventicles, and to those that meet there, the Judges, and all that are for the Support of the Laws, may be reckoned to them as *Enemies*. But when it is so uncertain who are meant, how can we supply it by such an *Innendo*? That there might have been a good Indictment framed upon such Words as these, as he in all Probability spoke them, and he justly found guilty, is no Question with me at all. And (as I said the other Day, for the sake of the Auditory) if he be guilty of speaking such Words, and of Treason in speaking them; what will they be guilty of that were present, and heard the Words spoken? They may thank God, that we have a gracious King, that does not take all

the Advantages the Law gives him against those that break his Laws.

Mr. Sol. Gen. My Lord, your Lordship was pleased to mention *Staley's Case* to me. As I do remember it, it is not as your Lordship says: But it is, *That he, to perfect his wicked Treason (speaking of the King) said so and so.* Now, if an Averment be necessary, this is a naughty Averment; for it is not positively averred that he did speak of the King.

L. C. J. Well, we will look upon it. And I would ask you, *Mr. Solicitor*, Whether if he said (as it is most likely he did) *If you will stand to your Principles*; and you put in *se ipsi*, whether that would be good?

Mr. Sol. Gen. My Lord, we put it in as the Witnesses swore it.

L. C. J. They did swear the words according to their Apprehension; but, no doubt of it, in common Form he must speak them as I say.

Mr. Att. Gen. They swore the words so; and we could lay them no otherwise.

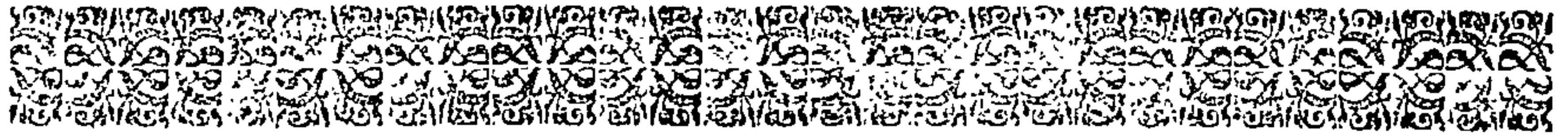
L. C. J. Well, *Mr. Attorney*, will you move any thing?

Mr. Att. Gen. No, my Lord.

L. C. J. Then we will consider of it. And take you back the Prisoner; and you shall have a Rule of Court to bring him, when the Court is ready for Judgment.

Then the Prisoner was carried back to the King's Bench; and no Judgment was given that Term; But the next Term Mr. Rosewell pleaded the King's Pardon at the Bar of the Court of King's-Bench; and was discharged.*

* See the Pardon in the Appendix.



CXXXI. *The Trial of JOSEPH HAYES* at the King's-Bench for High-Treason, in corresponding with Sir Thomas Armstrong, an Outlaw for High-Treason. Nov. 21, 1684. Mich. 36 Car. II.*

MR. Hayes was brought by *Habeas Corpus*, upon the 3d of November, 1684, from the *Gate-house*, and was arraigned upon an Indictment, to this Effect, *viz.*

That he being a false Traitor against the King, &c. the 31st of August, in the 35th Year of the King, knowing Sir Thomas Armstrong to have conspired the death of the King, and to have fled for the same, did traiterously relieve, comfort, and maintain him; and for his Relief and Maintenance, did pay the Sum of 150 l. against the duty of his Allegiance, &c. To this he pleaded Not Guilty.

Upon the 21st of November, 1684, He was brought to Trial, before the Lord Chief Justice *Jeffreys*, Judge *Holloway*, Judge *Withins*, and Judge *Walcot*; and the Jury being called, he challenged the following Persons.

Sir Thoms Griffith,
Richard Ellis,
Thomas Langham,
Henry Whistler,
Nicholas Smith,
Thomas Soper,
Thomas Passenger,
Henry Minchard,
Peter Jones,
William Crowch,
Peter Devet,
Henry Lodes,
William Fownes,
Charles Gregory,
William Peele,
Richard Weedon,
Thomas Pory,
Thomas Piercehouse,

Richard Burden,
John George,
John Steventon,
Robert Watkins,
George Twine,
Thomas Short,
Robert Townshend,
James Busb,
Walter Masters,
Thomas Larkham,
Edward Cooke,
William Fashion,
John Flowerdew,
John Greene,
John Grice,
Charles Fowler, and
James Smith.

* *Burn.* Hist. of his own times, Vol. I. p. 599.

The Jury sworn, were

<i>Samuel Sheppard,</i>	<i>Edward Piggot,</i>
<i>Daniel Allen,</i>	<i>Thomas Brailesford,</i>
<i>Röwland Platt,</i>	<i>Edward Cheek,</i>
<i>Adam Bellamy,</i>	<i>Edward Underwood,</i>
<i>Daniel Templeman,</i>	<i>Robert Masters, and</i>
<i>William Dewart,</i>	<i>William Warren.</i>

Then, the Indictment being read, Mr. *Dolben* as Counsel for the King, opened it to the Jury.

Mr. *Attorney General* *. After
* Sir *Robert Sawyer*. Sir *Thomas Armstrong* had fled, the Prisoner relieved, and aided him with Money, and that, after he was indicted, and sued to the *Exigent*; besides, a Proclamation followed upon his flight, which was a sufficient notice to all the King's Subjects. Sir *Thomas* went by the Name of *Henry Laurence*, beyond Sea; by that Name the Prisoner held a Correspondence with him, and sent him a Letter, dated the 21st of *August*, and tells him, he had sent him a Bill of *Exchange*, for 165 *l.* drawn upon his Brother, *Israel Hayes*, who was acquainted with Sir *Thomas*.

If it were not for these receiving and nourishing of Traitors, they would not lurk at *Amsterdam*, as they do. The Letter was taken about Sir *Thomas*, and we shall prove it is the Prisoner's Hand-writing, and that Sir *Thomas* received the Money.

I hope, you will take care, by convicting this Gentleman, to stop the Fountain, which issues so much Supply to these Traitors, who lurk abroad.

Mr. *Hayes* then affirmed, that he never knew Sir *Thomas* in his life.

Then, the Indictment against Sir *Thomas* was read, which was found the 12th of *July*, and Mr. *Glover* proved a Copy of the King's Proclamation against Sir *Thomas*, dated the 28th of *June*, 1683.

Then, *Ezekiel Everis* was sworn, and testified, that in *August*, 1683, he was at *Cleve* in *Germany*, with the Lord *Grey*, who went by the name of *Thomas Holt*, and Sir *T. A.* came thither, by the Name of Mr. *Henry Laurence*, and shewed him a Bill of *Exchange*, from *England*, upon Mr. *Israel Hayes* in *Amsterdam*, for 160 *l.* odd Money; and that it was for 150 *Guineas* paid in *England*; and he told him, it was drawn by *Joseph Hayes*, and it was signed *Joseph Hayes*; and the Bill was accepted, and he saw *Israel Hayes* his Letter to Sir *Thomas*, by the Name of *Laurence*, which mentioned the sending the said Sum to *Cleve*.

The Common Serjeant (*Crispe*) then delivered a parcel of Letters into the Court, and swore that he received them of the Lord *Godolphin*, and they had been ever since in his hands.

The Lord *Godolphin* then testified, that he received three Letters produced in Court, from Mr. *Constable*, Mr. *Chudley's* Secretary, who told him they were taken about Sir *Thomas*, that one of them, without any Name, mentioned 150 *Guineas* returned to *Henry Laurence*.

Constable testified, that he was present, when the Scout of *Leyden* apprehended Sir *T. A.* and that the Letters were taken out of his Pocket, and he himself delivered them to Mr. *Chudley*, who seal-

ed them up, and sent them by him, to the Lord *Godolphin*.

Charles Davis testified, that taking Boat from *Amsterdam* to *Rotterdam*, he met *Israel Hayes* and Sir *Tho. A.* coming to take Boat, and Sir *Thomas* went with him in the Boat, and he told him his Name was *Henry Laurence*.

Davis added, that he lodged a Month in one *Briscoe's* House at *Amsterdam*, where there was a Club every *Thursday*: There were Mr. *Israel Hayes*, Mr. *Henry Ireton*, one *Wilmore*, *Emerton*, *Dare*, and some other *English* Merchants; and he heard them several times abuse the King at Table.

The *Attorney-General* then shewed Mr. *Hayes* a Letter, saying, It may be he will save us the labour of proving it; but Mr. *Hayes* disowning it,

Mr. *Walpole* was called, and Mr. *Hayes* said, He was my Servant, and went away, after a rate, that possibly would not be allowed.

Walpole testified, that he served Mr. *Hayes* almost four Years and three Quarters, and did believe the Letter to be Mr. *Hayes's* Hand.

Mr. *Hayes*. My Lord, in Matters of Treason, I hope you will not admit of comparison of hands and belief, for Evidence.

Chief Justice. Yes, no doubt of it.

Mr. *Hayes*. It has not been so in other Cases, that have not been capital; as particularly in the *Lady Carr's* Case.

Chief Justice. That is a Mistake, you take it from *Algernon Sidney*, but without all doubt, it is good Evidence.

Judge Withins. Comparison of Hands was allowed for good Evidence in *Coleman's* Case.

Mr. *Hayes*. That, with Submission, vastly differs: Those Letters were found in his own Custody; this was not found in my possession, but in another Man's, and in another Nation.

Sir *John Trevor*, Counsel for the King. This Gentleman was a Trader with the *East-India* Company, and made Contracts with them, which are entred in their Books: We will compare them with the Writing in this Letter.

The Common Serjeant then called *Harman* and *Brittle*, and demanded of them, where the Books were; and they produced them.

Harman testified, that he knew Mr. *Hayes*, and that he made several Contracts in 1683, and that he saw him in *September*, 1683, subscribe his Hand to a Book of the Company's, shewn to him.

Brittle testified, that he is Porter in the Street to the *East-India* Company, and that he saw Mr. *Hayes* write his Hand to a Book shewn to him.

Capt. *Piercehouse* produced a Note, which he said, was Mr. *Hayes's*, and that he supposed it to be his hand, and compared it with the hand in the Book, and said, that he delivered the Goods upon it: and *Walpole* then said, he believed it to be Mr. *Hayes's* hand.

Then Mr. *Sturdivant* was called, and they shewed him the Letter, and he said, Here is *Joseph Hayes* writ, but I do not know it to be his hand.

The Common Serjeant said, that Mr. *Sturdivant* swore he did know Mr. *Hayes's* hand, before the Grand Jury; but Mr. *Sturdivant* affirmed, the Common Serjeant was under a mistake.

Then Sir *John Trevor* called for Mr. *Hardresse*,
but

but the Common Serjeant answered, That he was out of Town, before he could be served with a *Subpœna*.

Then the Letter was read, it was subscribed *Joseph Hayes*, and dated the 3rd of *August*, 1683, directed to *Mr. Henry Lawrence* senior, at *Amsterdam*, and began thus, *Sir, at your desire I have sent you a Bill, &c.*

The Letter and the *East-India* Books were then shewn to the Jury, and to the Prisoner.

Mr. Hayes denied the Letter to be his Writing, and said, 'Tis very strange I should not know my own hand; may not Counsel be admitted to plead, Whether comparison of hands and belief are any Evidence in criminal Causes? I have been informed, it hath been denied to be Evidence.

Chief Justice. You are under a Mistake; some body has put it into your Head, and puffed you up with a vain story; there is no such thing, 'tis a Fiction, a meer Whim, only said by *Mr. Sidney*, and no ground in the World for it.

Mr. Hayes. Was it not so in the Case of my *Lady Carr*? There is a Record of that I suppose.

Chief Justice. It was not so. * It was in Trinini-ty-term 1669. An- no 21. Caroli. ii. 1 Sid. 418. Don't talk of it*, there was no such thing at all — Comparison of Hands was allowed for good Proof in *Sidney's* Case. We must not alter the Law for any body.

Mr. Attorney-General. Besides this Comparison of Hands, we shall give an Account of the Correspondence of the Prisoner's Brother, and that he received the Money of him. *Mr. Common Serjeant*, Where had you this Paper?

Common Serjeant. I had them from my Lord *Godolphin*. This is an Account of the Receipt and Disbursement of the Money, shew it *Mr. Constable*.

Constable. This is one of the Papers, which was taken out of *Sir T. A's* Pocket.

It being shewn to the Jury, one of them demanded, whether any one proved the hand that was in that Note?

Mr. Attorney. No; but *Everis* swears, that *Sir T. A.* shewed him a Bill, subscribed *Joseph Hayes*, for so many hundred *Guilders*.

Common Serjeant. He says, it was 160 odd *Pounds*; now, the Sum of this Note is 161 *l. 5 s.* which is the change of 150 *Guineas*.

Mr. Hayes. Here is no body proves this Letter to be my hand, positively: They only prove it by similitude, and comparison, and belief.

I conceive there is but one Witness, that that Letter was found in *Sir T. A's* hands. *Everis* says, he saw a Bill had my Name to it. *Sir*, you did not know me, nor ever saw my hand?

Everis. No, never in my Life.

Mr. Hayes. 'Tis only an evidence of Reputation, he heard it was my Bill; you saw no Money paid upon it, did you?

Everis. No; but I saw a Letter from *Mr. Israel Hayes*, that gave some Account of it.

Mr. Hayes. All this is but Similitude and Circumstance; and I thought in case of Treason there ought to be two Witnesses, and hope you will let it be so here — here is no Evidence but the Letter, and that is not two Witnesses; there is no body has proved the *knowingly* in the Indictment, that runs, that I knew *Sir T. A.* and his Treason, that ought to be proved, but I am sure 'tis not. Your Lordship says, that the Indictment and the

Proclamation are sufficient Notice, that he was a Traitor; that may admit of Counsel to debate it; there ought to be Witnesses, that could shew me to be concerned with him; which no body in the World can prove, or that I ever saw him; and that Witness, who says, he saw the Bill, or this Letter, does not know that I wrote it; there are them that say, they heard of Money paid upon this Bill, but there is not one of them says, he saw any Money paid; and these are several Witnesses, every one to a several thing.

Here is no Proof, but by the *East-India* Porters, and those who say, they believe this Letter to be my hand; no body says, he saw me write this Letter, or had any Correspondence with *Sir T. A.*

If they pretend there was Money paid beyond Sea; is this Indictment well laid, for it is laid to be paid in *London*? The Payment of Money beyond Sea can be no Evidence of the Fact upon this Indictment; for the Jury of *London* are to enquire of Matters arising in *London* only. If I am to be tried for Payment of Money beyond Sea, the fact should have been laid there, and the Trial ought to proceed upon the *Statute* of 35 *H. 8. cap. 2.* The Indictment should be taken by Special Commission from the King, and the Trial be in the County, that the King should choose. I desire Counsel upon this point.

L. C. Justice. No, 'tis an idle Whim, and I would fain know the Counsel, that put that foolish Notion into your head.

Mr. Hayes. If you will allow me Counsel, you shall hear who they are; I have been informed the Law is so.

Chief Justice. We are of another opinion: if any whimsical Notions are put into you, by some *Enthusiastick* Counsel, the Court is not to take notice of their *Crotchets*.

Mr. Hayes. The Witnesses are Strangers to me; there is one that has been sworn, to whom I have paid several thousands of *Pounds*, who says, he does not believe it to be my hand.

Then he called *Mr. Sturdivant*, who looking upon the Letter, said, I do not believe it to be his hand, I have had dealings with him, and he hath given me many Receipts.

Mr. Hayes. There have been a great many Forgeries; and this Letter is forged; there have been Forgeries so like, that the Persons themselves have not known their own hands.

Every body knows, that a hand may be counterfeited very like: in *Mr. Sidney's* Case, *Mr. Wharton*, a young Gentleman, not above one or two and twenty, said, He could undertake to counterfeit any Man's hand whatsoever.

I am not a Man of that Quality, to give *Sir T. A.* 150 *Guineas*.

Chief Justice. We all know you have been a very active Man, a busy Fellow about the City; as forward a Spark, as any I know, of a great while. I don't know what you talk of your Quality, but we know your Qualifications, you have always been factious and turbulent against the King and Government.

Mr. Hayes then affirmed, that he neither gave, nor lent, nor returned any Sum of Money to this Person; and then called *Mr. Langley*, who testified, that a Letter was counterfeited, and a Bill of *Exchange* for 450 *l.* and so exactly like, that if he had not known of it before he saw it, he must have

have owned it for his hand; and the Party that paid the Money, paid it in his own wrong; for he never drew any such Bill. Mr. Common Serjeant had my Books several days in his hands, where there is an Account of 20,000 *l.* between my Brother and me; and if I would set my hand to such a Letter and Bill, and write my Name at length, is it not as reasonable that I should put the Name of *Laurence* in my Books? and if it were there, it would appear.

Indeed here is an Account produced, of divers Parcels of Money disbursed, in little Sums; but I appeal to the Merchants, whether any Bill of *Exchange* was ever paid in such Parcels? No foreign Bill was ever paid by 3 *l.* or 5 *l.* or 20 *l.* at a time: it must be paid at the day, or it will be protested — Here is a Computation of a Sum like to the Sum in the Bill; but these are Suppositions, and not Proof.

Then Mr. *Hayes* called Alderman *Jeffreys*, to speak to his Reputation and Conversation; who said, That he had known him many Years, and never knew any hurt of him.

Chief Justice. Have you been at any of the Elections at *Guild-hall* for Mayors or Sheriffs, when Mr. *Bethel*, and Mr. *Cornish*, and them People were chosen; and have you seen Mr. *Hayes* there, and how he behaved himself? A very forward active Man, I will warrant you.

Alderman *Jeffreys.* I suppose, I may have seen him there, but I cannot say any thing to his Behaviour.

Then Mr. *Hayes* called Mr. *Pellet*, Mr. *Lloyd*, Mr. *Withers* senior, Mr. *Withers* junior, and Mr. *Hugh White*, who gave a fair Account of his Dealing and Conversation. He then said, that he would trouble the Court with no more Witnesses.

Mr. Attorney-General then said, that he would call one Witness more against him; and ordered *Atterbury* the Messenger to be sworn, and the Letter was shewed to him.

Atterbury. I apprehended Mr. *Hayes*, and brought him before the King, and was present when the Letter was shewed to him; and the King, and Lord Keeper *North* pressed him to own, whether it was his hand, or no; and he said, he should say nothing to it, if they could prove it upon him, well and good.

Mr. *Hayes.* His Majesty was not there.

Atterbury. As I remember, the King was there; I imagine the King was there.

