

to set it down; the Substance of what he did say was this, *The Bailiffs took the Pistols from my Table and shot me twice, the fat Man run me thro' and then drew my Sword, which I broke my self in his Hand, and beg'd for my Life: I never fired a Pistol, nor made one Push, they both run me thro', I offer'd to pay them the Money.* The Condition the Gentleman was in at that time was such, as it was not thought reasonable that he should sign it, but they will give you an account that he was perfectly sensible. My Lord, in the Afternoon somebody sent for Mr. Peters the Clergyman again, and it was with an Intent that the Deceased might receive the Holy Sacrament; and Mr. Peters, like a prudent Man, says, *According to the Account you have given you have been hardly used; however it becomes me to hope and desire, and you to express, that your are in Charity, before I Administer the Holy Sacrament.* Says he, *As I shall appear before the great God of Heaven, what I told you is true, I was barbarously murder'd; however I am in Perfect Charity with them, I forgive them, and I pray Almighty God to forgive them their Indiscretion.* My Lord, he did continue for some time in a languishing Way, tho' all Care was taken to save his Life. On Examination after his Death, (which is a sad Circumstance in the Case) there are found no less than ten Wounds on him, many of them mortal; he did continue till the 17th about Ten at Night and then he died. My Lord, here is a Case of great Consideration; and as on the one Hand the Defendants are Officers and Ministers of Justice, and must be protected in serving of their Process, and as long as they do their Duty must not be abused; yet when People submit to their Authority, they too must be protected, and the Law, that requires the one to submit, requires the other to protect and preserve their Lives; and if any Officer gives unreasonable Correction, where they make no Resistance in Cases of Durance only, where Hardships and Difficulties are put upon them, so as to shorten their Lives. I submit it to my Lord's Direction, whether they are not guilty of the Murder. To shew how careful the Law is of the Life of Man, my Lord Coke \* says, *If any Man who is in Custody of a Goaler dies, the Coroner's Inquest must sit upon him;* and it is for this Reason, that the King may be apprized that the Subject had no foul Play, but came to a natural Death; this Policy of Law is a good one. These, Gentlemen, are the Bounds which will be taken into Consideration, and when we have called our Witnesses, it must be left to my Lord's Direction and your Consideration, whether the Defendants Case is a Case to be justified, or whether or no they won't deserve the Punishment due to Ruffians and Assassins.

Mr. Reeve. I am Counsel likewise in this Case for the King: The Facts have been fully open'd in every particular Circumstance, and I apprehend this is not a Matter proper for us to shew with its usual Aggravations; for considering the Prisoners are not allowed Counsel, we are only to lay the Matter fairly before the Jury and the Court, both in relation to Matters of Fact and of Law.

True, the Defendants are Officers of Justice, and as such are entitled to the Protection of the Law, so far as the Law authorizes them in what

they do but in case they exceed that Authority, and use Barbarity to their Prisoners, where there is no occasion for it, they exceed the Bounds of their Authority, and what happens afterwards by a needless Quarrel, they themselves are the occasion of, and if a Person is killed, I submit it to your Lordship if they are not guilty of Murder.

We agree, my Lord, if Resistance is made by a Person arrested, and it is necessary for the Preservation of the Prisoner, or for the Life of the Officer, if his Life is attempted by the Prisoner, and in doing what is necessary for their Defence, and for the keeping of their Prisoner, there happens a Quarrel commenced by the Fault of the Prisoner, we agree the Officers are not to be blamed: But if a Quarrel is commenced by the Officers against a Prisoner submitting to the Law, and to their Authority and willing to do that which the Laws requires, namely, to pay the Debt, then only for Civility Money they use Durance, and they used him ill, and they begin the Quarrel and fight with the Man on that account, we must submit it, whether it is not Murder. We must agree in our Evidence, that there was not any Person present at the time of the beginning of the Quarrel, nor who continued there during the Quarrel: But from the Circumstances, and the Evidence we have to lay before the Jury, it will amount to a Proof, that this Quarrel was begun by the Officer. It is true, there were Pistols fetch'd by the Deceased, but these Pistols, if we shew they were not designed to be made use of to injure the Bailiffs, but were only for his own Preservation, if he should be ill used by them; if after he had taken these Pistols he dismiss'd himself from the Custody of these Pistols, as we apprehend will appear from the Evidence, and they take up these Pistols, and with one of these Pistols shoot their Prisoner, we apprehend that will take off the Circumstances, that would seem in favour of them. My Lord, we will call our Witnesses, and prove all our Facts, and then we must submit it to your Lordship's Direction to the Jury, whether on those Facts it doth not appear that the Offence committed is Murder.