Chief Justice. I was there, what he says, is true; you said, I am not bound to accuse myself; 'tis true, you did deny that you knew *Laurence* or *Armstrong*; and 'tis as true, you would not absolutely deny the Letter, but said, you were not bound to accuse yourself.

Mr. *Hayes.* My Lord, I did hope, that in point of Law, my Counsel should have been heard to those things I mentioned, and I wish you would favour me in it; but that being denied him, he addressed himself to the Jury: Nothing has more troubled me, since my Confinement, than the Imputation of High-Treason, a Thing I always detested; I never knew any, the least thing of the Conspiracy, but by the Trials, or other printed Papers; not one of the Conspirators, who have come in, or been taken, have charged me in the least; nor did he himself accuse me, with whom I am charged to have this Correspondence. Gentlemen, I desire you to consider, that 'tis my Life

is concerned, and I beg you would consider what these Witnesses have testified; they are not positive in any respect, nay, there are not two to any one thing that is charged: *Constable* says, the Letter was found among Sir *T. A.*'s Papers; he says no more; and here are not two Witnesses to that: *Everis* tells you, he saw this Bill, but did not know my Hand; there is no body tells you I wrote this Letter, but it is found in another Man's custody, in another Nation.

Gentlemen, 'tis very hard, that by comparison of hands a Man's Life should be in danger; when, in lesser Crimes, it has been denied to be good Evidence; and none of you can escape the same danger, if this be allowed to be Evidence; for your hands may be counterfeited, as well as mine.

If there had been any Probability of my knowing him, it had been something; but there is not one that testifies, that ever I knew him, nor indeed did I: There is a great deal of Circumstance made use of, upon the account of his Acquaintance with my Brother in *Holland*; but, 'tis strange, there should not be some Evidence of a further Correspondence between him and me, if there were that Intimacy, that such a Letter as this doth import.

I must, with Reverence to the Divine Majesty, say, and I call God, Angels, and Men, to witness the truth of it, as I shall answer it to him, before whom, for ought I know, I am quickly to appear, that I never in my Life spoke with Sir *T. Armstrong*, nor was ever in his Company, nor ever wrote to him, by the Name of *Laurence*, or any other Name; and I do solemnly say in the presence of God, that I never gave, sent, lent, paid, or ordered to be paid, any Money, directly or indirectly, to Sir *T. A.* or *H. Laurence*, or to him by any other Name, or to his Use; I speak it without any counterfeiting or equivocation.

Gentlemen, there have been Overtures, if I would say some things, that my Life might be saved; and 'tis not to be believed, that I would run the Risque of my Life, if by speaking the Truth, I could save it.

The Chief Justice did here appear enraged, and interrupted him, saying, What do you mean by this?

Mr. *Hayes.* I say —

Chief Justice. Ay, but you must say those things that are decent and fit for us to hear; you must not insinuate, as if the Government would make any such Compacts as you talk of.

Mr. *Hayes.* I say, that Mr. *Foster* told me —

Chief Justice. If you offer that, I can tell you a Story, that perhaps you will be very unwilling to hear; on my word, 'twill be very unpleasant to hear it; you had better let those things alone, for you will but draw a load upon you.

Mr. *Hayes.* I beseech your Lordship to hear me. —

Chief Justice. Yes, I will hear you, provided you keep within due bounds; but we must not suffer these things.

Mr. *Hayes.* I say nothing but this, it has been told me, the way to save my Life is to confess.

Chief Justice. As you represent it, 'tis a reflection upon the Government — you talk of Overtures having been made you; don't make me say what I have no mind to say.

Mr. *Hayes.* I say, Mr. *Foster* by Name told me, there was no way for me to escape, but by Confession.

Chief

Chief Justice. You had best call Mr. Forster, to know how he came to tell you so; if you do, I

** The Story of the 4 or 5000l. was this, an eminent Papist, very acceptable to King Charles the second, undertook to some of the Friends of Mr. Hayes, that a Pardon should be had for 4000 Guineas to the King, and 1000 to himself; but he afterwards declared, that the King had refused him therein, and told him, that he was advised, that he had better give that Papish Friend 4000l. out of the Exchequer, than pardon Hayes; but that he gave his Royal Word, that the Overture should not hurt Mr. Hayes.*

will tell you of another thing, of * 4 or 5000l. that was offered for your escape; you had better forbear, or else I shall put you in mind of a Brother of some Body, that is at the Bar.

Mr. Hayes. My Lord, I was told, that was the way: Gentlemen of the Jury, I have declared to you the whole truth,

with all the Solemnity that becomes an innocent Man, and not an ill Man—— Besides, what you have heard, in all this Evidence, is nothing but Circumstance and Hear-say; and shall a Man's Life be taken away for *I believe*, and *I think*, or *I have heard*?

Gentlemen, I know you are my Fellow-Citizens and Fellow-Christians, and of the same Reformed Religion that I am; and I hope you are sworn into this Service without any Prejudice against me, but with an impartial Resolution to do Justice: and therefore I cheerfully leave the matter with you; I am sure, that if God help me, and deliver me in this Exigency, that it is he, and you under him, that preserve my Life—

Gentlemen, The great Incertainties, Improbabilities, and Consequences in this Case, I hope will be weighed by you, and make you the better to consider the Proof which is made by none but such as are Strangers to me; since then they know me not, I hope you will weigh it, before you give it against me: We must all die, and I am sure it will be no grief to you, to acquit a Man that is innocent; I leave it with you: The Lord direct you.

Sir Thomas Jenner the Recorder. The Treason charged on the Prisoner is of that sort, that if he be guilty, he will be a just example, to terrify others from doing the like; for if Traitors had not Persons to supply them with Money abroad, it may be, they would not have so much Courage to run away. We have satisfied you that *Sir Thomas Armstrong* was indicted, that an Exigent was gone against him, upon that Account; here was a Proclamation, and *Sir Thomas Armstrong* named in it; and so the Recorder repeated the Evidence of the Witnesses, and concluded: Gentlemen, We think that his Defence has been so little, and our Proof so strong, that you have good ground to find him guilty.

The *Chief Justice* then summed up the matter to the Jury.

Gentlemen of the Jury, This is an Indictment of High-Treason against the Prisoner at the Bar; and you are to try it according to your Evidence; the Prisoner's Affirmation of his Innocence is not to weigh with you. Nay, I must tell you, I cannot but, upon this Occasion, make a little

Reflection upon several of the horrid Conspirators, that did not only, with as much Solemnity, imprecate Vengeance upon themselves, if they were guilty of any Treason; but thought they did God Almighty good Service in that hellish Conspiracy: It is not unknown, one of the Persons proscribed in this Proclamation, did declare, they should be so far from being esteemed Traitors, that they should have Trophies set up for them; and all this under the pretence and enamel of Religion: Nay, I can cite to you an Instance of another of the Conspirators, [*Lord Ruffel*] that after a full and evident Proof, and plain Conviction, of having an hand in it, when he comes upon the Brink of Death, and was to answer for that horrid Fact, before the great God, he blessed Almighty God, that he died by the hand of the Executioner, with the Ax, and did not die by the Fiery Trial: He blessed God, at the place of Execution, that he died a Traitor against the King and Government, rather than died a Martyr: for his Religion. I think it necessary to make some Reflection upon it, when Men, under the Pretence of Religion, are wound up to that height, to foment Differences, to disturb and distract the Government, to destroy the Foundations of it, to murder his sacred Majesty, and his Royal Brother, and to subvert our Religion, and Liberty, and Property; and all this carried on upon Pretence of doing God good Service. You are to go according to Evidence; as the Blood of a Man is precious, so the Government also is a precious thing; the Life of the King is a precious thing, the preservation of our Religion is a precious thing, and therefore due Regard must be had to all of them. I must tell you, in this horrid Conspiracy there were several Persons, that bore several parts; some, that were to head, and to consult; there was a Council to consider; others were designed to have a hand in the perpetrating of that horrid Villany, that was intended upon the Persons of his Sacred Majesty and his Royal Brother, and with them, upon the Persons of all his Majesty's Loyal Subjects, that acted with duty, as they ought to do; there were others, that were to be aiding and assisting (as in the case of the Prisoner, if you find him guilty) aiding, abetting, assisting by Money, or otherwise, or harbouring any of those Persons, that were concerned therein. Then he recounted the Evidence given against the Prisoner, and made such Remarks upon the same, as he thought fit.

The Jury withdrew, and spent two hours in consideration of the Matter; and then returning, gave their Verdict, that the Prisoner was not guilty.

Mr. Attorney-General. My Lord, tho' they have acquitted him, yet the Evidence is so strong, that I hope your Lordship and the Court will think fit to bind him to his good behaviour during his Life.

Chief Justice. Mr. Attorney, that is not a proper Motion at this time.

So the Prisoner was discharged, after he had been imprisoned five Months.



CXXXII. *The Trial between Sir WILLIAM PRITCHARD Plaintiff, and THOMAS PAPILLON Esq; Defendant at Nisi Prius at the Guild-hall of London, in an Action upon the Case for a false Arrest, Nov. 6, 1684. Mich. 36. Car. II.*

London ff. **S**IR *William Pritchard*, late Lord Mayor of the City of London, having in *Easter Term* last, brought an Action upon the Case, for falsely, maliciously, and without probable Cause, procuring him to be arrested and imprisoned in his Mayoralty, against *Thomas Papillon Esq;* the Defendant pleaded, Not Guilty, and thereupon Issue being joined, it came this Day to be tried before the Lord Chief Justice *Jeffereys*; and the Jury sworn to try this Cause, were these,

<p><i>Bartholomew Ferryman,</i> <i>Thomas Blackmore,</i> <i>Thomas Symonds,</i> <i>William Wharton,</i> <i>John Green,</i> <i>Thomas Amy,</i></p>	<p>} Jur. {</p>	<p><i>Joseph Baggs,</i> <i>Daniel Chand Jr,</i> <i>John Reynolds,</i> <i>John Allen,</i> <i>Joseph Caine, and</i> <i>William Withersjun.</i></p>
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Mr. Munday. May it please your Lordship, and you Gentlemen of this Jury, *Sir William Pritchard* Knight, late Lord Mayor of the City of London, is Plaintiff, and *Thomas Papillon Esq;* is the Defendant: And this, Gentlemen, is in a special Action upon the Case, wherein the Plaintiff does declare, That whereas the 12th of *February*, in the 35th Year of this King, and before and after for several Months then next ensuing, he was Mayor of the City of London, being duly elected and sworn into the Office of Mayoralty of the said City, and according to the Custom of the said City, time out of mind, he ought daily to attend the said Office, in the diligent Government of the said City, according to the Duty of his said Office, which he was to execute to the Honour and Dignity belonging thereunto: That the Defendant, *Thomas Papillon*, being one of the Commonalty of the said City, and under the Government of the Plaintiff, by virtue of his Office aforesaid, not being ignorant of the Premises, but contriving, and falsely, and maliciously envying the happy Estate of the Plaintiff in his said Office, as also unjustly to disturb the Plaintiff in the Execution of his said Office, the said 12th Day of *February*, in the 35th Year aforesaid, the Defendant for Vexation to the Plaintiff, not having any lawful or probable Cause of Action against the Plaintiff, falsely and maliciously did prosecute the King's Writ of *Alias Capias* out of the Court of *King's-Bench*, against the Plaintiff, by the Name of *Sir William Pritchard* Knight, directed to the then Coroner of the City of London; by which Writ it

was commanded the said Coroner to take the Plaintiff, if found within the said City. and safely keep him, so as to have his body before that Court at *Westminster*, upon *Wednesday* next after 15 Days of *Easter*, then next following, to answer the now Defendant in a Plea of *Trespass*: And that the Defendant of his further Malice against the Plaintiff, afterwards, and before the Return of the Writ, to wit, upon the 24th Day of *April*, in the 35th Year aforesaid, at London, to wit, in the Parish of *St. Mildred the Virgin*, in the *Powtry*, in the Ward of *Cheap*, London, delivered the said Writ of *Alias Capias* to one *John Brome* Gent. then being Coroner of the said City, to be executed; and then and there the Plaintiff, then being Mayor of the said City, by virtue of that Writ, maliciously and unjustly did procure to be taken, and arrested, and detained in Prison, under the Custody of the said Coroner, for the space of six Hours, to the Disgrace and Scandal of the Plaintiff and his said Office, as also to the manifest Damage, Prejudice, and Grievance of the Plaintiff: Whereas, in Truth and in Fact the Defendant at the time of the taking, arresting, and detaining of the Plaintiff in Prison, as aforesaid, had not any just or probable Cause of Action against the Plaintiff in the Premises, whereby the Plaintiff says he is injured, and for which he lays to his Damage, 10,000 *l.* To this the Defendant has pleaded, Not Guilty. If we that are of Counsel for the Plaintiff, shall prove this Matter unto you, Gentlemen, that we have laid in the Declaration that has been opened unto you, you are to find for the Plaintiff, and I hope will repair him in Damages for this Affront and Injury.

*Mr. Att. Gen.** May it please your Lordship, and you Gentlemen of the Jury, I am of Counsel in this Case for the Plaintiff; and this Action is brought, Gentlemen, to vindicate the honour of the Chair from such Affronts as these, which in no Age, till of late days, our Times of Faction and Confusion, it ever met with: That by a Person that is a Citizen of London, and one of the Commonalty, that ought to have paid Submission to the Lord Mayor as his chief Magistrate, and was bound so to do by his Oath, as a Freeman, should, without cause of Suit, arrest the Lord Mayor of the City. That there was no probable Cause, is evident by his not proceeding in the Action, that he had thus brought. But, Gentlemen, we shall shew you in the Course of our Evidence, that there lay a further Malice in this Case, and that there was a Design in it against the Govern-

* *Sir Robert Sawyer.*

Government. For we shall give you Evidence, that this Design was laid to carry on the great Plot against the lives of the King, and his Brother, and for the Subversion of the Government. For they contrived it so, that they would imprison the Mayor, and then thought they, the Loyal Citizens will interpose to rescue him, and then the Party should rise to assist the Officer, he having the Countenance of Authority, and being in the Execution of the King's Writ (especially if it be considered then who was Coroner) and so a publick Commotion would be made a general Mutiny, and that would be a fit Opportunity, in the Confusion of the City wanting its Chief Governor, of doing what they designed. Gentlemen, we shall prove all that is laid in the Declaration; and likewise that the End of this Business was to have had a Commotion for the accomplishing their great Conspiracy, as has been opened. That Sir *William Pritchard* was arrested in his Mayoralty, I suppose, will be agreed, or else we shall prove it.

Mr. Ward. Yes, yes, we agree it.

* *Mr. Finch.* * *Mr. Sol. Gen.* Then we will go on and prove the manner of it. Swear *Mr. Gorges,* and *Mr. Keeling.* [*Which was done*] *Mr. Keeling,* pray, will you tell my Lord, and the Jury, were you made a special Bailiff to arrest Sir *William Pritchard,* when he was Lord Mayor, and what did you do upon it? Tell all you know of it, and what was designed by it.

Keeling. My Lord, all that I know of it, is this: It was upon the 24th Day of *April,* I have the Warrant here to shew, I met with *Mr. Goodenough,* at *Mr. Russel's* the Cook, in *Ironmonger-lane,* and several others were there; and I went away a little while, and came again: While I was gone from them, they put my Name into the Warrant, and upon that Warrant, I did arrest Sir *William Pritchard,* who was then Lord Mayor, at the Suit of *Mr. Thomas Papillon,* I suppose this is the Gentleman [*Pointing to the Defendant*] I had no Order for it from *Mr. Papillon,* nor ever spoke with him about it; but I had order from the Coroner, who, upon the arresting of him, took my Lord Mayor into his Custody.

Mr. Att. Gen. Where was my Lord Mayor then?

Keeling. At *Grocers-Hall.*

Mr. Att. Gen. Was that the Place he kept his Mayoralty in?

Keeling. Yes, it was so.

Mr. Sol. Gen. What was he doing when you arrested him?

Keeling. There was some disturbance upon it, among the Officers and People there. The Coroner came up to him and said, Sir, I have a Writ against you, I pray you would please to give an Appearance at the Suit of *Mr. Thomas Papillon,* and another at the Suit of *Mr. John Dubois,* and some Words there passed between him and the Coroner; and my Lord Mayor refusing to give any Appearance, the Coroner, *Mr. Brome,* bid us execute our Warrants, upon which I came up to my Lord Mayor, and touched him upon the Shoulder, and said, I arrest you at the Suit of *Thomas Papillon Esq;* and one *Ferdinando Burley* arrested him again, at the Suit of *Mr. John Dubois.*

Mr. Att. Gen. What did you do with him, when you had arrested him?

Keeling. The Coroner dismissed us, and, as I take it, carried him home to his House.

Mr. Att. Gen. What Instructions had you, what

to do, in case he made any Resistance, and did not submit to the Arrest?

Keeling. I know of no Instructions about any such thing.

Mr. Sol. Gen. Who was by, pray, when Orders were given you to arrest my Lord Mayor?

Keeling. Both the *Goodenoughs.*

Mr. Att. Gen. He in the Proclamation, you mean; and his Brother?

Keeling. Yes, *Richard* and *Francis Goodenough.*

Mr. Sol. Gen. And who else, pray?

Keeling. Several that I did not know.

Mr. Att. Gen. Can you remember any body besides the *Goodenoughs* in particular?

Keeling. There was one a Tallow-chandler, and a great many that I did not know.

Mr. Sol. Gen. How many do you think there were? And where was it?

Keeling. I believe there were about thirty or forty, and it was at *Russel's* the Cook in *Ironmonger-lane.*

Mr. Att. Gen. Did they all come along with you to *Grocers-Hall,* to arrest my Lord Mayor?

Keeling. No, my Lord, they did not.

Mr. Sol. Gen. Did any of them, and which, pray?

Keeling. Sir, I will tell you who did come to my Lord Mayor's. There was the Coroner, *Francis Goodenough,* *Ferdinando Burley,* and myself: And after my Lord was arrested, the Coroner bid us be gone, and he would look after my Lord Mayor.

Mr. Sol. Gen. Whither did you go after that?

Keeling. I went to Sir *Harry Tulse's* directly.

Mr. Att. Gen. Did not you expect an Opposition? And had you not some Discourse what you should do in case there was an Opposition?

Keeling. No, I cannot tell any thing of that.

Mr. Att. Gen. You say, there was a Meeting, or Consult, at *Russel's,* of forty People; had you not there some Consultation what was to be done, if my Lord Mayor did not obey the Arrest?