L. C. J. Call your Witnesses. Sir John Pratt: Thomas Hargrave sworn.

Mr. Hungerford. My Lord, Thomas Hargrave was the Deceased's Servant, and he saw more than any Body; he will give your Lordship an account of the Matter.

Serj. Cheshire. Thomas Hargrave, do you tell my Lord and the Jury, what you know in relation to your late Master Mr. Lutterell, what past between him and the Defendants, and either of them, tell from the beginning, and be sure you tell the Truth.

At the Prisoners Desire the other Witnesses were ordered out of Court.

Hargrave. The first beginning, my Lord, was my Master sent me out of the House to call a Pair of Oars to go up to Westminster on Tuesday between Nine and Ten a Clock.

L. C. Just. What Day of the Month?

Hargrave. I don't know; with that I went and call'd a Pair of Oars, and came back and told him I had called them; says he, *Thomas get your Hat and go along with me;* when we had got two or three Doors from our Lodging, a little Man,

whose Name is *Tranter*, clapt him on the Shoulder, and presently after came another Man *Reason*, and said they arrested him, with that my Masters says, *Gentlemen, if you will go with me, you shall have your Money, my Wife is with Child, and I am afraid she will be frightened.*

*No, Damn you, we will go with no such Minter*, with that with great Persuasion my Master got them to go to his Lodging; my Master said, *fetch the Attorney and I will pay the Money: Reason* sent *Tranter* for the Attorney, and *Reason* went up with my Master, who said to my Mistress, *My Dear, don't be frighten'd, here are two Rascals who have abused me in the Street*; and my Mistress said to me, *Go to my Nephew*, I went, but he did not immediately come; when I returned I went into the Room, and there was no harm then, my Master was walking about the Room, and *Reason* stood with his Back to the Ceiling with his Face to the Pistols. My Master said, *Let me see your Warrant: Reason* show'd it him, and he said, *wipe your Arse with it*, and throw'd it down upon the Ground. *Reason* ask'd for Civility Money; my Master said, *No, he would give him none, for he had not used him well.* At last *Tranter* came; I opened the Door to him, he run up Stairs, I staid to shut the Door, and I heard a Rustling, or Noise; upon which I ran up Stairs after *Tranter*, and I saw *Tranter* close with my Master and throw him against the Closet Door, and *Reason* took his Sword and run my Master through; I took *Reason* hold of the Sword Arm, and he said, *Damn me, if you don't go out of the Room you shall die before your Master*; I heard no Pistol all that time.

*Serj. Cheshire.* Did you go in after the Pistol was shot off to see your Master?

*Hargrave.* No, I did not see him till after he was carried into t'other Room.

*Serj. Cheshire.* Do you know of any Direction given by your Master about fetching the Money?

*Hargrave.* Yes, I heard my Master say to my Mistress, *Fetch the Money and I will pay these Rascals.*

*Mr. Reeve.* I think you say upon hearing of a Scuffle you ran up Stairs, and you saw *Tranter* run your Master against the Closet Door.

*Hargrave.* Yes, Sir,

*Mr. Reeve.* Had your Master any Weapon?

*Hargrave.* No.

*Mr. Reeve.* Where were the Pistols?

*Hargrave.* One was on the Table, and the other in the Window.

*Mr. Hungerford.* How far were the Pistols from your Master, were they within his Reach?

*Hargrave.* No, Sir.

*Mr. Reeve.* You say you saw him stab your Master.

*Hargrave.* Yes.

*Mr. Reeve.* Was there any Attempt to give another Stab?

*Hargrave.* Yes, he went to give another Stab, I took him by the Sword Arm, and he said, *Damn you, you shall die before your Master*; upon that I went and cried out *Murder.*

*L. C. Just.* You say that before that he demanded Civility Money.

*Hargrave.* Yes.

*L. C. Just.* What said your Master?

*Hargrave.* He said, *I will give no Rascals as you are Civility Money, for you have show'd me no Civility.*

*L. C. Just.* Then you went down by your Mi-

stres's Direction to call her Nephew; when you return'd, before you came up, what did you hear? Did you hear any Noise, or Bustle, or Blow?

*Hargrave.* No.

*L. C. Just.* None at all?

*Hargrave.* No, it was after *Tranter* came that I went up Stairs again.

*L. C. Just.* When *Tranter* came you opened the Door to him, and followed him up Stairs.

*Hargrave.* Yes.

*L. C. Just.* Did you hear before *Tranter* enter'd the Room any Noise, or Stroke?

*Hargrave.* Only two or three Words.

*L. C. Just.* What were those Words?

*Hargrave.* I don't know.

*Mr. Hungerford.* What said *Reason*, when your Master told him he did not use him well?

*Hargrave.* Then he was mad, he swore and called him a great many Names, call'd him a Minter, and I don't know what.

*Reason.* Did not your Master request us to go to the *Tilt-yard* Coffee-house?

*Hargrave.* No, he said, *if you'll go with me I will pay the Money*; you said, *I will go with no such Minter.*

*L. C. Just.* Did your Master desire them to go to any particular Place?

*Hargrave.* He said, *If they would go with him to Westminster, he would pay them the Money*; but they refused and said, *they would go with no such Minter.*

*L. C. Just.* Did your Master propose to go to his own Lodgings?

*Hargrave.* Yes, when they would not let him go there.

*L. C. Just.* Why would he had them have gone to *Westminster*?

*Hargrave.* Because for fear of frightening his Wife, she was great with Child; with great Persuasion he got them to go to his Lodging.

*Reason.* Did he not ask us to go to his Lodging?

*Hargrave.* I don't know, I did not hear him.

*L. C. Just.* You said just now with much ado your Master persuaded them to go to his Lodging, now you say you did not hear him ask them to go; I only admonish you not to be too hasty in your Answers, but to consider. Who proposed going to your Master's Lodging?

*Hargrave.* Why my Master, when they would not go there.

*Reason.* Did not I ask him to go to the *Crown-Tavern*?

*Hargrave.* Not that I heard; I heard *Reason* bid *Tranter* go for the Attorney.

*L. C. Just.* Did you hear *Tranter* ask *Mr. Lutterell* to go to the *Crown-Tavern*?

*Hargrave.* No, Sir.

*Tranter.* At whose Desire did I go to the Attorney?

*Hargrave.* Why my Master said, *fetch your Attorney, and I will pay you your Money.*

*Tranter.* Did not I desire your Master to send you, and he said, *Damn you, you shall go?*

*Hargrave.* No, I heard no such thing.

*Hester Gerrard* sworn.

*Mr. Serj. Cheshire.* Do you tell my Lord and the Jury what you know when the Defendants, or either of them were at *Mr. Lutterell's* Lodgings, and what pass'd there; begin at the beginning, tell all you know.

*Hester.* I happened to be in the Kitchen when my Master came in.

*Serj. Cheshire.* Tell us the Time and the Day of the Month.

*Hester.* I don't know indeed, it was of a *Tuesday*.

*Serj. Cheshire.* Do you know what Month?

*Hester.* I don't know. Being in the Kitchen I heard my Master return again, when he was but just gone out before; hearing his Tongue I step'd to the Stairs, and wondered he should come in again so soon; I saw him come in with another Man, I heard him go up Stairs, I listened, and I heard him speak loud; I understood he was arrested, I was surpriz'd at it; I staid a little while till he went up, then I went up to my Mistress, because she was with Child; I was afraid she would be frightened; when I came up she was in the Dining-Room with my Master and Mr. Reason, and in a little time she went out of the Dining-Room into the Bed-Chamber, and she was heaving, and in some time my Master and Mr. Reason was in the Room together, my Master talk'd and walk'd about the Room; I staid with my Mistress some time, and at last I heard my Master go up Stairs, and he came down immediately again; upon this I went into the Room, my Master had two Pistols, and he put them on each side of his Coat; I ask'd him, *What do you do with those Pistols? if my Mistress comes she will be frightened: Says he, I do not design to do any hurt.* Then he told me how they had abused him in the Street, and called him *Minster*; this Man (pointing to Reason) was in the Room all the time. *Sir, says I, pray lay down the Pistols,* and he came and lay down both the Pistols on the Table at my Request, and he had only his Cane in his Hand. I went into the Room again to my Mistress, and when I came there she was in her Closet taking out some Money: She got up, locked the Closet Door, and sat down on the Bed-side, and was frightened. I persuaded her not to be frightened: Afterwards I heard somebody knock at the Door, and I step'd out to the top of the Stairs to see who came in, and I saw I suppose that Man: (pointing to Tranter) the Boy let him in, I saw him come along the Entry and the Boy follow him: Upon that I went into my Mistress, and said there was a second Person come, I don't like him, shall I stop him on the Stairs; he went into the Room, and I saw the Boy follow him; I went into my Mistress again for fear she should be frightened; I heard a Noise, but did not know what it was; I heard the Noise grow greater; I step'd softly through the Passage, threw open the Dining-Room Door, and I saw this Gentleman (pointing to Reason) stabbing my Master with all his Might and Main, and he on his Back on the Floor, lifting up his Hands as if he beg'd for Mercy. The other Bailiff had his Back towards me, standing by the side of my Master; I ran to the Door and cried out *Murder*; then off went the Pistol: I was frightened, for I thought they had shot after me; and in about two Minutes there went off another.