Keeling. I do not remember any thing about that, at that time.

Mr. Att. Gen. Was there at any other time before? Or did you hear any of those People discourse the *Goodenoughs,* or any of them, what they would have done in case they were resisted?

Keeling. I do not remember any Discourse of such thing, before or after.

* *L. C. J.* Pray, *Mr. Keeling,* let me ask you a Question or two. * *Sir George Jeffereys.* Were you ever employed by the Coroner to be a special Bailiff to arrest any body, before this time you speak of, that you arrested Sir *William Pritchard*?

Keeling. No, my Lord, I never was.

L. C. J. Then pray recollect yourself, who were at that Meeting, when, as you say, your Name was put into the Warrant, for this Arrest?

Keeling. My Lord, when I went away for a little while, I left these Persons particularly that I did name, the two *Goodenoughs,* and one *Burton,* I think, and one *Crompton,* and that Tallow-chandler; there were to the Number of thirty or forty, that I did not know their Names.

L. C. J. But, pray, how came you to be employed

ployed in this Service then? Were you a Tradesman in Town then?

Keeling. Yes, in *Wapping*.

L. C. J. Good now, how came you to be employed in arresting my Lord Mayor, more than any other of those thirty or forty, that you say were there then?

Keeling. I went there among them, but did not know then that I should be concerned in this Business; and I went away a little while, and when I came back, they told me, that my Name was put into the Warrant.

L. C. J. Pray, tell us the whole Story, how you that were a Tradesman at *Wapping*, should come to be employed as a Bailiff to the Coroner of *London*, to arrest my Lord Mayor? There must be some particular End in it.

Mr. Att. Gen. Mr. *Keeling*, tell the Court and the Jury the whole Story, and what it was that brought you into this.

Keeling. My Lord, Mr. *Goodenough* told me I must be concerned.

L. C. J. Ay, prithee tell us what *Goodenough* desired you to be concerned in?

Keeling. Upon my coming back to the Company that was at *Russel's*, Mr. *Richard Goodenough* told me, I must be concerned in the Business of arresting my then Lord Mayor, Sir *William Pritchard*. Said I to him, Mr. *Goodenough*, this is foreign and remote to my Business, to be concerned in such a Matter as this, it will seem very strange for me to do it. He pressed it upon me to do it, and says he, If you will not do it, you will be a Man looked ill upon, and it will be taken strangely from that Party; he meant, I suppose, the discontented Party, the Faction, or what you please to call it, that were not contented with the Administration of the Government in the City at that time; and he urged it upon me with a great many Arguments. I opposed it with much Vigour a good while, but at last he prevailed upon me to go along with the Coroner; and *Frank Goodenough* his Brother said he would go with me, and he did so; and we came and arrested my Lord Mayor, as I told you before.

L. C. J. Where did Mr. *Goodenough* press you to be concerned in this Business, as you say?

Keeling. At Mr. *Russel's* a Cook in *Ironmonger-lane*.

L. C. J. How came you thither?

Keeling. He sent me a Letter to meet him there. He was at me before to be concerned in it, but I did not comply with him in it. Mr. *Richard Goodenough* it was, and Mr. *Ashhurst*, I think it was Alderman *Cornish's* Son in Law, was by.

L. C. J. Was *Nelthrop* there?

Keeling. No, my Lord, he was not there; but they did not proceed then, because my Lord and his Brethren were gone out of Town to wait upon the King, I think; and this was six Weeks or two Months before this Meeting at *Russel's*.

Mr. Sol. Gen. Pray, Mr. *Keeling*, recollect your self. Had you any Discourse with *Goodenough*, or any body else, what the Consequence of such an Arrest would be?

Keeling. They told me, my Lord Mayor, and Count of Aldermen, had made an ill Return to the *Mandamus's* that were served upon them, for the swearing of Mr. *Papillon* and Mr. *Dubois* Sheriffs, and therefore Mr. *Papillon* and Mr. *Dubois*

had good Cause of Action against them; and *Goodenough* said, he had order from them to arrest my Lord Mayor upon an Action, and desired me to be concerned.

Mr. Sol. Gen. But pray, remember what you said before, Mr. *Keeling*, why should the discontented Party, as you call them, be concerned, and be angry with you, if you did not arrest my Lord Mayor?

Keeling. The particular Argument that he used with me to persuade me to it, was this, That I having a Trade and Dealing among that Sort of People, they would think ill of me, if I did not do it.

Mr. Sol. Gen. But why should the Party be angry with you, if you were not a Bailiff to arrest my Lord Mayor, at the Suit of Mr. *Papillon*?

Keeling. I did not know the reason of their Anger, he might have something in his Head that he did not reveal to me. But that was the Argument he used, The Party would think ill of me.

Mr. Serj. Maynard. If you have done with this Witness, I would ask him a Question. You say, Sir, that *Goodenough* told you, the discontented Party would be angry with you, if you did not do it: Upon your Oath, was the discontented Party named?

Keeling. No, Sir, but that Party of which Mr. *Goodenough* and I then was, and they were the discontented Party, I think, for they were so discontented, that they would have killed the King and the Duke.

Mr. Att. Gen. That is an Answer, I hope, to your Question, Mr. Serjeant.

L. C. J. I think, when he names the *Goodenoughs* to be of the Party, no body questions but they were discontented.

Mr. Sol. Gen. He has explained well enough sure, what he meant by the discontented Party, those that were so discontented, that they would have killed the King and the Duke. Those were the Promoters of this Action, and Mr. *Keeling* must engage in it, or they would be displeas'd. Now, my Lord, we shall call Sir *Henry Tulse*, and Sir *Robert Jefferies*, to shew what the Coroner did.

Keeling. I arrested Sir *Harry Tulse*, afterwards.

Then Sir Harry Tulse was called.

Mr. Ward. My Lord, we desire Sir *Harry Tulse* may not be sworn, we have an Exception to his Testimony.

L. C. J. What is your Objection?

Mr. Ward. We are informed, he and the rest of the Court of Aldermen have joined their Purse to carry on this Suit, and then, with Submission, he is not a good Witness.

L. C. J. Ask him that Question upon a *Voyer dire*.

Then he was sworn upon a Voyer dire.

Mr. Williams. Pray, Sir, is there any Order of the Court of Aldermen to lay out Money for this Cause, out of their Joint Purse, or the Publick City Stock?

Sir *Harry Tulse*. Not that we know of.

Mr. Williams.

Mr. Williams. Pray, Sir, do you know whether Sir *William Pritchard* laid out Money in it, or who else doth?

Sir Harry Tulse. I cannot give a positive Answer to that, who layeth out Money upon it, nor do I know of any such Order as you speak of.

Mr. Ward. *Sir Harry Tulse*, though you know of no such formal Order of the Court of Aldermen; yet is there not some Direction by the Court of Aldermen about expending Monies in a joint way?

Sir Harry Tulse. I assure you, Sir, I know nothing of it.

L. C. J. Come, he has given a full Answer to your Question, swear him.

[Which was done.]

Mr. Holt. *Sir Harry Tulse*, now you are sworn, pray, will you give an Account of what happened about this Matter, within your knowledge? Pray, tell the whole Story.

Sir Harry Tulse. My Lord, about four of the Clock in the Afternoon, this Gentleman, and two more, came to me to my own House, and he did arrest me (I mean, *Mr. Keeling*, that was sworn here before me) at the Suit of *Mr. Papillon*; and another of them did arrest me at the Suit of *Mr. Dubois*: Said I to them, I do not know that I owe them, or either of them, a Farthing. But, what must I do? He told me, it was only to give an Appearance. Said I, Gentlemen, I shall consider of that. Then, says he, you must go to my Lord Mayor: Why, where is he, said I? said he, he is in the Custody of the Coroner, at his House. Where, said I? He is gone to *Skimmers-Hall*, said he. This is well, said I. So I called for my Man to bring my Cloke, Then they told me, if I pleased, they would take my Word 'till to morrow Morning, if I would promise to appear. I told them, they might do as they pleased. So they left me; and I went first to my Lord Mayor's House, but found him not there; so I went down to *Skimmers-Hall*, and there I found my Lord Mayor all alone, and no Alderman, only the Officers. I asked his Lordship how he came there? He told me, he was arrested by the Coroner. I asked him how long he had been detained? And, he said, But a little time: And indeed I think it could not be long, for I met his Coach coming back from *Skimmers-Hall*, when I went. After that, he was detained there 'till about Eleven of the Clock or thereabouts. This is all that I know of it.

L. C. J. What became of the Government of the City all that Time?

Sir Harry Tulse. There was presently a great Noise all about the City concerning my Lord Mayor's being arrested, and abundance of People were gathered together about the Door, but there came a Company of Soldiers of the Trained Bands, and they kept all quiet. There were great apprehensions of an Uproar. I saw nothing of hurt done though. And I asked *Mr. Brome* the Coroner, who was by, Am I a Prisoner too? For I was arrested to Day, by a Warrant pretended to be from you. Says he, I have a Writ against you, and now you are here, I cannot let you go, 'till you have given an Appearance. So I took myself to be detained there with my Lord Mayor in Custody, and staid as long as he staid, and went away with him.

† *Mr. Recorder.* Swear *Mr. Wells*, the Common Crier, and *Sir John Peak*.

V o L. III.

Mr. Wells was sworn.

Mr. Recorder. *Mr. Common Crier*, were you at my Lord Mayor's House when this Hubbub was made? Pray tell my Lord and the Jury what you know of it.

Mr. Wells. Yes, I was there.

Mr. Holt. Then tell what pass.

Mr. Wells. I was not in the Hall where my Lord Mayor was, but in another Room by: And the Officers came running in to me, and told me, I must come to my Lord Mayor quickly, for he was arrested by some People. When I came, I found there were none of the Sheriffs Officers that used to arrest People, but the Room was full of other Persons. My Lord Mayor bid me take the Sword, and go along with him, for the Sword-bearer was not then just at hand. I asked his Lordship whither he was going? The Coroner said, he was his Prisoner, and must go along with him to his House. My Lord Mayor bid me presently send out the Officers to summon a Lieutenancy, which I did. I desired the Coroner and his Men to be gone, said I, Cannot you let my Lord alone, and go about your Business? No, he said, except my Lord would give an Appearance, he must go along with him. I then asked him whither my Lord must go? He said, he had no Place but his own House to carry him to, and thither we went; where when we came, my Lord was put up into a little Room by himself, where were none but myself, and the Coroner, as I remember. My Lord Mayor bid me go and see for *Sir James Edwards* and *Sir Harry Tulse*, and my Lord Mayor that now is, and so I went; but I found they were arrested too before I came.

L. C. J. How did my Lord go away from thence?

Mr. Wells. In his Coach.

Mr. Att. Gen. Were you by when he went away? And who was there?

Mr. Wells. *Mr. Brome* the Coroner was not there, when my Lord Mayor went away, but there was *Goodenough*.

L. C. J. Ay, he was in trusty Hands upon my Word.

Mr. Att. Gen. The Soldiers prevented the Design, and so they let him go again.

Mr. Recorder. Swear *Sir John Peak*.

[Which was done.]

Sir John, what can you say to this Business?

Sir John Peak. My Lord, I had order from the Lieutenancy, to raise my Regiment upon the News of my Lord Mayor's being arrested, which I did in a very little time, and came with my Soldiers to *Skimmers-Hall*, where I heard my Lord Mayor was, and prevented any Stir, as it was feared there would have been. But *Mr. Keeling*, I believe, can tell something more of the Design than he has spoken, for I remember at the Trial of the Traitors at the *Old Baily*, he did say, That after my Lord Mayor was arrested, they did intend something, but their Hearts misgave them when the Regiment was up.

L. C. J. That is nothing to this Cause, what he said there; now he remembers nothing of it. Have you done, Gentlemen, or will you call any more Witnesses?

Mr. Att. Gen. We rest it here, my Lord, 'till we hear what they say to it.

L. C. J. Come then, what have you to say that are for the Defendant?

Mr. Serj. Maynard. May it please your Lordship, and you Gentlemen of the Jury, I am of

Counsel in this Case with the Defendant, Mr. *Papillon*. I see, Gentlemen, it is a Cause of great Expectation, and by that means they would make it greater by far, than indeed it is in itself. But I suppose, you who are upon your Oaths, to try this Issue, will duly weigh and consider what it really is. Gentlemen, the record tells you what it is, an Action upon the Case, wherein the Plaintiff declares, that the Defendant did arrest him, being then Lord Mayor, without any probable Cause, and out of Malice. Now as to that, Gentlemen, I conceive and think, I may appeal to my Lord Chief Justice in it, for Direction in Point of Law, that my Lord Mayor, if he do mistake in his Office, and do not do that which belongs to him to do, he is as much subject to the Process of Law and Actions, as any private Person in the City of *London*. If he does any Man an Injury, or does that which is not right in his Office, by which another Person is grieved, he is liable to the Prosecution of any particular Subject the King has, that is so grieved by him. Then they alledge, that this particular Action and Arrest thereupon was prosecuted and done out of Malice, and without probable Cause. Now what have they proved of that? They prove the Thing done, that he was arrested at the Defendant's Suit, and that he was kept in Custody six Hours. But if we can give you any Account of a probable Cause for it, that is sufficient to justify us from this Action. Gentlemen, the Question that you are to try is not, Whether this Man or that Man were duly chosen into such an Office, but whether there were any probable Cause for the Defendant to contest about the Choice. And herein the Case will fall out to be thus: There was a difference in the City of *London*, as is very well known to every body, about the Choice of Sheriffs for the City, wherein the Defendant was one of the Competitors; there were, upon the Nomination and Election in the Hall, a great many more voices or suffrages for one than for the other, which was certified to the Court of Aldermen and Lord Mayor, as is usual, but some Contest being, a Poll was demanded and granted, and upon that Poll, my Lord Mayor was pleased to declare the Election on one Side against Mr. *Papillon*, who yet was apprehended, by the first Choice, to be one that had most suffrages. But several meetings there were, and several Common Halls assembled, so that it was a contested Matter, and, as I said, there had been a Report made on the Defendant's behalf. We insist not upon the Right of Election, that has been otherwise determined. But when he is put in Nomination by the Electors in the City, and has many Suffrages, and he conceives himself rightly chosen, and they that are the Managers of the Election give such an Account that in their Judgment he was chosen, that surely was a probable Cause for him to proceed upon it. And if there be but a probable cause to bring this to a question, no doubt he might very well take the course the Defendant took. Here is no Arrest without legal Process, nay their own Witnesses say, there was an Offer to take an Appearance without putting it on so far as an Arrest: If my Lord Mayor would have but given an Appearance, there had been an end, but he did not think fit to do that, and so the Process of Law was executed upon him. Then here is the Case in short: A Man thinks himself rightly and duly chosen into an Office, and has probable reason so to think, for the Judges of the Election think so too, and deliver that as their Opinion; so that though he is mistaken, as the Event proves, yet he is not alone in

his Mistake, nor without ground of his Apprehension, then if it be (under favour) such a Man has no other Proceedings to take in the World for settling this Matter, but to appeal to your Lordship, and that great Court where your Lordship sits, to have a Writ to command the Mayor, or other proper Officer to swear such a Man into the Office, or shew good Cause why he doth not. If the Mayor upon the Receipt of the Writ thinks fit to obey it, and swears the Man, all is well: If not, he must make a Return of the Writ, with the Cause why the Command of the Writ is not obeyed. Now the Suggestion of the Writ is, that he was duly chosen into such an Office, and therefore he had a fair way to put this Matter to an end; if he would have returned he was chosen, or not chosen, there had been an end of the business, which he ought (under favour) to have done in Obedience to the King's Writ. What then follows upon his not doing so? The Party that is grieved hereby, has no other Course to take, but to bring his Action against the Mayor for it. This Course the Defendant took, by taking out a Writ against the Plaintiff: And what was the Effect of that Writ? It is indeed charged here by the Counsel on the other Side, That there was a Design of a discontented Party in it, and I know not what, and a great deal of Stir made, that a Coroner of the City of *London* should arrest my Lord Mayor. It may be it was not so reverently done, but yet if he thought he had good Cause of Action against him, he might do it lawfully. Doth this prove to you, that this was maliciously and unreasonably done? Malice must be to the Person, Zeal and Earnestness to have Right done to a Man's self or another, in a legal Course of Justice, is not Malice, nor will make the Prosecution of the Action unreasonable and groundless. Have they proved to you, Gentlemen, any particular Discontent and Malice, that is between the Plaintiff and Defendant? No truly, I think, by all the Proof that has been offered, the quite contrary does appear. The Defendant took out a *Mandamus*, directed to the Plaintiff, which was not duly returned: What then doth he do next? Doth he most violently arrest him? That, with Submission, he might do, and no Offence in Law: No, but he doth not do it, but only desired from time to time, as we shall prove anon, that he would but give an Appearance, that would have put a Conclusion to this Dispute. There is no Appearance given: Whereupon he is arrested, and detained in Custody six Hours. If a Man be once in the Officer's Hands taken upon legal Process, how long soever the Officer keeps him, is not at all to be laid upon the Person that brings the Suit, that is to be looked after by the Officer himself. Whatsoever was the Usage in that Matter, we are not to answer for (though it is plain an Appearance would have done all presently) we shall prove we gave order to use all Deference and Respect in the World. And besides (though I would not speak it to invalidate any of the Evidence given about the Right of Election one way or other, yet) there being a Return of the Defendant's Election by the Sheriffs to the Court of Aldermen, but they being of another Opinion, gave Order, that those that thought themselves aggrieved should take their Remedy at Law: Which Order we have pursued in that regular Course that the Law has prescribed. And I hope it will never come to that, that a Man (though mistaken) conceiving himself to have a Right of Action, and suing out the King's Writ, shall suffer for so doing, unless particular Malice

Malice be made to appear. Here is a great Noise of Damage, and Disrepute, and Disgrace to the Plaintiff and his Office, and he has been pleased to reckon his own Damages at 10,000*l.* We say he has sustained no Damage by any thing we have done, but we are quite not guilty of this unreasonable and malicious Prosecution laid to our Charge. And that we are not guilty, the Matter that has been opened, we think, will sufficiently declare. For if there was a Contest about the Election, and the Sheriffs returned it as their Opinion, that the Defendant was chosen, though they and he too were mistaken, yet that might give a probable Ground for his pursuing the Course he did take, and the very Court of Aldermen, and the Lord Mayor, bidding them take their Course at Law, we sure shall not be punished for it. We did not prosecute our Question in any malicious way, but in that Course that the Law allows, by taking out the King's Writ; and we hope the Law will protect us for it.

Mr. *Williams*. Will your Lordship be pleased to spare me a Word on the same side with Mr. Serjeant *Maynard*. I am of Counsel, Gentlemen, with Mr. *Papillon* the Defendant in this Action. We do not insist upon it, nor now offer any thing to assert our Election: We did apprehend we were elected, but that is ruled against us, and we rested satisfied with it. But we come here now before you upon this Question: Whether we had any probable Cause of Action, upon which we might take out this Process mentioned in the Declaration, which is a *Capias* upon a *Latitat*? And we do insist upon it, that this Action of the Plaintiff's must fall upon the Issue joined, if we can satisfy you, and shew that it was not malicious, and without probable Cause. And tho' our Cause of Action against the Plaintiff falls out in the Event not to be a good and sufficient Cause, yet if it were probable, it will evade this Action, and that is all we labour for. They do not attempt to prove, at least-wile I have not heard any thing of it, that there was any express Malice, any thing either said or done by the Defendant, more than the causing him to be arrested upon this Writ. It is very well known, it was in the City of *London* a very much controverted Question, Whether Mr. *Papillon*, and Mr. *Dubois*, or Sir *Dudley North*, and Mr. *Rich*, were chosen Sheriffs of *London*? I would not run over the History of it, it is but too well known and remembered, the Divisions that were in the City about it. Some were so much dissatisfied with the swearing Sir *Dudley North*, and Mr. *Rich*, Sheriffs, as thinking them not duly elected, that they would have the Court of *King's-Bench* moved, for the Writ of *Mandamus* to swear Mr. *Papillon*, and Mr. *Dubois*. This *Mandamus* was moved for, and granted, and to this Writ the Mayor and Aldermen, to whom it was directed made a Return that we were not elected Sheriff of *London*, which Return was apprehended to be false; and really to try the truth of this Return, was the Action brought against the Plaintiff. A Man that is injured by a False Return, hath indeed no other way to right himself, but by bringing an Action against them that made it. Upon this Action brought, I hope you are satisfied, Gentlemen, from the Evidence that has been already given, the Defendant proceeded regularly and orderly, in a decent manner applying himself to get an Appearance to his Action. And we shall prove he did so: For, first, he took out a *Latitat* against my Lord Mayor, and by the Attorney gave him notice of it, and desired an Appearance; so that the Question in dispute might

come to some Determination. But he was not pleased to give us an Appearance to that Writ, so we took out a *Capias*, gave him notice of it, and desired an appearance, but could have no appearance, whereupon we took out an *Alias Capias*, which is the Writ mentioned in the Declaration: And the Coroner, who has been named, was then told, he should be called upon to make some Return to his Writ, which he acquainted my Lord Mayor with, and desired him to give an Appearance, which he refusing to do, the Officer was constrained to arrest him, to execute the King's Writ, and you hear how he treated him with all the respect, and carried him to his own House, where he staid some Hours, and then went away. All this time were we satisfied with what was done, we expected no more than an Appearance, which at last was given. Upon that Appearance we did declare, in the Beginning of *Hilary* or *Easter* Term (83) But it fell out, that in *Easter* Term (83) there was an Information for a Riot upon *Midsummer-day* before, about this contested Election, came to be tried. And that coming to trial, 10. *Maii*, and being found to be a Riot, and the Sheriffs sworn to be duly elected, thereupon we were abundantly satisfied that we were mistaken, and under misapprehensions, and that our Cause of Action would not hold, and we did discontinue it. Indeed, if we had prosecuted our Action after that, it would have been more like an angry and a silly Prosecution, and the whole have had a worse Construction, than the thing in itself would bear. But when we found the Opinion of the Court to be against us about our Election, we immediately discontinued our Action. Gentlemen, we shall prove these to have been our Proceedings, and that, I hope, will satisfy you, we are not guilty, according as we have pleaded.

Mr. *Ward*. May it please your Lordship, and you, Gentlemen of the Jury, I am of Counsel on the same side, for the Defendant, and desire to be heard one Word, as to some Things that have been said on the other side on this Cause. There have been some Questions asked, that do very much reflect upon the Defendant, and which I would take out of this Cause. I shall take notice, first, what the Questions were, and then give them that Regard and Answer which they deserve. That which is urged, Gentlemen, by way of Crimination, in this Cause, against the Defendant, and an unjust as well as foreign Reflection, not at all concerning the Cause, is, as if the Defendant were acquainted with the Insurrection and Conspiracy that was intended against the King's Life, and for subversion of the Government, and procured the Plaintiff, then Lord Mayor, to be arrested, to further and promote that Insurrection. But as that was insinuated only for Reflection's sake, so I hope you, Gentlemen, will be pleased to take notice, that not one Word of any such thing is proved at all that the Defendant ever knew of any intended Insurrection, nor that this was done with any such Design: For even their first Witness, *Keeling*, from whose being employed by the Coroner in the Execution of the Writ upon Sir *William Pritchard* the Plaintiff, they would argue that somewhat else was designed in it, doth give a positive Denial of any such thing now upon his Testimony here. And Mr. *Papillon* the Defendant never knew him in his Life, nor employed him in this Business, nor ordered that he should be employed in it, nor ever saw him, but the Coroner gave him his Warrant to execute. If therefore *Keeling* and *Goodenough* were concerned in any

ill Business, and have taken upon them to do that which they ought not to have done, that doth not signify any thing in this Case, nor ought to turn to the Defendant's Prejudice. Nor, if any thing were done by the Officers, that were to execute this Process, that were a *Misfeasance*, or a Male-execution of their Office; that ought not to be imputed as a Fault in the Defendant. But for this Matter now before you, the Case will depend upon this Point chiefly, Whether the now Defendant had a reasonable Cause, or probable Ground, to bring an Action against the Plaintiff at the time when it was brought, and this Arrest made? For there is many a Man, that at the Commencement of his Action, doth conceive in himself, he has a good probable Cause of Action against another Man, that in the Event of Things finds he was mistaken, and hath no such Cause; and thereupon desists the Prosecution of it. Therefore the Probability of the Cause, at the time when this Fact was done, is the Question you now are to try. For we are not now considering, whether that probable Cause did continue and prove a good Cause, the event of this Matter has proved it quite otherwise. Indeed the original Question of this whole Cause was, Who were only elected Sheriffs? And that at the time of such Election made, a great Number of Votes passed for the Defendant, is, I think, very notorious, both upon the lifting up of Hands, and upon the Poll. These things we shall offer to you, and shall make it out that these gave occasion to the Defendant to contest the Election, and consequently to the bringing of the Action that the Plaintiff was thus arrested upon. If then there were such things as these that we have opened, which gave a colour to controvert the Right, and the Defendant pursued the Method prescribed by the Law to bring it to a Determination, and there was no particular Disrespect or Incivility offered to my Lord Mayor, then sure there was no reason to bring this Action against us. And that there was no indecent Behaviour used towards the Plaintiff doth appear from the Evidence that hath been given of the whole Transaction. All that was desired of my Lord Mayor, was but an Appearance. For this was indeed an Action that did not require Bail, but an Appearance; tho', I must needs say, I never knew any one so averse to give an Appearance to an Action as the Plaintiff was, for after a *Latitat* and *Capias* taken out, and being frequently acquainted with it, and at length, upon application after the taking out of the *Alias Capias*, and many Attendances, with all the Deference and Respect imaginab'e, both to his Person and Office, not so much as a bare Appearance could be obtained. Upon the opening of the Declaration and the Cause you have been told of the great Dangers that were in the Case, as to the Infringement of Publick Peace, and the Government, which has been very much aggravated on the other Side. But had the reasonable Request of the Defendant by his Attorney, or the Officer, so often repeated, been but complied with, it had been but sending to any Attorney, and ordering an Appearance, and then, I hope, the Peace of the Kingdom had been in no Peril from such a Design as this Arrest. Which I would not have mentioned, nor should have taken to be at all concerned in the Issue now before you to be tried, but that I find them to be taken into the question, when I hope you will consider they are no way material to the Point in Controversy. Now, Gentlemen, in our Defence against this Suit of the Plaintiff's, we shall

call our Witnesses to prove what we have opened: And our Defence will be in these Steps: First, To shew the Inducement to our Action against the Plaintiff; which will shew there was a probable cause. Secondly, Give an account of the reverent Carriage and Behaviour towards the Plaintiff in the Prosecution, how with reiterated Applications it was only desired that the Plaintiff would give an Appearance, which he was not pleased to do; and that thereupon, with great Civility, the King's Writ was executed, as indeed I see no Proof to the contrary. For neither the Coroner, nor those other People, that gave their Assistance to him, were at all rude in their Carriage to my Lord Mayor, but as soon as the Arrest was made, they were all turned off, and the Coroner staid alone with my Lord, and went with him, in his Lordship's own Coach, to the *Skimmers Hall*, which was the Coroner's House. Neither was there any thing ill done, after all this was past: For, upon the Plaintiff's Appearance, the now Defendant declared in his Action, and intended to pursue it, but it happened that afterwards, in a short time, these things suffered some Debate, in a Trial that was here about a Riot at this Election, where the Question of the Right and Election was determined on the other side, which gave the Plaintiff in that Action, the Defendant in this, satisfaction that he was in a Mistake, and so he thought fit to discontinue that Action, and proceeded no further—

L. C. J. No, Mr. *Ward*, that was not the Question determined then.

Mr. *Ward*. My Lord, I humbly conceive the Issue of that Cause did determine that Question—

L. C. J. No, no, I tell you it was not the Question.

Mr. *Ward*. I must submit it to your Lordship—

L. C. J. I perceive you do not understand the Question that was then, nor the Question that is now. You have made a long Speech here, and nothing at all to the purpose: you do not understand what you are about, I tell you it was no such Question.

Mr. *Ward*. My Lord, I was only giving an account of what we should prove as to the Fairness of our Proceedings—

L. C. J. But I must interrupt you, and tell you, all you have said signifies nothing. And as to what you mention of the Trial for the Riot, I say, if there be any Election to an Office at any time, that is controverted or doubtful, you have Forms and Methods of Law to determine the Controversy—

Mr. *Ward*. And we say, with Submission, my Lord, we have only pursued such Form and Method.

L. C. J. You are not to try Rights by Club-Law, by Riots, by Noise, and by Tumults. Therefore you are mistaken, to say, that was the Question upon the Trial of the Riot. No, it was not the Question, but the Defendants there were tried for a notorious Offence, and disorderly tumultuous Assembly, an Assembly that had like to have set us together by the Ears. Therefore you must not talk after that rate. If you will speak, apply to the Business in hand. Do not make such Excursions, *ad captandum Populum*, with your Flourishes; for that is all that is designed by your long Harangues. But I must not suffer it, I will have none of your Enamel, nor your Garniture. The Business of the Court is, and, by the Grace of God, it shall always be my Business,

Business, and so it should be the Counsel's too, *Servare jus illatum*. But I see you do not understand the Question, and that makes you ramble so much in your Discourse.

Mr. Ward. My Lord, I desire always to do my Duty; and do it as well as I can. I know very well, and hope to apply it to this Case, that in a Question of Right there are Forms and Methods of Law to be pursued, and I would defend my Client from this Action, by proving he did pursue that Method; and when he apprehended he had been before mistaken, he desisted from what he had begun—

L. C. J. I tell you, I perceive you do not understand the Question.

Mr. Ward. If your Lordship will give me leave to explain my self, I hope I shall satisfy your Lordship.

L. C. J. Indeed, *Mr. Ward*, you do not understand the Question at all, but lanch out into an Ocean of Discourse, that is wholly wide from the Mark. I see you do not understand it.

Mr. Ward. Will your Lordship please to hear me—

L. C. J. Ay, if you would speak to the purpose; but I cannot sit here all Night to hear you make florid Speeches about Matters that are foreign to the Point before us. Come to the Question, Man; I see you do not understand what you are about.

Mr. Ward. My Lord—

L. C. J. Nay, be as angry as you will, *Mr. Ward*, I do tell you agen, All you have said is nothing to the purpose, and you do not understand the Business.

Then there was a little Hiss begun.

L. C. J. Who is that? What in the Name of God! I hope we are now past that time of day, that Humming and Hissing shall be used in Courts of Justice; but I would fain know that Fellow that dare to hum or hiss while I sit here; I'll assure him, be he who he will, I'll lay him by the Heels, and make an Example of him. Indeed, I knew the time when Causes were to be carried according as the *Mobile* hiss'd or humm'd; and I do not question but they have as good a Will to it now. Come, *Mr. Ward*, pray, let us have none of your Frangencies, and fine Rhetorical Flowers, to take the People with.

Mr. Ward. My Lord, I do not do any such thing; but if your Lordship would please to hear me, I would explain my self, I hope, to your Lordship's Satisfaction, and the Satisfaction of the Gentlemen of the Jury.

L. C. J. Hear you? Why, I did not interrupt you, Man, till you came to lanch out into extravagant things that did not at all concern the Cause. Keep close to the Question we come here to try, and I will hear you as long as you will. The single Question is here, Whether there were a probable Cause for your arresting the Plaintiff, or not?

Mr. Ward. My Lord, we did apprehend, I say, that we had a probable Cause; but when we found our Mistake, we discontinued our Action, paid Costs, and have a Receipt for them. This was it I was saying—

L. C. J. Say what you can, in God's Name, that will conduce to the Point in hand; but do

not make the People believe as tho' the Right of Sheriffs, or not Sheriffs, were determined upon the Trial of a Riot.

Mr. Serj. Maynard. There are these things that are proper to be considered in this Question? Whether the Cause were probable, or not probable? And if not probable, whether malicious, or not?

L. C. J. True, Brother: If People will but understand their Business, it is reduced to a narrow Compass; but if they will not understand what it is they come about, they will ramble from the Point, and who can help it? But we must keep to what is before us.

Mr. Williams. We shall make it out, that nothing was done but very civilly.

L. C. J. You must make it out, that nothing was done but what you had probable Cause at least for.

Mr. Williams. We will, my Lord, apply our selves to that which your Lordship directs. Call *Mr. Brome*, *Mr. Courthope*, and *Mr. Cornish*.

Mr. Brome sworn.

Mr. Ward. *Mr. Brome*, are you sworn?

Mr. Brome. Yes, Sir.

Mr. Ward. Have you the Writs here? The *Latitat* and the *Capias*?

Mr. Brome. Truly, Sir, I have not; I did not bring them with me, they are at home at my House; if you please, I will fetch them.

Mr. Ward. Pray, can you tell, Sir, when the first Writ was returnable?

Mr. Brome. In *Hilary Term*.

Mr. Ward. When you had that Writ brought to you, Sir, what did you say to my Lord Mayor about it?

Mr. Brome. I went to my Lord Mayor with *Mr. Goodenough*, and desired my Lord that he would appear to it, as *Mr. Goodenough* told me he had desired of him himself before. But he said he would give no Appearance. If I would take him upon the Writ, I might do as I pleased, and he would consider, and do as he should think fit, but he would not give any Appearance. I told him, I had Writs against several of the Aldermen upon the same account, and that I would wait upon them also; and I did so, and desired them to appear, and offered to take an Appearance from them, and gave my Lord Mayor and them time to consider of it, and came again; but they told me, they had considered of it, and would give no Appearance.

Mr. Williams. When was this, Sir?

Mr. Brome. In the beginning of *Hilary Term*, to the best of my remembrance.

Mr. Brome. What time did you give my Lord Mayor to consider of it?

Mr. Williams. About a Week, or some nine or ten Days time, as I remember.

Mr. Ward. Where was it that you had that Answer, that he had considered of it, and would give no Appearance?

Mr. Brome. It was at the Court of Aldermen.

Mr. Williams. Were the Writs brought again to you?

Mr. Brome. There was not time to make a Return then, and so they let all alone till a little before the beginning of *Easter Term*; and then one Day, *Mr. Goodenough* the Attorney brought me

me the Writs again; and threaten'd to complain to the Court of me; and acquaint them, that I had neglected the Execution of the King's Writs, two of them.

Mr. Ward. Upon your Oath, Sir, did he threaten you, that if you did not make a Return of the Writ, he would complain?

Mr. Brome. He said I had expos'd him to the Complaint of his Client; and if I did not do it, he would complain to the Court of me: If I would make a Return, as I ought to do, well and good, if not—

Mr. Williams. If not, what then? Did he use any other threatnings, pray, Sir, but that he would complain to the Court?

Mr. Brome. He did threaten to complain of me.

Mr. Att. Gen. You say, Sir, he threaten'd you; what Answer did you make to him?

Mr. Brome. I did not use to execute Writs myself, I told him: Thereupon he did propose two Persons to me, Mr. Keeling, and one Mr. Burleigh, for he told me the Sheriffs Officers would not do it.

Mr. Att. Gen. Pray, Sir, did you endeavour to get any of the Sheriffs Officers to do it?

Mr. Brome. He told me he could not get any of them to do it.

Mr. Ward. Mr. Brome, what did you do after he had propos'd those two Persons to you?

Mr. Brome. After I had given those Warrants to the Officers he had named, I told him, I was willing to go once more to my Lord Mayor, to see if I could get an Appearance of him without arresting him; so I waited on him at his House at Grocers-Hall, but found him then at Dinner; so I went away, and came again about four o'Clock, and I first spoke to Mr. Gibson, and intreated him to let my Lord Mayor know, that I desired to speak with his Lordship at his leisure: Afterwards, when I came up to my Lord Mayor, he asked me, what was my Business; I told him the Writs were renewed, at the Suit of Mr. Papillon and Mr. Dubois, and I was press'd to make a Return; and I desired his Lordship that he would be pleas'd to give an Appearance. He told me he was ready to submit to the KING's Writ, but would not give an Appearance; thereupon the Officers named in the Warrant by my Command did arrest him.

Mr. Ward. How often did you wait upon my Lord Mayor for an Appearance upon both the Writs, before he was arrested?

Mr. Brome. Several times; I cannot exactly tell how often.

Mr. Williams. Had you Directions, if he would please to give an Appearance, to take an Appearance, and not to arrest him?

Mr. Brome. I had Directions to take an Appearance, if he would give it.

Mr. Att. Gen. From whom had you that Direction, Mr. Brome?

Mr. Brome. From the Attorney Goodenough.

L. C. J. Now, Mr. Brome, let me ask you a Question or two: How long had you been Coroner before?

Mr. Brome. About two Years before, or thereabouts.

L. C. J. Had you ever made any Warrants upon Writs of *Capias* before?

Mr. Brome. Yes, my Lord, several.