*Mr. Hungerford.* In that Place where your Master was, could he come at the Pistols?

*Hester.* No, my Master had his two Hands lifted up thus.

*Mr. Hungerford.* Had your Master any thing in his Hand?

*Hester.* No.

*Serj. Cheshire.* What Condition did you leave

your Master in when you went out of the Room?

*Hester.* He was upon the Ground on his Back, and his two Hands lifted up thus, and Mr. Reason stabbing him when upon the Ground; he stab'd him upon the left side.

*Serj. Cheshire.* I ask you, consider, by the Oath you have taken, whether the Pistol did go off till after you had left your Master, and he was stabbing of him?

*Hester.* It was after that I saw him, within two Minutes after; upon my crying out *Murder* the People came up Stairs.

*Reason.* How long was this after Tranter came?

*Hester.* Immediately.

*Reason.* How long was it after Tranter came in before you saw this?

*Hester.* Not long, all the Action was not long.

*Mr. Strange.* You did not observe where the Pistols lay?

*Hester.* No.

*Mr. Strange.* Did you observe your Master had any thing in his Hand?

*Hester.* No, I did not.

*L. C. Just.* Did you see your Master when he went out in the Morning?

*Hester.* No, I heard him.

*L. C. Just.* You saw him when he returned?

*Hester.* Not till he was up in the Dining-Room.

*L. C. Just.* Had your Master any Sword on?

*Hester.* I believe he had, I did not mind.

*L. C. Just.* When your Master came in and Reason after him, you heard your Master talk of an Arrest, and that you had the Curiosity of hearing what past between them; did you hear any Words of Heat or Passion?

*Hester.* No, my Lord, I heard my Master talk something, by which I understood my Master was arrested.

*L. C. Just.* Did your Master seem angry?

*Hester.* Yes, because they seemed so uncivil that they did not come and give him Notice of it.

*Mr. Hungerford.* You say you saw your Mistress telling Money, can you guess at the Quantity of it?

*Hester.* No.

*Mr. Hungerford.* Can you tell for what Purpose she was telling the Money?

*Serj. Cheshire.* Did you hear Mr. Lutterell speak to his Lady to fetch any Money?

*Hester.* I was not in the Room.

*Reason.* Did I stay in the Room by my self when your Master went up Stairs?

*Hester.* Yes, you did.

*L. C. Just.* And when he came down he had a Case of Pistols?

*Hester.* When I saw him he had them in his Hand, and when I insisted upon his laying them down, he came and laid them down on the Table by me.

*Hungerford.* When did your Master die?

*Hester.* He died the Night following, I was with him all the time.

*Thomas Waters* the Waterman sworn.

*Serj. Cheshire.* *Thomas Waters,* will you tell my Lord and the Jury what you know on the Occasion of a Noise and crying out *Murder* at Mr. Lutterell's Lodging.

*Waters.* My Lord, I was at the Water-side when Capt. Lutterell came down to go by Water, I went down to carry him, there two Men crossed over the Way to him; I was gone down to my Boat to wait for him, but he not coming down,  
I came

I came back again, and seeing them go into the House, I went to the Water-side, and staid there some time, and the Lad running out of the House, and crying *Fire, Murder*, I run up, and run into the Door, and when I was about half way up Stairs, *Lord*, says the Boy, *they are murdering my Master*; I run to the Stair-head and heard the Pistol go off, and then said to the Boy, is there any more Pistols? Then I opened the Door, and went in, and met *Reason* with his Sword drawn in his Hand, and as he was putting it in it stuck.

Mr. Serj. *Cheshire*. Where was Captain *Lutterell*?

*Waters*. Laid down on the Floor, all in his Gore; when I came into the Room the young Man followed me in; I saw one Pistol lay upon the Table; *Tranter* was behind *Reason*, *Reason* was putting his Sword into his Scabbard, and it stuck, and as I came in *Tranter* shew'd me his Hand, and said, see how I am used, *Reason* was opening the Door, I took hold of him and said, you must go no further, here is Murder done; then the Constable came in, and I charged the Constable with them. The Captain's Sword was in the middle of the Room broke, he lay on his Right Side with his Arm on the Chair.