L. C. J. Who did you use to make your Warrants to, to be executed?

Mr. Brome. I never keep my Warrants; they that execute them have them.

L. C. J. But answer me, To whom did you make them?

Mr. Brome. To one of the Sheriffs Officers commonly.

L. C. J. Then I ask you, upon your Oath, did you before this Time ever make any Warrants to any other Person, till such time as you made these Warrants to arrest Sir William Pritchard?

Mr. Brome. I have made several to the Sheriffs Officers, that I cannot remember now particularly.

L. C. J. But mind my Question, Man, and answer me directly; for I expect you should answer me positively to it. Have you ever at any time made any Warrants to any other but the Sheriffs Officers till this time?

Mr. Brome. I cannot remember that I have.

L. C. J. How then came you at *Ruffel's* House to discourse with Mr. Goodenough about who would be fit to execute the Writ, when you used to employ the Sheriffs Officers, and there were so many of them?

Mr. Brome. He told me he could get no one of them to execute it.

L. C. J. But there must be something more in it than ordinary, that you, and Goodenough, and all those other People, should come to meet about such a thing as this, to discourse and consider who should be fit to be put into a Warrant to make an Arrest upon a *Capias*, when before that time you used to make it to those that are vers'd in those Matters.

Mr. Brome. When the Attorney came with a Writ, and desired a Warrant upon it, it is usual to take whom he nominates, and make him the Officer to execute it.

L. C. J. Then give me, if you can, any one special Instance, wherein you have taken the Direction of the Attorney, whose Name to put into the Warrant.

Mr. Brome. Yes, my Lord, I can.

L. C. J. Do then, let's hear it, when was that?

Mr. Brome. I did it in the Case of His Royal Highness against Mr. Pilkington: Mr. Swift came for a Warrant, and directed me whom to put into it.

L. C. J. What Directions did he give you?

Mr. Brome. He gave me the Names in writing.

L. C. J. Where is Keeling?

Keeling. Here, my Lord.

L. C. J. What was the meaning of that Word that was used by you, that the Party would be angry, if you did not arrest my Lord Mayor; for that is it, which makes me so inquisitive into this Matter, how these People came to be employed?

Mr. Sol. Gen. Ay, pray consider with your self, and recollect, Mr. Keeling; when you were first mentioned to be a special Bailiff to arrest my Lord Mayor, you say you oppos'd it: How then came you to be drawn in, and engaged to do it?

Keeling. I will tell you, my Lord.

L. C. J. Ay, and tell us what Number of People were there.

Keeling. There were about thirty or forty.

L. C. J. Was Brome among them?

Keeling.

Keeling. He was there some part of the time.

L. C. J. Well, what was the Reason that you should be engaged about this Thing?

Keeling. I went away a while, and came again: *Mr. Brome* came in, and I was away an Hour and half, as I remember, or some considerable time. *Mr. Brome* cannot forget, that, when I came again, I found my Name inserted in the Warrant, as a Bailiff to the Coroner, to arrest *Sir William Pritchard*, then Lord Mayor. I disputed it, as being never concerned in any such thing before, and was very unwilling to be employed in the Affair. Says *Mr. Goodenough* to me thereupon, You will disoblige the Party in case you do not do it.

L. C. J. Was *Mr. Brome* in the Company when *Goodenough* said so to you?

Keeling. I know not that truly, but he was before in the Company.

L. C. J. How many were then in the Room?

Keeling. About twenty, or more, as near as I can remember.

L. C. J. You, *Brome*, did you ever, when you received a Writ to arrest a Man, and were to give a Warrant upon it, call a Consult of Twenty or Thirty, how to do it, before this Time?

Mr. Brome. I did not do it now.

L. C. J. No, no, a-lack-a-day, thou wert as innocent in all this Matter as a sucking Child.

Mr. Williams. Was *Mr. Papillon* in the Company, *Mr. Keeling*?

Keeling. No, he was not.

Mr. Att. Gen. *Mr. Brome*, pray answer me; When you had my Lord Mayor in your Custody, how came you to discharge him out of Custody?

Mr. Brome. I was taken into Custody myself.

Mr. Ward. Did my Lord Mayor give an Appearance?

Mr. Brome. I was committed to the Compter myself.

Mr. Williams. Were you by when it was agreed that my Lord would give an Appearance?

Mr. Brome. I believe not; it was afterwards, as I have heard.

L. C. J. A-lack-a-day, it went strangely against *Mr. Brome's* Stomach, all this did. I know it very well, he had no mind to it at all.

Mr. Att. Gen. *Mr. Keeling*, did you hear any Discourse between the Twenty or Thirty that were in that Company about this Business?

Keeling. I cannot say who in particular discoursed of it, or what was said.

Mr. Sol. Gen. Was it discoursed of in the whole Company?

Keeling. There was some Discourse about it in the Company.

L. C. J. You, *Brome*, were you ever acquainted with *Keeling* before?

Mr. Brome. I had the Misfortune, my Lord, to be concerned with him about some Coal Works.

L. C. J. Did you know that *Mr. Burleigh* before, that was the other Bailiff?

Mr. Brome. I knew him by sight; I had no great Acquaintance with him.

L. C. J. Pray where lived *Keeling*?

Mr. Brome. At *East-Smithfield*.

L. C. J. And where lived *Burleigh*?

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Mr. Brome. Truly, my Lord, I know not; I think at the other end of the Town.

L. C. J. But, prithee, how came you to join these two People together in this Business; the one from *Wapping*, the other from *Westminster*?

Mr. Brome. Where the Sheriffs were concerned, as they were in this Matter, and therefore it came to me, I thought it not so proper to pitch upon the Sheriffs Officers, nor would they do it, as he told me; and especially it being to arrest my Lord Mayor, I did not think proper to employ any one that lived in the City.

L. C. J. But there were abundance of People that were not Citizens, that were nearer at hand, and nearer together, and fitter for such a Purpose than a Tradesman fetched out of the East, and I know not who out of the West, to arrest a Man: There must be some other meaning in it.

Mr. Brome. I gave them the Nomination, as I used to do in like Cases.

L. C. J. Upon your Oath, Sir, was it you or the Attorney that named these Persons?

Mr. Brome. He told me he could get none of the Sheriffs Officers to do it; and I did not think it indeed proper for any of them.

L. C. J. And why, good Sir?

Mr. Brome. I did think so, truly, my Lord.

L. C. J. Why? Why? What Reason had you for it?

Mr. Brome. It was reasonable, as I apprehend, my Lord, for me to think so, it being in a Matter wherein the Sheriffs were so much concerned.

Mr. Sol. Gen. But did you propose it, or any one else in the Company, upon your Oath? and who was it?

Mr. Brome. The Attorney named them.

Mr. Com. Serj. It seems here were a great many Persons met at *Ruffel's* about this Business. I desire, my Lord, that *Mr. Brome* may name as many of them, as he can, that were there.

L. C. J. Ay, as near as you can, name the twenty or thirty Persons that were there; for you living in the City, and having an Acquaintance among that Sort of People, must needs know most of them.

Mr. Brome. Why, my Lord, there were both the *Goodenoughs*, and *Mr. Nelthorp*, and who in particular else, I cannot well remember.

L. C. J. Yes, yes, I am sure you can tell more of them.

Mr. Brome. My Lord, I cannot swear that I remember any other in particular.

Mr. Com. Serj. It seems he has named some of those that are in the Proclamation; pray, Sir, do you remember any others were there, that were in the Proclamation?

Mr. Brome. I do not remember any other of those in the Proclamation were there.

Mr. Att. Gen. Can you remember any that were not in the Proclamation?

Mr. Brome. There were several People that I knew by sight; but I cannot remember their Names.

L. C. J. Nay, nay, pray open your Eyes a little, and recollect your Memory, and tell us who were there; I know you can do it.

Mr. Brome. My Lord, there were many Citizens, that I knew by sight; but had no particular Acquaintance with them.

Mr. Sol. Gen. Did you know any of the Company

pany besides the *Goodenoughs*, and *Keeling*, and *Neltborp*?

Mr. Brome. I had a little Acquaintance with him.

Mr. Sol. Gen. How come you to remember him so particularly?

Mr. Brome. I verily believe he was there.

Mr. Recorder. Was *Mr. West* there?

Mr. Brome. I cannot positively say, whether he was, or not.

Mr. Williams. Swear *Mr. Cornish* then.

[Which was done.]

L. C. J. You, *Brome*, was *Mr. Cornish* there?

Mr. Brome. Not that I know of.

Mr. Att. Gen. It is strange we cannot learn who those Persons were that met there.

L. C. J. Oh these Fellows have strange Memories for their Purposes. Well, what do you call him for?

Mr. Ward. My Lord, we call *Mr. Cornish* to give an Account what he knows of this Matter, what Directions were given by the Plaintiff to his Attorney, how he should carry on this Matter.

Mr. Cornish. My Lord, That which I particularly remember, I shall fully and very faithfully declare. I was with *Mr. Papillon*, and *Mr. Dubois*, at my House. The Occasion of their coming thither I knew not, nor did expect either of them there; I my self came from *Guild-Hall*, either from a Court of Aldermen, or from a Committee; and when I came Home, I found them there. We had not been many Minutes together, but in comes *Mr. Goodenough* the Attorney; and he applied himself particularly to *Mr. Papillon* and *Mr. Dubois*, to receive their Orders what he should do; for he said the Time was almost spent, and he had addressed himself from time to time to my Lord Mayor, and some of the Aldermen, to get them to appear, but they would not. They told him then, they had given him what Orders they had to give him already; that it was fit the Matter should be brought to some Trial or Issue, that there might be an end of it. He pressed them then earnestly to know what he should do: Said they, you are to desire an Appearance to the Action, and if he will give it, take it, and remember my Lord Mayor is the chief Magistrate of the City; and pray, carry it with all respect and regard imaginable to him.

Mr. Williams. You say, Sir, they bid him to take an Appearance, if he could get it?

Mr. Cornish. Yes, and they declared, that their Design was only to bring it to an Issue to be tried, and they would not insist upon any thing but an Appearance, if it might be had.

L. C. J. Wonderful careful and civil they were, no doubt of it.

Mr. Cornish. This is the Truth, and the whole of the Truth, that I know of, relating to this Matter.

L. C. J. *Mr. Cornish*, you speak of some of the Aldermen, that he said he had been with: What Aldermen were those?

Mr. Cornish. There were several of them, that he said he had Writs against.

L. C. J. You were an Alderman then, pray, had he any Writ against you?

Mr. Cornish. I know not whether he had, or no.

L. C. J. But he did not require an Appearance of you, I suppose.

Mr. Cornish. If he had, I must have taken notice of it to defend my self as well as I could.

L. C. J. Ay, no question but you would; but were you asked for an Appearance, or no?

Mr. Cornish. I was told I should be sued among the rest.

L. C. J. But was there any Writ shewn to you?

Mr. Cornish. No, my Lord.

L. C. J. Then pray let me ask you a Question or two. Did you ever know any Man before bring an Action, or sue to be Sheriff of *London*? You have been Sheriff your self we know.

Mr. Cornish. This was a Matter that had been much disputed in the City; and a Question had been depending upon it, whether the Right was to my Lord Mayor, or in the Sheriffs.

L. C. J. But the Question of Right between my Lord Mayor and Sheriffs, what was that to *Mr. Papillon*? Did you ever know a Man bring an Action, or sue to be Sheriff?

Mr. Cornish. Truly, he that experienceth the Trouble of it, will, I believe, never be desirous of it.

L. C. J. But that is no Answer to my Question, answer me directly: Did you ever know any such thing before?

Mr. Cornish. I never did hear of any such, that I know of.

L. C. J. How then came *Mr. Papillon* so officiously to desire it?

Mr. Cornish. I cannot answer; what his Reasons were I know not.

Mr. Williams. It was an Action to determine the Question that was at that time so much litigated in the City of *London*.

Mr. Att. Gen. *Mr. Cornish*, Pray, will you answer me one thing; Were you never in no Company, wherein it was agreed this Suit should be brought and carried on in their Names?

Mr. Cornish. *Mr. Attorney-General*, I never meddled nor managed it.

Mr. Att. Gen. Did you never hear it was so agreed?

Mr. Cornish. It is known to Thousands, as much as I know of it; the Matter was disputed of in all Companies in the City.

Mr. Att. Gen. But you do not answer to my Question; were you ever in any Company when it was agreed that so it should be?

Mr. Cornish. Sir, I tell you as well as I can, the Matter that was to be disputed by that Action, was the general Discourse of all Societies of Men whatever, in the City at that time.

L. C. J. It is a strange thing, that one cannot get a direct Answer from these People, to any thing one asks them; I desire to know one thing of you, *Mr. Cornish*: You have known, *Mr. Papillon*, the Defendant before this time?

Mr. Cornish. Yes, my Lord, I have known him several Years.

L. C. J. Was he ever chosen Sheriff of *London* before?

Mr. Cornish. Yes, my Lord, I suppose he was.

L. C. J. How chance he did not hold then?

Mr. Cornish. I have heard he fined, as was common and usual, when Persons Occasions would not permit them to attend the Service of the Place.

L. C. J. He did so, it is known to Thousands, as you say, that he did. Now, pray, let me ask you

you another Question: Was *Mr. Bethel* ever chosen Sheriff before that time you and he were Sheriffs together?

Mr. Cornish. I do not know that he was chosen before.

L. C. J. How is that?

Mr. Cornish. My Lord, I do not understand what the Question is, or else I know nothing of it.

L. C. J. How, did you never hear of that before? For, *Mr. Cornish*, I do not speak of a thing that no body knows; alas, thousands, and ten thousands of People know that too.

Mr. Cornish. My Lord, upon my Oath, I do not know that ever he was.

L. C. J. Did you ever hear it?

Mr. Cornish. I do not know that ever I did.

L. C. J. Did you never hear that *Mr. Bethel* swore himself off, as they call it? You know what I mean.

Mr. Cornish. I do not remember any thing of it.

L. C. J. Nay, nay, it is to the Matter, I assure you, *Mr. Cornish*, whatever you think of it. I ask you then another Question, that lies something nearer your Memory: Upon your Oath, when you two were elected upon *Midsummer-day*, was not that Election vacated, and you chosen again within a Week, or some little time after? And was it not because you had not taken the Sacrament, and the Corporation-Oath?

Mr. Cornish. My Lord, I do remember there was a second Election.

L. C. J. And we remember it too well enough.

Mr. Cornish. That was so lately, that any Citizen of *London*, or any one that lived here, may remember the Passages of those Times.

L. C. J. And you have as much Cause to remember it as any Man, I assure you, for several Reasons that I know.

Mr. Cornish. My Lord, I think I have reason to remember it.

L. C. J. Lest you should forget it, I will enlighten you, and refresh your Memory a little: I ask you again, upon your Oath, was not your first Election set aside, because you had not taken the Oaths and the Sacrament?

Mr. Cornish. There were two Elections, my Lord, I say, I do remember.

L. C. J. Sir, do not prevaricate with me; I expect a positive Answer: Was not that the Reason, upon your Oath?

Mr. Cornish. I cannot say that was the positive Reason.

L. C. J. Then I ask you upon your Oath, had you taken the Oaths and the Sacrament as the Law requires?

Mr. Cornish. My Lord, *Mr. Bethel* was a Stranger to me, I did not know him before that time.

L. C. J. Gentlemen, Men must not think to dance in a Net, and blind all the World. As to my own self, I know these things very well, without any of their assistance, and I only ask these things by the by, to let the World be satisfied what sort of Men these are, that pretend to Saintship, and yet, you see, one can hardly get one Word of Truth out of them: Let the Law, in God's Name, take place, and let every Man prosecute his legal Actions; but when, under the Umbrage and Countenance of Law, Men shall desire to put themselves into Offices, and Places of Trust, on purpose to disturb the Government: Do you think

the Government will ever suffer itself to be snivelled at, and overthrown by a Company of such whining Fellows? Let them hiss and hum, and make a Noise and ado as they will; thanks be to God, 'tis not that time of Day now: Such things have pass'd too much uncontroul'd in the body of this City heretofore. What, Gentlemen, are you baffling the Law with such Pretences as these, now-a-days, and do you think to sham People into Offices? No, I tell you, Villany was the Foundation of it, and Knavery the Superstructure; and it is high time it should be told out, since I hear People begin to doubt of it as a question.

Mr. Ward. Where is *Mr. Serjeant*? Swear him.

[Which was done.]

L. C. J. Do not I know, as sure as I sit in this Place, that *Bethel* did once before swear himself off? and that there were two Elections of these two very Men that Year, and that one of the Reasons was, because they had not taken the Oaths and the Sacrament according to Law? Nor would they ever have done it, we know them, neither *Bethel*, nor that very Fellow that stands there, *Cornish*, neither, till they found it would contribute to the design of subverting the Government; then these Rascals could qualify themselves for an Office, only to put the Kingdom into a Flame.

Mr. Cornish. When the City chose me, I had good Reason for what I did.

L. C. J. Reason? I tell you, the City was in great Happiness and Quiet, ever since the late Times of Rebellion and Confusion; every one knew his Duty to his Superiors, and did it cheerfully and conscientiously, till such time as a couple of busy Fellows came to get into the publick Offices. Let the whole Party go away with that in their Teeth, and chew upon it, if they will.

Mr. Williams. *Mr. Serjeant*, will you please to tell my Lord and the Jury, what Directions you heard the Defendant, *Mr. Papillon*, give about the Plaintiff, how they should treat him?

Mr. Serjeant. My Lord, I was in the Counting-house at *Mr. Alderman Cornish's* House, when *Mr. Papillon* and *Mr. Dubois* were there; I went into the Parlour to them, and *Goodenough* coming in, they fell into a Discourse about this Action, that was brought by them against *Sir William Pritchard*, then Lord Mayor, and some of the Aldermen; and *Goodenough* gave them an account how far he had proceeded in it; he said, he could not get any of them to give an Appearance, and the Time was near spent, and he desired to know of them what he should do. *Mr. Papillon* and *Mr. Dubois* both did declare to him over and over again, that it was their mind only to have the matter brought to a fair Trial; and they charged him to look to it, to do nothing but what was Legal, and carry it with all respect imaginable to my Lord Mayor, as the chief Magistrate of the City; that he should by all means get an Appearance from him, if he could, and get the Coroner, who was an Officer of the City, to go with him, and carry all Things fairly and decently.

Mr. Att. Gen. Who gave these Directions, Sir, do you say?

Mr. Serjeant. *Mr. Papillon*, and *Mr. Dubois*, both of them did.

Mr. Ward. Now, my Lord, we shall shew that we proceeded so far in the Action, as to declare, but afterwards apprehending our selves to be under a mistake, we discontinued our Action.

Mr. Williams. And the Costs upon the discontinuance

continuance were received by my Lord Mayor's Attorney. Here is the Declaration as it was filed.

L. C. J. Ay, it may be there was a Declaration filed; but not regularly.

Mr. Williams. My Lord Mayor after appeared.

L. C. J. How doth that appear in Evidence? For the Coroner says he himself was in Custody, and knows no more of the Matter afterwards.

Mr. Williams. I believe your Lordship doth remember there were many Motions made in Court about this Matter, on the one side and the other, and at length in Court it was compromised, and my Lord Mayor promised to give an Appearance.

L. C. J. Prove what you can; prove the Appearance enter'd, and Declaration received.

Mr. Williams. My Lord, I only offer this as an Evidence of an Appearance.

L. C. J. A Record, I know, is a good and fair Evidence, shew that if you can.

Mr. Ward. It is not usual to declare till the Defendant appears.

L. C. J. A Declaration may well be upon an Appearance; but because it cannot be good without an Appearance, therefore it cannot be a sufficient Evidence of it.

Mr. Ward. We will prove the Costs of the Discontinuance paid and accepted. Swear *Mr. Baker.* [*Which was done*] What do you know, Sir, of any Costs that were taxed and paid for a Discontinuance in this Case?

Mr. Baker. My Lord, *Mr. Aston* told me he appeared for *Sir William Pritchard*, then Lord Mayor, and had a Declaration from the now Defendant's Attorney: So I entered up a Discontinuance, and paid the Costs, and have *Mr. Aston's* Receipt for them.

L. C. J. He says well. Go on then.

Mr. Williams. My Lord, it is a thing that hath frequently happened, that after a Man has brought an Action against another, he finds he was mistaken, and hath no Cause of Action, and thereupon relinquisheth his Suit: But sure that will not make him liable to a Suit.

L. C. J. Well, pray, go on with your Evidence.

Mr. Ward. My Lord, we are not now offering to try the Right of Election, tho' that really was the Foundation of the Action that we brought, but we apprehended that Question to be determined, and we acquiesced in it, when that Trial was over. Now, my Lord, we shall shew that apprehending ourselves really chosen, we did in a due Course of Law sue forth our *Mandamus*, directed to the Plaintiff and the Aldermen; and there is a Return made. I pray these may be read.

The Mandamus and Return were read.

Mr. Williams. Then that which we shall next shew, is the Grounds and Reasons why we thought this Return was false, and thereupon brought our Action. We shall shew, that at a Common Hall, held for the Election of Sheriffs, the Defendant was in Nomination, and had a great Number of Hands and Voices for him. Pray, call *Mr. Gilbert Nelson*, *Mr. William Wightman*, and *Mr. Leonard Robinson*.

[*Who all appeared, and were sworn.*]

Mr. Ward. *Mr. Nelson*, Pray, were you at the Common Hall for Election of Sheriffs, in the Year 1682?

Mr. Nelson. I was at the Common Hall in June, 1682, on *Midsummer-day*.

Mr. Williams. Pray, Sir, will you tell us who were then in Nomination, and how they did proceed?

Mr. Nelson. There were in Nomination for Sheriffs, he that is now *Sir Dudley North*, then *Mr. North*, *Mr. Box*, *Mr. Papillon*, and *Mr. Dubois*.

Mr. Ward. Pray, Sir, who had the Majority of Hands?

Mr. Nelson. I did see the Poll Books after they were cast up.

Mr. Williams. But did you observe the holding up of the Hands?

Mr. Nelson. Upon the holding up of the Hands, the Election was by the Sheriffs given to *Mr. Papillon* and *Mr. Dubois*.

Mr. Williams. But pray, Sir, upon your View, and in your Judgment, were there many Hands for *Mr. Papillon*?

Mr. Nelson. I guess there were the most Hands for him and *Mr. Dubois*.

Mr. Ward. What say you then to the summing up of the Poll-Book, that you spoke of?

Mr. Nelson. I did see the Books after they were cast up.

Mr. Ward. Was there a great Number for *Mr. Papillon*?

Mr. Nelson. Yes, there was the greatest.

Mr. Com. Serj. What Books do you mean, *Mr. Nelson*?

Mr. Nelson. The Books in the Sheriffs Custody, Sir.

Mr. Com. Serj. But did you see my Books?

Mr. Nelson. That was upon the second Poll.

Mr. Ward. Then which is *Mr. Wightman*?

Mr. Wightman. Here I am, Sir.

Mr. Ward. Were you present at this Common Hall? Did you see this Election?

Mr. Wightman. I can say nothing to the Election.

Mr. Williams. Were you at the Common Hall on *Midsummer-day*, 1682?

Mr. Wightman. I cannot say that, Sir.

Mr. Ward. Then what is it you can say to this Matter in question? Did you take any Poll?

Mr. Wightman. I did take the Poll in one of the Books.

Mr. Williams. Was there any Number for *Mr. Papillon*?

Mr. Wightman. There were 2400 and odd for *Papillon* and *Dubois*.

Mr. Thompson. Who were in Nomination, Sir? Who were the Persons polled for?

Mr. Wightman. *Sir Dudley North*, *Mr. Papillon*, *Mr. Dubois*, and *Mr. Box*.

Mr. Ward. What say you, *Mr. Robinson*? Were you at this Common Hall in 1682?

Mr. Robinson. Yes, I was.

Mr. Williams. Who were named to be Sheriffs then?

Mr. Robinson. *Mr. North*, now *Sir Dudley North*, *Mr. Ralph Box*, *Mr. Thomas Papillon*, and *Mr. John Dubois*, they four.

Mr. Williams. What Number had *Mr. Papillon* for him?

Mr. Robinson.

Mr. Robinson. I never saw the Poll.

Mr. Ward. But upon the View in the Hall, in your Opinion, did you look upon it as a doubtful Case which was elected?

Mr. Robinson. By the Hands I judged the majority was much more for Mr. *Papillon*, and Mr. *Dubois*, than for the other two.

Mr. Williams. So you think in your Judgment?

Mr. Robinson. Upon my Oath, that was my Opinion.

Mr. Williams. Well, my Lord, we must rest it here, unless they give us further Occasion.

Mr. Att. Gen. You say, the majority was for *Papillon* and *Dubois*: Pray was the Election declared at that time by the Mayor and Aldermen, or was there a Poll demanded?

Mr. Robinson. Mr. Attorney, First the Question was put for the Persons, then the Sheriffs declared their Opinion, and a Poll was demanded, and a Poll was granted, and the Sheriffs went with the Common Serjeant up to the Court of Aldermen, and acquainted them with it; and then they all came down again, and declared that there should be a Poll.

Mr. Sol. Gen. Who were Sheriffs then, pray, Sir?

Mr. Robinson. Mr. Alderman *Pilkington*, and Mr. *Samuel Shute*; and in the Evening, after the Poll was closed, the Books were numbered up, the Sheriffs came down upon the Huttings, and declared the Numbers; and then, as I remember, the Number declared for Mr. *Papillon*, and *Dubois*, was above 2000, and the Number declared for the other two, was some Hundreds under 2000.

Mr. Ward. My Lord, we leave it here.

L. C. J. Will you, that are for the Plaintiff, say any thing more to it?

Mr. Att. Gen. Yes, my Lord, We have more Evidence to bring in answer to what they have brought here. My Lord, that which they would excuse themselves by, is, that there was a probable Cause; but that will fail them, if it be but observed what doth appear upon their own Evidence. It is true, where a Man hath a probable right, he may sue. But this matter here contended for, was never such a right as a Man may sue for. No Man can ever shew, that for the Shrievalty, an Office of Burden, an Office of Hazard, and an Office of Charge and Expence, any Man did ever sue, so little ground of Reason had they to bring this Action for this Office. And then for their Title to the Office, that will appear but very weak. They pretend that my Lord Mayor and Aldermen could not try the right who was elected truly and rightfully, and they bring this Action to try it, and then they produce some of the Men that held up their Hands, and in their Opinions, Gentlemen, they say, the Election fell upon *Papillon* and *Dubois*. But, Gentlemen, that my Lord will tell you is nothing at all of Title, but a Poll was demanded, and by that it must be decided. Then one of their Witnesses tells you a Story of what the Sheriffs did upon the Poll: But all that is nothing too. For we tell you, and shall prove it, That those Sheriffs did, in a riotous manner, assume, and take upon themselves the Supreme Government of the City, and would have excluded my Lord Mayor from it. But all their Proceedings, and all that they call a Poll, was void, and can make no Title to any thing at all. It was a bare Dispute of a factious Party, to subvert the orderly Government of the City. There was no probability of

Title or Right could be gained by it. For the Chief Magistrate of the City, for the time being, ever did direct the Poll, and all the Proceedings upon Election of Officers. And when he did so in this Case, we shall prove to you there was not any considerable Number (that is, not twenty Men) to give any pretence of Title to this Gentleman, that thus sued for this Office. But indeed in that most riotous Assembly one of them, that ever was, they do pretend to be elected: But we shall shew that for that riotous Assembly they were convicted here as Rioters upon an Information, and fined to the King for it. And I could tell them of a like Case of an illegal Title; a Man goeth by a false Oath to get a Possession of Goods, takes out a *Capias*, and with others, getting into a House to arrest the Party, he then carries away all the Goods, and upon this Possession would set up a pretence of Title. But upon an Information for a Riot he was severely punished for it. Mr. *Papillon*, if he had thought he had had a good Title, or Cause to bring this Action, he would have employed better Instruments to have proceeded in it. The Attorney he makes use of, who is it but Mr. *Goodenough*? One who did not live within the City, nor had any thing to do in it, till brought into Office as the great Instrument of Mr. *Bethel* in his Actions, and a great Plotter in the late horrid and dreadful Conspiracy. And this Cause how is it managed? Not by any Counsel of worthy Men of the Robe, or grave Citizens, but by a Cabal of thirty or forty Rioters, most of them in the Proclamation proscribed as Traitors, and run away from Justice upon the Discovery of the Plot. All this speaks Malice, and the worst of Malice, the thing it self speaks it, to pretend a Title with so little or no ground. For you plainly observe, there is no Title but this riotous Assembly to ground their pretences upon. In the Prosecution of this Action there was no Order, whatsoever they pretend, for to take an Appearance, I mean by those that really were at the bottom of the Design. For the forty Men at the Consult at *Russel's* did not meet to be sure to give Order for an Appearance. No, they had other Work to do. An Appearance would not do their Work: For, as Mr. *Keeling* at large could explain it, they took all Opportunities to rise and make a Mutiny, and take Advantage of the *Mobile* and Disturbances, to bring about their main Plot. They did not care five pence for the Appearance: But when the Soldiers were up, then the Plot was spoiled, and then my Lord Mayor may go home, if he will. Gentlemen, we shall prove what I have opened to you, tho' I am persuaded not one of you but know it as well as I.

Mr. Sol. Gen. Shew the Records of the Conviction of the Riot.

L. C. J. Hold, Mr. *Solicitor*, I tell you before hand, that as I stopped them from urging the Trial for the Riot, as any Determination of the Right of Election, or as any ways tending to the Question now before us; so I must not let you neither enter into that matter. The Business of the Indictment, Conviction, and Sentence upon the Rioters, makes nothing, either to the Right of Election, or this Right of Action. And therefore, and I said to Mr. *Ward*, it was nothing to the Purpose to mention it on that side: So it is to no Purpose, I must tell you, to mention it on the other side. For it was no Determination of the Point of Right one way or other. And he could not give it in Evidence, that that was a *Litigation* of the Matter in Dispute, and upon the Decision of that Indictment (till which he

he apprehended he had a Right) he found it was against him, and so desisted. No, the Right, I say, was not at all affected by that Trial, one way or other. For admitting they had a Right, or you had a Right, yet the gaining your Right must not be attempted in a wrongful manner, but they had a lawful Way to come by their Right, and if they pursued that, well and good; if not, then they must take what comes of it.

Mr. Att. Gen. My Lord, that right was insisted on by them as the probable ground of their Action; and that, we say, was no Right.

L. C. J. Therefore it is to no Purpose to urge it.

Mr. Sol. Gen. But, my Lord, with Submission, our Answer to their Title is, That there was no Colour of Pretence; and this Conviction proves it.

L. C. J. No, *Mr. Solicitor*, that is not any Evidence one way or other.

Mr. Sol. Gen. If your Lordship please, it destroys their very Title, which is the Number of the Poll.

L. C. J. Lord! the thing is as plain, Gentlemen, as any thing can be. You or they may have a good Title, and yet do a thing that is unlawful to bring the Title into Possession. But then the punishing you for that unlawful Act is not an Evidence, either against or for the Title, nor doth determine it for you, or against you.

Mr. Sol. Gen. My Lord, we submit to your Lordship's Directions in it. But then this we say to it, the Question now is reduced to this Point: Whether there were any probable Cause for the Defendant's Suit against the Plaintiff? They have insisted upon it that there was, from two grounds. They call Witnesses, who declare they were of Opinion, that the Defendant had the Right of Election by the holding up of the Hands. That is one of the probable Causes of their Suit. Now that is clearly gone by this single Point, whether the Election was determined upon that holding up of the Hands, or they went to a Poll to decide it? If they went to a Poll, then it is clear the Right of Election was not determined; and he could have no Right to be Sheriff upon the holding up of the Hands. Then they went a little further, and offered in Evidence the Sheriffs Poll books, or the Numbers taken out of them, wherein they say, the Majority was for *Mr. Papillon*, and so thereupon, say they, we brought our Action. Now, to that Objection it is proper for us, with Submission, my Lord, to answer it, that that can be no manner of Cause of Action in the World; because, say we, that was no Part of the Election at all, nor was it at all to govern the Question of Right one way nor other, 'twas a Number of Names taken out of the regular Course upon Elections by Persons that had no legal Authority, nor was it such a Method, as was a Foundation to ground any Opinion upon one way or other, much less, such a one, as would be a Cause of Action. These are all the grounds they went upon. The first, by their own shewing, was no ground at all; for there was no Determination of the Right upon the View, but a Poll was agreed upon: The other, we shall call Witnesses to prove was irregular, and so not legal. Swear *Mr. Town-Clerk*.

[Which was done.]

Mr. Att. Gen. Pray, Sir, will you give my Lord and the Jury an Account who is to govern

the Poll upon the Election of Sheriffs, or other Officers, at the Common-Hall?

Mr. Town-Clerk. My Lord, I never knew a Poll about Sheriffs till about five or six Years ago; and that was the first Poll that ever I knew, and it was between *Mr. Jenks* and *Sir Simon Lewis*, and indeed it was the first that ever I did read of in any time within the City of *London*. I think, I have seen the Entry of all the Elections of Sheriffs, that are extant in our Books in all times; and I think, I did never see in any of those Entries one Poll that was ever taken for Sheriffs, it is only mentioned, Such an one elected by the Mayor, by Prerogative, and such an one, by the Commonalty. Among other Books of the City's, there is an old Book, that is called by the Name of *Liber Albus*, which, speaking of the Constitution of the Common-Hall for Election of Sheriffs, says, *First of all the Mayor shall choose one of the Sheriffs for London and Middlesex, for whom he will answer, and then the Commonalty shall choose another to join with him, for whom they will answer. And if there arise any Difference between them, who is elected, or not elected, it shall be determined in the same manner as it is in Common-Council.* This is all the Notice, that I find in any of the City-Books, that looks like a deciding the Election, when disputed, by a Poll. Now in another Chapter of that Book, where the Common-Council is mentioned, it is said, *If there be any Division of Opinions in the Common-Council, the Common-Serjeant and the Town-Clerk shall examine every Man severally, what their Opinion is, which is by way of Poll at this Day when we had a Common-Council.* But till that time that the Poll was between *Mr. Jenks* and *Sir Simon Lewis*, I never knew any Poll for Sheriffs, and that Poll was taken immediately by telling one and the other. For my Lord Mayor and Aldermen, as soon as ever they come upon the Hustings, make Proclamation to have the Liveries attend for such Elections, and then withdraw, and leave the Sheriffs and the Common Serjeant.

Mr. Att. Gen. Sir, the Course is very well known, I suppose to the Gentlemen of the Jury. But pray, did any Persons poll at my Lord Mayor's Books for *Dubois* and *Papillon*?

Mr. Town-Clerk. Not that I know. As to this Poll, my Lord Mayor caused the Common-Hall to be adjourned to such a Time, and after that sent for the Common Serjeant, and my self, and required us to go get Books, to take the Poll for *Mr. Box*, *Mr. Papillon*, and *Mr. Dubois*; as for *Sir Dudley North*, he was not to be polled for, he being chosen before, by the Prerogative of the Lord Mayor, and my Lord Mayor and Aldermen declared him fully elected; and upon that he was called out by publick Proclamation upon the Hustings, to come and take the Office upon him, as is usual in such Cases. But we had Directions to provide Books to take the Poll for *Mr. Box*, *Mr. Papillon*, and *Mr. Dubois*; and we did so, and took the Poll for these three Gentlemen, and upon closing of the Poll, we all of us sealed up our Books, and delivered them to my Lord Mayor, and at a Common-Hall afterwards he did declare *Mr. Box* to be chosen the other Sheriff, to be joined with *Sir Dudley North*: The Poll was, as it always ought to be, by the Direction of my Lord Mayor, and the Sheriffs are but Officers, and not the Judges and Managers of the Poll, without my Lord Mayor's Direction.

L. C. J. What say you to it, Gentlemen? Have you any more Evidence?

Mr.

Mr. Serj. Maynard. My Lord, and Gentlemen, Here has been much said in this Cause, that is nothing to the Purpose. As particularly, that which the Plaintiff's Counsel did last insist upon, who took the Poll, and who had right to take the Poll or not, is not any thing to this Question: This Action is not at all concerned in that matter. For whatsoever the Dispute was, and which soever had the right, and because it was a Dispute, some it may be could not poll at the one, and others would not poll at the other, yet the lifting up of two Thousand Hands might make him think that he was chosen Sheriff; and there lies the Cause of his Action, his Apprehension of a Right: Your Lordship did object this to us, Who ever before brought such an Action as ours, and did sue to be Sheriff of *London*, a Place of Charge and Trouble? —

L. C. J. No, I did not make it as any Objection. I asked your Witness *Cornish* that Question indeed, for some Reasons that I know.