Mr. Serj. *Cheshire*. How far was the Table off?

*Waters*. The whole Breadth of the Room; he lay just before the Fire-Place; I saw but one Pistol; I came in when the last Pistol went off, and I met Mr. *Reason*, and put him by with my Hand, to come into the Room.

*Tranter*. What Wound did you see me have?

*Waters*. No more than in your Hand, he shew'd me his Hand.

L. C. *Just*. Did it appear to you upon looking on his Hand, that he had received a Wound in his Hand?

*Waters*. Yes, my Lord, I believe he was wounded, because he shew'd me his Hand, and it was bloody.

*Tranter*. Was my Head broke?

*Waters*. I did not see that.

L. C. *Just*. When you came into the Room, you saw but one Pistol?

*Waters*. I saw but one, and that upon the Table, just as I came into the Room.

L. C. *Just*. How far from Mr. *Lutterell* was it?

*Waters*. I believe three Yards.

L. C. *Just*. How far from the Prisoner, or either of them?

*Waters*. The Prisoner stood by the Table, as I came into the Room.

L. C. *Just*. Was the Sword in the Scabbard, that was broke.

*Waters*. It was out, and please you my Lord.

L. C. *Just*. Whose Sword was it?

*Waters*. It must be the Deceased's, because the other had his Sword with him in his Hand drawn. I saw the Blood: I desired the Constable to draw the Sword, and I saw it bloody a good way.

Mr. *Peters* sworn.

Mr. Serj. *Cheshire*. Mr. *Peters* will you tell my Lord and the Jury, whether on the 17th of *October* last you was sent for, and by whom?

Mr. *Peters*. On the 17th of *October* last, I think it was in the Forenoon, about 12 o'Clock, I was sent for to visit Mr. *Lutterell*; the Messenger told me he lay expiring: I came into his Room, where I found him on his Bed, in a wounded Con-

dition, and languishing of his Wounds; he seem'd desirous, that I would pray to Almighty God for his Soul, for he believed he had but a little time to continue in this World, and therefore he desired to make the best Use of it; I was ready to assist him; and desired him to consider how far he might be instrumental in bringing this Misfortune on himself. I desired him to consider, that as a dying Man great Weight would be laid on his Words, therefore if he said any thing not strictly true, he might involve innocent People in the Guilt, and the Punishment: Therefore I desired him to lay his Hand upon his Heart and consider.

He told me, *As a dying Man, as he expected to be tried for this very Fact at the Bar of Heaven, as well as the Persons, who had injur'd him, he assur'd me he was murdered in a barbarous manner.* Afterwards came in one *Church*, a Bailiff in the same Street, and desired me to put it home to him: I did; upon which he made me the same Answer, *That he was barbarously murder'd*; he wanted Spirits, or would have express'd himself more fully: On this I pray'd by him, and when I had done, I took my leave of him. In about an Hour afterwards I was sent for again; when I came there, I met Mr. *Vernon* and Mr. *Haines*, Justices of the Peace; one of the Justices gave Mr. *Lutterell* his Oath, and there being no Clerk there, desired me to take his Words in Writing, which I did; the Words were these; *The Bailiffs took the Pistols from my Table; they fired them twice; the fat Man drew his Sword, and run me into the Body with his Sword; and then drew my Sword, which I broke in his Hand, and begg'd for Life; I neither fired a Pistol nor made one Push; they both run me through; I offer'd to pay them the Money.* I think these are the very Words he said. After this I pray'd by him again, and still desired, that he would not lay any thing to the Charge of People that were not guilty: I left him then, and came again a third Time, and as I was praying by him, he interrupted me, and ask'd me, If it was not proper to receive the Holy Sacrament, which he was desirous to do: I ask'd him, if ever he had received the Sacrament; he told me he had; I desired him to consider; and to assist him, I put him into a Method; I told him one Thing which was necessary, which perhaps he might come into with Reluctance, and that was Charity and forgiving his Enemies. I told him he had been hardly dealt with I believed, yet it did behove him, as he died a Christian, to forgive them; he told me he did forgive them, and he hoped Almighty God at the last Day would forgive their Indiscretion; he died some time afterwards, but then in so doing a Condition, that I could not attend him to any purpose.

Mr. *Hungerford*. Did he say any thing about who fired the Pistol?

Mr. *Peters*. I mentioned it to him; when I ask'd him, if he had fired either of the Pistols, I told him one of the Bailiffs was wounded, and that there were two Balls taken out of his Hand; he assur'd me, as he was a dying Man, he fired neither of the Pistols.