Mr. Serj. Maynard. That may be objected indeed to the Prudence of my Client, *Mr. Papillon*, to desire such an Office: But that proves nothing of Malice in him against the Plaintiff; for if he were never so unwise as to desire it, if he had a Right to it, or thought he had, it is not a malicious thing in the Eye of the Law, for him to take his legal Course for it. And then the Objection that is made of the Instruments that were used: Our Attorney *Goodenough* is in a Plot: What is that to us? There is not the least Suspicion upon us. He is a bad man: But that doth not make all his Clients bad. But the Question now before you is, First, Whether there were any probability of a Cause of Action? Secondly, If there were not a probable Cause; yet whether that Action was grounded upon Malice? What Malice, I pray, is there in this against my Lord Mayor, to desire an Appearance of him, when it is conceived, though upon mistake, that there is Cause of Action against him? We did not press him to give us Bail to our Action, or threaten else to arrest him: No, it was a decent rather than an irreverent Application to him. If then there be not both concurring, want of Title, or probable Cause, and Malice too, this Action of the Plaintiff's is without ground. No man, that has any Sense, if he knows he has a clear Title against him, will bring an Action; but though it should be clear against him, yet if he do bring an Action, but not vexatiously, and maliciously, that cannot subject him to an Action; that would frighten men from bringing Actions upon doubtful Matters, which certainly is lawful for any Man to do. Now, what Malice is proved in the Defendant against the Plaintiff, the Jury here are Judges of. If we were Criminal in the Manner of our Proceedings, they might come before your Lordship in another way; but sure this is not the way; and if it should be actionable, and we likewise subject to be punished as a Criminal, then we should suffer twice for the same Fault. Now, Gentlemen, upon this Action we are not to be fined; but they, if they can, are to shew what Damages the Plaintiff sustained by our Action; and if what we have said do not satisfy you, that we had probable Reason for what we did, then you, upon your Oaths, are to give him what Damages you in your Consciences think he has received by it.

Mr. Williams. My Lord, if your Lordship please, I would ask one Question of Mr. Town-Clerk, as to the Right of managing the Election. Sir, You have observed many Common-Halls for Elections?

Mr. Townclerk. Yes, Sir, I have for this twelve Years.

Mr. Williams. Did the Common-Hall ever go to a Poll upon an Election, before this time, that you know of?

Mr. Townclerk. Never but once for the Election of Sheriffs, I say.

Mr. Williams. I speak, Sir, of any sort of Poll; for I suppose you do not call the holding up of hands a Poll.

Mr. Townclerk. Mr. *Jenks's* Poll was the first that ever I knew for Sheriffs.

Mr. Williams. Well, Sir, was that managed by the Sheriffs, or by my Lord Mayor, or by you, and the Common Serjeant; or who was it by?

Mr. Townclerk. Sir, The Mayor and Aldermen withdraw, and leave the Sheriffs to view the Election by the Hands; and the Common Serjeant propounds the Question, *So many of you as will have, &c.* —

Mr. Williams. By whose Direction doth he propound the Question, pray?

Mr. Townclerk. By the Direction of the Common-Hall, I take it.

Mr. Williams. But if a Question do arise upon an Election, so that it cannot be decided by the view, but they go to a Poll, who is to manage that Poll?

Mr. Townclerk. The Officers of the City, by Direction of the Lord Mayor.

Mr. Williams. That Poll you speak of, for *Lewis* and *Jenks*, was that managed by any body but by the Sheriffs?

Mr. Townclerk. It was managed by the Sheriffs and the Common Serjeant, in the accustomed manner.

Mr. Williams. How! in the accustomed manner, when you say that was the first that ever you knew?

Mr. Townclerk. It was so for Sheriffs; but there have been Polls for other Officers.

L. C. J. Why, Mr. *Williams*, every body knows that well enough, that the Sheriffs are concerned in the management of the Election, or the Poll, as all the rest of the Officers of the City are, under my Lord Mayor; and the Common Serjeant consults with the Sheriffs Officers and People about him, upon the view.

Mr. Williams. Pray, Sir, do you remember the Election of Mr. *Bethel*, and Mr. *Cornish*?

Mr. Townclerk. Yes, Sir, there was a Poll there too, that was the Year after.

Mr. Williams. Who managed that Poll?

Mr. Townclerk. The Sheriffs, and the Common Serjeant, and I, did agree to take it thus in two Books, whereof one was with the one Sheriff, and the other with the other Sheriff; at the two ends of the Hall.

Mr. Williams. That was taken in Writing, Sir, was it not?

Mr. Townclerk. Yes, Sir, that other of *Jenks* was only by telling.

Mr. Williams. Were you concerned in taking that Poll?

Mr. Townclerk. I did assist at it one Day.

Mr. Williams. Who ordered you to take the Poll that Day?

Mr. Townclerk. Truly, I did concern my self as little as I could in those things: What Report was made to the Court of Aldermen, I cannot tell; but one Day, coming into the Hall, I had no mind to concern my self in it; but some Gentlemen did pray me to go up to the Poll; and I did go up.

Mr. Williams. Sir, upon your Oath, Did the Sheriffs direct you to take it?

Mr. Townclerk. I really think they did not.

Mr. Williams. Did my Lord Mayor direct you?

Mr. Townclerk. No, Sir.

Mr. Williams. Did the Sheriffs manage it?

Mr. Common Serj. I did it by Sir Robert Clayton's Order, who was then Lord Mayor.

Mr. Williams. My Lord, all that we say to it is this, We are not now proving our Right upon which we brought our Action, that we submit unto, it is against us, we must agree it: But be the Right one way, or other; yet we might, from a supposed Right, have a probable Cause of Action. It seems to be a doubtful Business, by all that Mr. Townclerk has said, who has the Right; for all he knows of the Constitution is from *Liber Albus*, and that is somewhat dark. You, Gentlemen, hear what is said; the Thing was a Question of five or six Days, and a puzzling one it seems; and therefore we might be misled into an Apprehension, that what the Sheriffs did was right, and so not at all concern our selves with what my Lord Mayor did.——

L. C. J. *Mr. Williams*, you talk of that you do not understand; for my Lord Mayor was not there at that time of *Jenks's* Poll: I was Common Serjeant my self, and I know the Sheriffs have nothing to do with it.

Mr. Williams. It should seem by Mr. Townclerk to be doubtful, sometimes one, and sometimes another did direct the taking of the Poll.

L. C. J. But you are out still. But for all that, this is nothing to your Right of Action, one way or other.

Mr. Williams. My Lord, I must lay it here, it was a doubtful Thing, and we brought our Action to try the Right; but afterwards conceiving we were out, and had no Right, we discontinued and desisted.

L. C. J. It was so far from being their Right, that I desire you to call me any one Witness, that can say, before *Jenks's* time, there was ever a Poll for Sheriffs, or such a Thing thought of.

Mr. Williams. We were under an Apprehension of a Right in them.

L. C. J. There could be no Colour for any such Apprehension in the World.

Mr. Williams. We must submit it to your Lordship's Directions.

Mr. Att. Gen. So do we.

Mr. Serj. Maynard. Whether this Action brought by us, was malicious?

Mr. Ward. My Lord, Mr. Attorney doth challenge the Defendant to shew that his Action was brought by advice of Counsel; we shall shew it was with good Authority of Counsel. *Mr. Baker*, can you tell whether it was by any Advice, and whose?

Mr. Baker. It was by the Advice of *Mr. Thomp-*

son, *Mr. Pollexfen*, and *Mr. Wallop*, as I have heard.

Mr. Att. Gen. But you hear what *Keeling* says, there was a Party, that were at a Consult about it, and that were concerned in it.

Mr. Sol. Gen. My Lord, we have done on both Sides, I think, and submit to your Lordship's Direction in it.

L. C. J. Will any of you say any thing more?

Mr. Williams. No, my Lord, we have done, we leave it upon this Evidence to your Lordship and the Jury.

Mr. Att. Gen. My Lord, we have no more to say for the Plaintiff.

L. C. J. Then, Gentlemen of the Jury, as my Brother *Maynard* said in the Beginning of his Defence in this Cause; so I say now to you, to set all Things straight and right: God forbid, that any heat, or transport of the Times, should bring us into that Condition, but that every Subject of the King's, that hath a right of bringing an Action at Law against another, should have free Liberty so to do. And the Courts of Justice are now, and, I hope, always will be so open, that every one that would take a Remedy prescribed by the Law for a Wrong done him, may be received to bring his Action, which is a legal Remedy.

And I am to tell you, Gentlemen, that much has been said in this Case (which I perceive is by the Concourse of People a Cause of great Expectation, as my brother likewise said) which is not at all to the Case. I am sorry truly at this time of Day, that we should stand in need of such Causes as these, to settle and keep People in their due Bounds and Limits. But though many Things have been said in the Case, that are quite besides the natural Question; yet they having been made Dependencies upon that Question, and because it seems to be a Case of such Expectation, I think it will become me in the Place wherein I am, to say something to you, and, according to the best of my Understanding, tell you what I apprehend to be the legal Part of it, stripped of what hath no Relation at all to it. And if I shall omit any thing that is material on the one Side or the other, here are Gentlemen, that are learned in the Law, who are of Counsel both for the Plaintiff and the Defendant; and, I shall not think my self under any sort of Prejudice in the World, if they take the liberty, as they may freely do, to interrupt me, and enmind me of what I forget, or wherein I may mistake.

For, Gentlemen, I assure you for my own part, I would not have the Law made subservient to any Purpose, but the exact Rule of Justice. I would to the best of my Understanding in all Cases *servare jus illaesum*, preserve the Law and the Right of every man inviolable. I would have the Law of the Land to be the Measure of my own and all other mens Actions. And I hope no man can justly (I am sure I do not know they can) complain of any Breach or Invasion that is made in the Courts of Justice, either upon Law or Right. But all those that have the Administration of Justice committed to them by the Government, do behave themselves with all Equity and Impartiality towards all the King's Subjects; and the Law has as full and free a Course, and Justice doth every where take place as much as can be desired by any honest and good Man.

Gentlemen,

Gentlemen, In this Case, that you now are to try, I must first of all tell you, that this Business of the Right of Election, one way and the other, hath been too much insisted on on both sides. And I speak it, because tho' I my self in my own mind know what of it is true, and what not; yet I conceive it not so proper to be mentioned in this Case, it being no legal Evidence to the Point in question. Now it is a Duty incumbent upon you to observe, and upon the Court to suffer nothing to be urged so as to have any weight with you, but what is legal Evidence. That you are only to mind, Gentlemen. So that if I mention to you any Point of Fact, that hath not been given in Evidence, as having a true Relation to this Issue, you are not to mind what I say to you about it. On the other side, I must likewise acquaint you, if there be any Difficulty in Point of Law in the Case; you are to observe the Directions of the Court, who will be always ready to assist and direct you in it. Or the Gentlemen, that are of Counsel on the one side, or the other, may have the Matter found specially, if they think there is Fact enough to be found to ground a Question upon.

Therefore, Gentlemen, for the Customs of the City of *London*, as to the manner of Elections, or who hath the Right to manage them, they are not at all material to this Business; and if they were, there is never a one of you but know it as well as we, or any body doth. I my self had the Honour to serve the City of *London* in the Places of Common-Serjeant and Recorder several Years: So long ago, that not above one or two, that sit upon the Bench in the Court of Aldermen, have been longer conversant in *Guild-hall*, or know the Customs of *London* in those matters better than I do.

It is notoriously known to all that have had any Dealing in *London*, or been acquainted with any thing there, that till within these six or seven Years last past, the Lord Mayor and Court of Aldermen, and the Common Hall used to go a birding for Sheriffs (you very well know what the Phrase means) and perhaps it was not once in ten times, that those that were chosen Sheriffs, held; but generally every Year, there were I know not how many Elections upon fining off, or swearing, or some reason or other; so that now and then there was but one Sheriff chosen for a great while together; and now and then never a one from *Midsummer-day* till near *Michaelmas*. And the way was to consider, such a one hath most Money in his Pocket; Oh, then put him up for Sheriff: And then, if he went off, then another would be found out. And there was one old Deputy *Savage*, that used to keep a black Book, that would furnish Names for I know not how many Elections. And who should be Sheriff, so as to divide into Parties, and Poll, was never a Question before such time as Mr. *Jenks*, that they speak of, came to be put up, and there the Dispute began; then the Faction began to appear.

Now, if any Man offers to tell me, I apprehended always it was the Sheriffs Right to manage the Poll; I would ask him how that can be a Right that never was done before? Let them shew me any one Instance of a Poll for Sheriffs before that time. No, it was notoriously known when the Polls began, Persons did not think the Shrievalty such an Office, that it was so earnestly to be coveted and desired. Polls indeed used to

be heretofore for the Bridgemasters Places, that are Places of Profit and Advantage; and so for Aleconners, and the like, those have been often in your Time and mine, Gentlemen, we may very well remember them. But this Office of Sheriff People were not heretofore so ambitious of, as to poll for it; but the City was glad if they could get any worthy and fit Person to accept of it.

And for the Management of the Election, we all can tell the manner of it, as well as any thing in the World. After my Lord Mayor and the Aldermen were gone off the Hustings, and retired to this Place, the Common-Serjeant staying there with the Sheriffs, used to make a Speech to the Common Hall, a Rehearsal of what had been before said by the Recorder; and then received the Nomination of such Persons as were to be put to the Question for Election from the Common Hall. And upon the putting of the Question, every Man held up his Hand for those that he desired should be chosen; and if it could be decided by view of the Hands, well and good; and the Common-Serjeant, consulting with the Sheriffs and those about him, declared their Opinion, that the Election fell so and so, on the one side or on the other; but if doubtful, or a Poll demanded by any one, then they used to acquaint my Lord Mayor what was done in the Common Hall; and thereupon they gave Order for declaring the Election, or granting the Poll, and used to come down to the Hustings for that purpose; and no one ever thought that either the Common-Serjeant, or the Sheriffs, or any body else, but my Lord Mayor, had the Power of those Courts. For the Common Hall was always summoned by Precept from the Lord Mayor; and when the Business was done, or was to be put off to another Day, the Common Crier by Command from the Lord Mayor makes Proclamation, *You good Men of the Livery, &c. may depart for this time, and give your Attendance here again such a Day, or upon further Summons*. No body ever talked of summoning a Common Hall by any body but my Lord Mayor. He did it by virtue of his Office, and he dissolved it, or adjourned it by virtue of his Office. All this is as notoriously known to all Men, that know any thing of *London*, as the Faces of you of the Jury are to the People here, or to one another. And this never came to be a Question, till the Business of the Poll between Sir *Simon Lewis* and *Jenks* came about, which you have heard of. Mr. *Papillon* himself, when he was chosen Sheriff before, and fined for it, was chosen in this manner, and no other.

Mr. *Cornish*, he comes and gives Evidence that the Common-Serjeant was reckon'd to be the Man that managed the Choice by Command and Direction of the Sheriffs. And some of those Gentlemen, that have been produced on the Defendant's side, they say, they have looked upon it as the Sheriffs Business. But, alas-a-day, it belongs to neither of them, they are but Officers to the Lord Mayor. The Common-Serjeant's Business is but to put the Question into the Mouth of the Common Crier. In so much, that when I my self was Common-Serjeant, as I used to pass by the Shops in *London*, they used to cry, *There goes so many of you as would have*. It was as plain a Road of things, that every body knew it before these things untowardly have come to be imbrangled by our Factions and Divisions, and the Heat of some busy Fellows. Here are a great many

many ancient Citizens, that I see, that know, and so you do all, Gentlemen, that this is true. So that all the Discourse of this Matter is but Flourish and Garniture, and doth not affect this Case at all, one way or other.

Another thing, Gentlemen, hath been mightily talked of, and urged, and insisted upon both by Plaintiff and Defendant; and that is the Defendant's Right, or not Right of Election to the Office of Sheriff, and that the majority was on his side, say his Counsel: On the other side, say the Plaintiff's Counsel. And for the settling that Right, he brought his Action against the Plaintiff; but it being determined upon the Conviction for the Riot, There is no such thing, Gentlemen, as that it was therein determined: That cannot be a Determination of any Right at all. For tho' I may have a Right to an Office, or any such thing; yet I must pursue a legal Method to attain to that Right, and not go irregular Ways to work.

As if I have a Right to come into your House, because you have not paid me your Rent (to make my thoughts and meaning intelligible to you by a familiar Instance, which will shew what I intend) I must not make a Riot, and turn you by Violence out of Possession. For I have a legal Course to come by my Right, to wit, by bringing an Action, and evicting you. But if any man attempt to get a Right in an unjust manner, and he be punished for it by an Indictment or Information, that, I say, doth not determine the Question of Right, one way or other.

To come then to the Issue, that here you are to try, the Point of this Action before us revolves itself into a narrow Compass, and is only this in short, which you are to enquire of, Whether or no the Plaintiff was arrested by the Defendant without probable Cause, and maliciously?

Now matters of Malice are things that remain in a Man's Heart; and it is impossible for me to discover whether another Man hath a Malice against me, if I do not see it in his Actions. Malice being a thing that is internal, is not else discernible.

Therefore you must consider the Circumstances that do attend this Action of the Defendant, and if so be they are malicious, then you are to find for the Plaintiff: But if they for the Defendant have offered to you any Circumstances, that can prove, or convince you, that he had any Probability of a Cause of Action, and that not attended with a malicious Prosecution of that probable Cause, then the Issue is with the Defendant.

This is the right Question, and the Law of this Action; and the Fact to make it out one way or other is now in Judgment before you, upon the Evidence that hath been given on both sides.

Now, in point of Law, I am to tell you, and that you must observe, That tho' I have a probable conjectural Cause of Action against another Man; yet if, to obtain my End in that, I prosecute him maliciously, with a Design to ruin him, or to put an Indignity upon him, or the Character he bears in the Publick, or put a Hardship or Difficulty upon him (I mean Hardship and Difficulty in point of time) when it is probable the Remedy may be had at ano-

ther time, and the same thing done with less injury and less trouble; than an Action will lie against me, for bringing my Action in such a manner; tho' it be true, that I had a conjectural Cause of Action against him.

As in the Case that was here in this Court the other Day, of Mr *Swinmock* against the Serjeant, that came to him, and told him in his Ear, that he had an Action against him; and this was upon the Exchange: Thereupon Mr. *Swinmock* brings his Action for this, against this Man, for whispering this in his ear: If he had proved any malicious Intention to disgrace him, no doubt the Action would have lien. For tho' there might be a Cause of Action against *Swinmock*, yet if that be maliciously pursued to get him arrested, and held to Bail, where no Bail is required by Law; or with an intent to disgrace him upon the Exchange, when it might have been done elsewhere, or at another time, this irregular malicious Proceeding will bear an Action. The pursuing malicious ways to obtain a Right, makes a Man obnoxious to the Action of the Party so prosecuted. I desire to express my self by Words, that may declare my Meaning as plainly as can be: And I hope I do so.