*Reason*. Did not he confess, that he had broke one of their Heads?

Mr. *Peters*. No, he did not say, he broke one of their Heads, nor any thing like it; so far from that, that he said he did not design to hurt a Hair of their Heads.

*L. C. Just.* I think Mr. *Peters* you say, when you came there you met with two Justices of the Peace, Mr. *Vernon* and Mr. *Haines*, and because they had no Clerk there, they desired you to take the Examination.

Mr. *Peters*. Yes, my Lord, I did take it.

Mr. Serj. *Cheshire*. My Lord, I apprehended we had it ready to produce, or else I had not opened it; but upon my calling for it, I am told, to my Surprize, that Mr. *Vernon* hath it, and he is gone into the Country.

Mr. *Peters*. I have a Copy of it.

*L. C. Just.* We must have the Original.

Mr. *Peters*. My Lord, there is a Copy of it in my Deposition before the Coroner.

*L. C. Just.* Is Mr. *Haynes* here?

Mr. *Haynes* called.

*L. C. Just.* You have given an Account of the Examination of this Gentleman, first before the Clergyman, afterwards before two Justices of the Peace, his Examination is taken and reduced into Writing, and if it was reduced into Writing, by the Rule of Law, unless you shew you are disabled to do it by some Accident or other, you must produce that Writing.

Mr. *Reeve*. I am very much surprized, I apprehended they had the Writing ready in Court to produce. My Lord, Mr. *Haynes* will inform you.

Mr. *Haynes* sworn.

*L. C. Just.* Mr. *Haynes* we have been inform'd by that Gentleman that stands before you, the Minister, that upon hearing of this unhappy Accident, you and one of your Brethren, Mr. *Vernon*, came there in order to inquire into the Matter, and take the Examination of the Prisoners; did you do it?

Mr. *Haynes*. My Lord, on the 17th of *October* last, the Prisoners at the Bar were brought before me, and charged with the Murder of Mr. *Lutterell*; I understood Mr. *Lutterell* was not actually dead, so Mr. *Vernon*, another Justice of the Peace, went with me to Mr. *Lutterell's* Lodging, and there we found him in a very weak Condition, but sensible; we administer'd the Oath, in order to take the Information in Form; Mr. *Vernon* and the Minister were there; my Hearing not being good, Mr. *Vernon* examined him, but before they could perfect his Examination in form he fainted away, and could not go on: then we went to my House, where the Prisoners were, and examined them, and afterwards committed them. What the Deceased said to Mr. *Vernon* and the Minister I did not hear, so can give no Account of it.

Mr. *Reeve*. Had you a Paper taken?

Mr. *Haynes*. There was a Paper taken, but it was imperfect.

Mr. *Reeve*. And I think that is not in your Custody, had you the Paper?

Mr. *Haynes*. No, I had it not.

Mr. *Reeve*. Do you know where it is?

Mr. *Haynes*. No, I do not.

Mr. *Peters*. I gave it to Mr. *Vernon*, and obtained it of him to shew the Coroner, and afterwards I gave it him again; I took a Copy of it.

*L. C. Just.* The Copy you took is from the Paper produced to the Coroner.

Mr. *Reeve*. You was examined before the Coroner.

Mr. *Peters*. I brought the Original Paper to the Coroner.

Mr. *Reeve*. Whether that, which is mention'd in your Affidavit before the Coroner, was a Copy from the Original Paper?

Mr. *Peters*. Yes.

Mr. *Reeve*. And did you examine it?

Mr. *Peters*. Yes.

*L. C. J.* We must have the Original.

Mr. *Hungerford*. We hope we may have Liberty to read the Deposition taken before the Coroner, if what the Gentleman says be so; he saw the Examination taken in the Presence of the Justices of the Peace, and the very Paper, the Words of the Paper, are contained in the Deposition taken before the Coroner.

*L. C. J.* That won't do, you have not the Examination of the Deceased. This is ill done of Mr. *Vernon*, he ought to have taken Care, and attended here, and had the Examination before the Court, and without that we can't arrive at the Truth of this Case; I doubt you must lay aside all the Evidence of this Gentleman for want of the original Examination.