Then, Gentlemen, taking it thus as the Counsel for the Plaintiff say, to shew that the Defendant had no probable Cause of Action against the Plaintiff; they endeavour to answer what is alledged on the other side, as their probable Cause. And therefore, that we must consider first, what is said by the Defendant.

They tell you, here was an Election for Sheriffs of *London*, at *Guildhall*, where those Persons that they have nominated, were Candidates, and put in Nomination for that Office. And upon that Nomination, as say those three Witnesses, we were the Persons that had the majority of Voices; and thereupon we apprehended ourselves chosen, which gave us the Right of Action: So the Defendant, say they, sheweth some Probability of a Cause of Action; and if he have not pursued it with Malice, but in a regular way, the Probability of the Cause doth take off from the Malice, that else the very bringing of an Action without Cause, would imply in it self. And they say true, for I must repeat it again; if I have, *prima facie*, a probable Cause, and pursue it legally, no Action will lie against me for it.

But then, say they on the other side for the Plaintiff, That is no probable Cause; for you could from those transactions have no such Apprehensions of a Right; for that is not the measure of a Right of Election, or a Rule to guess who is elected by: For there being no Decision of the Election upon the holding up of the Hands, and a Poll being demanded, whereas the usual method is to have, by the Lord Mayor's Order and Direction, the Poll taken by such as he shall appoint; you went another way to work, you go your ways, and take Books to yourselves, and come not to the fair Determination of the Question: And they bring Mr. Town-Clerk to prove. You have heard what the Evidence is, and you are Judges of it.

Now take it, that this were in the Case of an office of Profit; as suppose it were a Question between me and *John-a-Stives*, for the Place of Bridgemaster, for the purpose, and a Poll is demanded, and granted; if they, that have no Authority,

Authority, shall go after the Court is adjourned by him that has Power, and take a Number of Names in the way of a Poll by themselves, and upon that come and say, *J. S.* has four and twenty hundred, and I have but so many, that sure is not any probable Cause, nor a Right; for you have gone here out of the known and usual method of such Matters, and depend upon that which can give no Foundation of Right at all. This is the Answer that is given to that by the Counsel for the Plaintiff.

You may have fifty thousand Names for you after that rate, and yet not be elected, nor have probable Cause of any such Apprehension. We all remember Sir *Samuel Sterling's* Case, which was upon the Denial of a Poll for a Place of Profit, that is to say, the Bridgemaster's Place: But this is upon a wrong Poll.

Suppose there had been a Poll granted (as there was) in this Case, and upon that Poll thus managed, Sir *Dudley North* and Mr. *Box* had had the majority but by a very few, and there had been an Action brought in such a Case, here was a probable Cause as good as in this Case, as it now stands, because some of them might happen not to have legal Suffrages, yet the taking the Poll by Persons of their own Heads, after the Court was adjourned, avoids all: so that that would have signified nothing. You are to consider of this Answer of theirs.

Then the great thing, Gentlemen, that you are to observe, is this: To bring an Action alone will scarce amount to a Proof of Malice; therefore Malice being in this Issue a great Point of Fact, you must weigh the Evidence whether the Circumstances do shew it, that there was Malice in Mr. *Papillon*. If the Circumstances are enough to amount to a Proof of Malice, you then are to find for the Plaintiff, and you are the Judges what Damages it is fit to give him for that Injury: He has laid Ten Thousand Pounds, but you must do what you, that are Judges of it, think fit in it.

Come, Gentlemen, it is best to be plain, and no Man needs to be thought wanting of an Apprehension, what is the meaning of all these things. It is commonly and universally known to all Mankind:

First, That no Man ever did pursue such an Action as this is, to be Sheriff, till these unhappy Times, wherein we are, and wherein we have lost that Quiet and Felicity, which I pray God we may be restored unto. And tho' it is true, a Man may lawfully sue for such an Office, and it is no Offence, yet it looks somewhat extraordinary, and that a Man has a mind to do something unusual in the Place, 'tis for some strange purpose or other, especially when a Man has fined for the Office once before, as we all know Mr. *Papillon* did.

Again, It is notoriously known, That for several Years last past the Government hath been beset: And that which is a baser Thing than ever was thought of, or acted in the highest times of Villany in these Kingdoms (I mean those of the late Rebellion) the very Methods of Justice have been corrupted, and all to serve the main Design of subverting the Government.

Gentlemen, This is so black a Wickedness, that no honest Man, that has any Sense of Loyalty, Religion, or common Justice, but must tremble at the very thoughts of it. When we see such Fel-

lows as are obnoxious to the Government, known Dissenters from the Established Worship, and that never thought of conforming to the Government, or the Laws, Civil or Ecclesiastical, or complying with the Church, but only to capacitate them to destroy it, nay, when Men, that are taken notice of to be common Reproaches to the Government under which they live, shall get into Office to make *Ignoramus Juries*, and to enable People to commit and be guilty of all the Falsities and Basenesses that Human Nature is capable of, no Man living, that has any Ingenuity or Goodness in him, but must cry out against it.

When Men begin to take Oaths to sanctify Villany, and enter into Clans and Clubs, and Cabals, to destroy the most Merciful of Kings, and to disturb, distract, and overthrow the best of Governments, What shall we say? And all this you, all of you, Gentlemen, know to be true. Was it not more safe to commit Treason in the City, than to sit upon a Bench of Justice to bring the Traitors to Judgment? Was it not more safe to conspire the Death of the King and his Brother, than to give the least Frown, or Look of Displeasure against one of these travelling Saints? Did not we know that Men were sanctified to be Jurymen, to enquire of Conspiracies against the King's Life and Government, that before that time were never thought fit to be trusted with the common Discourses or Society of honest Men?

When Men were thought fittest for Offices of such high Trust, according to their being thought capable of, and well-intended, to the overthrow of the Government: Do not we all know this to be as true, as that the Sun shines at Noon-day? When Traitors at the Bars were in less danger of being convicted of their Treasons, than the Judges were of their Lives?

Mr. *Papillon* knows all this to be true eminently. When packed Juries were grown to that height, and though seven or eight Witnesses came and swore positive downright Treason, the Traitor could not be by these Men so much as thought fit to be accused by an Indictment; to that Stupidity in Villany were Things brought by these Fellows: Nay, so far were the Proceedings in Courts of Justice tainted, that in no common Action whatsoever, that came here to be tried, but cropped Hair, and a demure Look, were the best Signs of a good Evidence, and the Business of an Oath signified nothing, provided the Party were to be propped up, and the Faction to receive an Advantage by it.

For God's sake, Gentlemen, let any Man but seriously consider and believe that there is a God in Heaven, and a dreadful Day of Judgment, when every one of us must answer for every Thought of our Hearts, every Word of our Mouths, and every Action of our Lives; and then tell me what horrid Impieties these are, such as any ordinary ingenuous Person would blush and tremble at.

And I would have Mr. *Cornish* to consider, whether ever till that time of famous, or rather infamous Memory, that he and his Fellow-Sheriff Mr. *Bethel* came into that Office, there were ever in London such Things as Tavern>Returns of Juries, or Clans and Cabals how to pack Fellows together for such wicked Purposes as these?

Do not most of you here know this? And doth not every one of your Hearts and Consciences agree with me in it? How far unlike

the Proceedings of those Times, in reference to Juries, were from what they anciently were? I have had the Honour to practise in this Place among you in my Profession, when without any disturbance, or mixture of Faction and Sedition, we were all quiet, and every one knew his Duty, and Justice was done in this Place so regularly, that it was grown to a common Proverb, if there were any Cause of any Difficulty, they would use to say to one another, *Come, we will be so fair with you, as to try it by a London Jury.* So far was it then from being thought, that in the City of London Justice should be corrupted, that the Ordinary Juries of London were thought the best Judges, and most impartial of any in the Kingdom. I appeal to all the Practisers of those Times that hear me, if what I say be not true.

But when once they had begun to pick and cull the Men, that should be returned for a Purpose, and got this *Factionous Fellow* out of one Corner, and that *pragmatical, pricked-ear'd, snivelling, whining Rascal*, out of another Corner, to prop up the Cause, and serve a Turn, then truly Peoples Causes were tried according to the Demureness of the Looks on the one Side or the other, not the Justice of the Cause.

Gentlemen, I take my self bound to tell you of these Things, and I wish I had no reason for it, and especially in this Case I should not do it, it being a private Action between Man and Man, were it not for the Ingredients that are in the Case, and that any Man, that has any Sense, may perceive.

Now then for this Case before you, Gentlemen, I desire, if possible, to be satisfied in one Thing or two: My *Lord Mayor of London*, it is true, is not, nor no Person whatsoever, be he of never so great Quality, is exempt from the Law: If he owe any Man any thing, he is bound to answer it to him, as much as any the meanest Citizen of London, or poorest Subject the King has: But is he to be arrested just at such a Time, because he is chief Governor of the City, and the Action will sound the greater? And the Court of Aldermen, are they to be arrested, because they are his Ministers, and necessary subservient Assistants to him in his Government, in such a Time as this was, when the Government, both in the City and elsewhere, was surrounded with Difficulties, and in great Danger on all Sides? What occasion was there for such haste and speed in this Action to be done just then? Would Mr. *Papillon* and Mr. *Dubois* have starved, if this Action had been suspended for a while? Sir *William Pritchard* would have been as answerable to this, or any Man's Action, when the Year of his Office had been out: But it carrieth Vengeance and Malice in the very face of it; it speaks, that therefore they would do it, because he was then *Lord Mayor*, the chief Person in the City for the Time, and thereby they should affront the Government, in arresting and imprisoning the King's Lieutenant, in one of the highest Places both of Trust and Honour. And this would be sure to make a great noise, and the Triumph of the Action would make their Party then to be uppermost, having got the chief Governor of the City in their own Clutches.

Nay, and because they would be sure their Malice and Revenge should take place, they take the very *Scoundrels* of the Party to be employed in

this great Work. For before that time, the Coroner (as he tells you himself) used to make his Warrants to the Officers that usually are versed in that Business, but here he must have the Direction of the Attorney, and who is that but *Goodenough*, a Man we have all heard enough of, and then *Burleigh* and *Keeling* must be employed, and by whose Advice, but by *Goodenough's* and *Neithorp's*? And all these Rascals, who now stand attainted of Treason, must be fetched in to consult about a fit Man to make an Arrest. And there they pitch upon this Man *Keeling* for one, who was one of the principal Conspirators in that damnable, hellish Plot against the King's Life, and that of his Royal Brother; but, by the Blessing and Providence of Almighty God, was made use of as a great Instrument of preserving those precious Lives, and with them our Government and Religion, and all that is dear to us, which by that Conspiracy was undermined, and I wish we had not Reason to say, and think, the Conspiracy still to be going on. But I hope in God, the Government, as established both in Church and State, will always be able to prevail, maugre all Designs, and those that are engaged in them, for its Destruction.

Now *Keeling* tells you he scrupled the Employment: No, said he, I desired not to have my Name put in, because I was never concerned in any such Thing before, and my Business was of another Sort. But then, Mr. *Goodenough* (and Mr. *Brome* the Coroner no doubt had a Hand in it, though now he has a very treacherous Memory, and has forgot all that was done) comes and tells him, You must concern your self, and do this thing; for you have a Trade with the Party, and it will be ill taken if you do not do it. And being asked whom he meant by the Party? He tells you, the discontented Party, and he explains their Discontent to be such, that they would have killed the King and the Duke. Now how far he was engaged with that Party is pretty well known, and therefore if he boggled at such a thing as this, which that Party it seems was engaged in, they would suspect him, and so, for the Party's sake, he was drawn in.

But then, when this Thing is done, pray, Gentlemen, do but consider what the Consequences might have been, and which perhaps (nay upon what has happened to be discovered since, doubtless) they did design it. But, God be thanked, those Consequences were prevented, and they themselves have Cause to be thankful to God Almighty for it. For here all the Magistrates of the City, that had any Care for the good Government of it, were to be taken up, and then, here was a Body without a Head, a Town full of Faction without any Government, and if the heady Rabble had been once up, without those that had Authority to restrain them, where then had been your Liberties or Properties, Gentlemen, or any Man's; nay, theirs that were engaged in this Design, if they had any? For those were Things much talked of by them. In what Danger had you, and all you had, for Life, Estate, Relations, and every thing been? But it pleased God in his infinite Mercy to shower down upon us, and upon this City, and the Government, in a mighty Preservation, putting it into the Hearts of some in Power, to bring the City-Militia some of them together, and prevent this Mischief, or else, God knows, this whole City might have been by this time

time once more in Ashes, and most of the King's Subjects wallowing in their own and one another's Blood. And their Party too would have felt the sad Effects of it, no doubt, as well as others. So that the Consequence of it was to destroy the Government, and that appears by the Party's being engaged in it; it could not be to gain a Right, to make this Hubbub and Ado to arrest the Magistrates of the City; and then take Advantage for some other wicked Purpose.

Another Point of Circumstance, that is considerable in this Case, is the particular Persons that were to be sued. The *Mandamas*, that was directed to the Lord Mayor and Aldermen; and there is a Return made, not by this, or that, or the other Man, but in the Name of them all, the whole Court. How comes it then to pass, that my Lord Mayor, Sir *Henry Tulse*, and those other Gentlemen, must be sued and arrested; but I warrant you Mr. *Cornish*, or his Party, were not to be meddled with? No, he had so much Zeal for Justice, and to do the Defendant Right, that if he should have been called upon to appear, he would not have stood out an Arrest; so just a Man he is, and such a Lover of Right without all doubt; but he was in no danger, I dare say; they loved one another too well to sue one another. That, I say, Gentlemen, is another Circumstance, that carrieth Malice in it. For I must tell you, these Things cannot be smothered, they are as apparent as the light: And though it falls to my Turn in this Cause, to enmind you of them; yet, they are as well known to you all, as the Passages in your own Families.

No, Gentlemen, there was not a Pursuit of Right in the Case; it was a designed Piece of Villany, on purpose to affront the Government; nay, to destroy it, and set us all together by the Ears. And if he were ten thousand times Mr. *Papillon*, I would, and must tell him so; and if it were not for some such devilish End and Purpose, he would never have been so greedy of an Office, he had before declined and fined for; and which he was only called to by a turbulent, seditious, factious Party, that had further Aims in it. Otherwise, I know Mr. *Papillon's* Humour so well, that I am confident, he would much rather have been contented to sit in his Counting-house, than in *Guildhall* in a Scarlet Gown. Alack-a-day, I know Mr. *Papillon* knows how to spend his Time to better Advantage to himself.

Ay, but say the Counsel for the Defendant, We did go on very tenderly and civilly, and respectfully; for there met at Mr. *Cornish's* House, Who, I pray? Mr. *Papillon*, and Mr. *Dubois*, and *Goodenough*, the prime Attorney in this Cause: And there, forsooth, they tell *Goodenough*, Be sure you do nothing, but what is exactly according to Law; and be sure you carry it very civilly and respectfully to my Lord Mayor, good Mr. *Goodenough*. Alack-a-day, how wonderful pious and considerate these People are! If Mr. *Cornish* had gone to my Lord Mayor, as it was his Duty to do, being then an Alderman (we know it full well) and said to my Lord Mayor, There were such Persons at my House talking of such a Matter, and I come to advertise you of it, and desire you would consider of it, he had shewn his Piety and Zeal, and Love for Justice, much more in that, than in admitting such Cabals in his House. But we know very well, as well as if we were in them, that they must go hand in hand in all these seditious and factious Businesses.

It is plain, Gentlemen, what the Design was from the Beginning to the End; nothing but to cause a Tumult and Confusion in the City, in Order to put that damned hellish Conspiracy, for the Destruction of the King and his Brother, and every Man that was honest and loyal, in Execution. This is certainly known to you all; and that there should be such a Parcel of People untowardly linked together in this Matter, not one man of which that they can pretend to be in any wise a Well-wisher to the Government, or to any that have any share in it: No, they are all Persons that are obnoxious to the Government, that had any Hand in it; but none of them Church of *England*-men, or Friends to her established Worship; notorious Dissenters, or profligate Atheistical Villains that herd together.

This, Gentlemen, is plain *Englisch*, and necessary to be used upon all these Occasions: So that it remains now upon your Consciences, whether upon all these Circumstances that have been mentioned, you think, the bare obtaining of a Right in a Legal Course, or some worse Thing, was designed.

We all know Mr. *Papillon* to be a wealthy man, an able Merchant; one that had rather have minded his Affairs Abroad, or at the *Exchange*, than the expensive, troublesome Office of Sheriff of *London*; but, that something was to be done to wreak a damned Malice and Revenge upon the Government. And sure, he must think, as his Party it seems did, that they would not be sufficient to subvert the Government, unless he could get into that Office.

This I tell him openly; and let him or his Party, make their Remarks upon it as they please. But you are to judge whether these Things be a sufficient Evidence of Malice, to support the Plaintiff's Action.

There was questionless a devilish Malice fixed in his heart and mind, and he wanted an Opportunity to effect it; and he thought it for his own Security to be best to take this Course, and nothing else was in it. For abundance of People have a mind to do Mischief, but want Opportunity and safe Ways to do it in: And, Oh, they rejoice, if they hit upon a Project, that shall carry a specious Pretence and Colour of Law; for then they think they are safe enough.

As in Case I have a mind to do any particular man an Injury in his Reputation and Business; the Business must not be done downright, by going to every body, and saying, Such an one is Poor, or a Beggar, and do not trust him; but I must cunningly and slyly insinuate it, I am sorry for such a man, I believe he is an honest man, but however he oweth Money; and under this Sort of Sniveling, Canting, Whining, sly Rate, do a man any Injury whatsoever: And yet forsooth he shall have no Advantage against me for it: I shall strike a Dart into the very Heart of that man's Credit, and yet he have no Remedy.

So, if I have a mind to talk against the Government, I will not do it aloud, and speak what I mean openly; but I will whine, and snivel, and cant, and make People believe I have dreadful Apprehensions of what is designing, and yet not bring my self in any Danger; for I will keep within Bounds all the while, though I do more Mischief than if I dealt fairly and above-board. *Alack-a-day* (as Mr. *Pilkington* said)