Mr. *Reeve*. We must submit it to your Lordship, as to the Confession, that Part of it that is not contained in the Examination, which was not proposed to him at the Time of his Examination, whether that is not Evidence; there are two or three Things he gives an Account of, that he said before it was reduced into Writing. But suppose we can't have the Benefit of the Examination, yet the Discourse that was had with the Deceased at another Time, whether we may not be admitted to give that in Evidence, we must submit it to your Lordship. But suppose no Examination had been taken, we humbly apprehend what he said would be proper to lay before the Jury. Therefore when he gives an Account of what he said at another Time than that of his Examination, though we can't produce what he said at the Time of his Examination, yet we may give in Evidence what he said at other Times. There were two other Times which he gives an Account of; the first was, when he was sent for to pray by him, and one *Church* came in; he then declared on the Words of a dying Man, *He was barbarously murdered.*

*L. C. Just.* You know in the Court of *Chancery*, when the Party is examined on his Oath, he gives in a first Answer; and on Examinations taken to it, he gives in a second, and so a third; all these are taken but as one Answer and entire Confession of the Party.

Mr. *Reeve*. Here is not an Examination before a proper Officer.

*L. C. Just.* You are to be heard no more to it because you ought to produce it.

Mr. *Reeve*. I am sure it is a Surprize on all of us.

Mr. *Hungerford*. As to us, we have the very Confession in our Brief, and I believe, if we had thought it could not have been produced, we should not have opened it.

*L. C. Just.* And there is too an Examination in Print; that ought not to be, and the Person that did it ought to be censured; are Juries to be prepossessed; here is a printed Pamphlet, whereof the Title is, Mr. *Lutterell's Cry for Justice.*

Mr. *Hungerford*. I never saw it, but am told it is most in Favour of the Prisoners at the Bar.

*L. C. J.* If the Examination is true, it ought to be produced, and the Prisoners ought

come fairly to their Trial, and, if guilty, God forbid but they should suffer, but not by passionate Insinuations in Print; and it is an unprecedented Thing, and if it comes out who did it, I shall take a Course with them: It is a way of preventing all Manner of Justice.

Mr. *Hungerford*. No doubt it is a very unjust Thing, and unwarrantable, no more to be justified, than Officers are, when under the Colour of Justice, they shall murder a Gentleman at his own Lodging; but as to the Case in *Chancery*, first, second, and third Answers are but one Answer. I speak it with all Deference, whether that be the same Case, the Words that he did deliver at other Times, when the Justices were not present, when he was a dying Person on the Brink of Eternity, and then said the same Words, and now this Paper can't be produced, whether the Words of the Paper may not be admitted as Evidence, we humbly submit it to your Lordship; and we believe the Witnesses will give you an Account of what he said at other Periods of Time, when there was no Examination in Writing, which was only when the Justices attended.

L. C. *Just*. Give an Account how it comes to pass, that you have not this Examination to produce, that was in Writing.

Mr. *Mitchell* sworn.

Mr. *Rex*. Will you give an Account of this Paper, and whether there hath been any Application made to get it, and why it is not here?

Mr. *Mitchell*. I called at Mr. *Vernon's*, but they told me he was gone into the Country, and he had not fixed any one Place, which he not doing, they did not know where to send to him.

L. C. *Just*. Here is a printed Narrative goes about the Town. Do you know who was the Author of that?

Mr. *Mitchell*. No, my Lord, we have been enquiring in order to prosecute the Person; I have asked the Widow, and Mr. *Keat* her Nephew, and they say they know nothing of it.

Mr. *Hungerford*. It sets out with this Fact, that the Deceased struck first; and if so, it is very reasonable to suppose, that this Paper was done rather in Favour of the Prisoners at the Bar, than of the Prosecutors.

L. C. *Just*. The Justice of Peace that had not the Examination down appear, but he that hath it is out of the way. Mr. *Peters*, how many Times was you with the Deceased?

Mr. *Peters*. Three Times; at 12 o'Clock, about an Hour after, and about an Hour after that, the third Time.

L. C. *Just*. When was it you reduced what he said into Writing?

Mr. *Peters*. The second Time; the third Time I administer'd the Sacrament.

L. C. *Just*. And when you examined him the first Time, and afterwards a second and third Time, the Design of that was to perfect the Examination which you took the first Time, and then it is all of a piece.

Mr. *Hungerford*. My Lord, the third Examination was after the taking any thing in Writing; when he took the Sacrament on the solemn Occasion, he declared, &c.

Mr. *J. Powis*. The last Examination therefore was an Advice to a forgiving Temper.

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Mr. *J. Eyre*. Mr. *Peters* should declare what he said the first and the third Time.

Mr. *Peters*. I press'd him to consider and recollect whether what he had said was true, he said it was.

Mr. *J. Eyre*. What did he say the first time?

Mr. *Peters*. The first time he told me, *he was barbarously murdered*: As I told you before there came in one *Church* a Bailiff, and then I put him to consider, whether he was not Accessary to his own Misfortune; to which he returned the same Answer, *that he was barbarously murdered, that he did not draw his Sword, nor fire his Pistol*.

L. C. *Just*. Did you ask him about any Blow, or Provocation given?

Mr. *Peters*. I ask'd him, to which he said, *he did not design to hurt a Hair of their Heads*.

L. C. *Just*. I must confess for my part I am not entirely satisfied: Mr. *Peters* at his first coming examines him, and after that he comes to him a second time, and then he is examined in the Presence of two Justices of the Peace, and by their Authority; and he says the Intent of that was to perfect the first Examination; and being so examined a second time, his Examination is taken in Writing; whether or no the first and second do not make an entire Examination, and so that you can't produce the first without the second; I make no doubt it might be produced; if there had not been a second; but he that examines him first, examines him afterwards a second time, in order to perfect that Examination, and when he doth it, it is reduced into Writing; to me it seems a Matter of great Consequence, if the first is allowed without producing the second.

Mr. *Just. Eyre*. It can't properly be called an Examination.

Mr. *Hungerford*. The first time he examined him as a Christian, as a Minister; as to the second Examination, Mr. *Peters* had no more to do in it than as a Justice's Clerk.

L. C. *Just*. The Examination taken before the Justice, was to confirm the former Examination, and upon that Examination all was reduced into Writing.

Mr. *J. Eyre*. That which is set down in Writing, if it be an Examination taken in Writing of a Prisoner before a Justice of the Peace, you can't give Evidence of that Examination *viva voce*, unless the Examination be lost; but what Declaration or Confession was made at any other time, may be given in Evidence; the particular Examination of what he said before the Justices, and was reduced into Writing, cannot be proved but by that Writing; but as to what he said at any other Time, the first and third Time, and not before the Magistrates, that may be given in Evidence.

Mr. *J. Powis*. The great Matter I observe is, that Mr. *Peters* did say, he did look upon the second Examination to perfect the first, the first was not so perfect, and then it was to be ascertained by a second, and which they not caring to trust to their Memory put into Writing; that Writing indeed the Justice of Peace hath; it is not produced, but if it be agreed that it was put into Writing, and after it was reduced into Writing, it seemed to be all of a piece, so as plainly to relate to what was done the Time before, how will they ascertain the whole, but by producing the writing? Then this writing can't be seen, the

Justice of Peace hath it, and doth not come here to produce it.

Mr. *J. Eyre*. I don't know how to call this perfecting the former Examination, you can't call the Discourse between him and Mr. *Peters* an Examination, when there was no Justice of Peace present; it is not an Examination what pass'd between Mr. *Peters* and this Gentleman. It is always taken so at the *Old-Bayley*, where Evidence is allowed to be given *viva voce* of what was said by People at other times besides the time of Examination.

Mr. *J. Powis*. What doth Mr. *Peters* mean by perfecting the Examination?

Mr. *Peters*. I beg your Pardon, it was not my Word.

*L. C. Just.* Not to differ about Words, whether this is an Examination before the Minister, when the Justices of Peace was not there; it is very likely this Minister came to inquire of this Gentleman about the Circumstances of his Death: after that the same Gentleman is present when the Justices of Peace come; thereupon the Justices of Peace desire him to take it in Writing; he asks the same Question as he did before, and they are taken in Writing; he takes it, designing to make the first Examination more authentic to charge the Person that gives the Examination. Now really when all this is done, the Examination of him before the Justice, taken in Writing by the same Person that inquired of him before, and all this done in order to perfect and consummate the Examination, whether you will not take them both together as one entire Account given by the Deceased? He gives the Account, he gives it as true in the Presence of the Justice; they were not present the first time, but the same Person that asked him the first time, he asks him when the Justices were there, if what he said before was true, and on that an Account is taken in Writing: Now upon this, when there is an Examination in Writing in the Presence of the same Person, and when they give you no reasonable Excuse why they don't produce it, there ought to be the less Credit given to them.

Mr. *J. Eyre*. I think there is the less Credit to be given, because the Examination is not produced; however it is Evidence.

Mr. *J. Powis*. If they were both of equal Validity you say something, but it is confessed on all Hands, that the second Examination was more solemn and valid, because two Justices of the Peace were present, and there was the Awe of Magistracy over the Person, and the second Examination relates to the first.

Mr. *J. Fortescue*. It is a hard Case on the Prisoners at the Bar; it is the Confession of Mr. *Lutterell*, and if they had that in Evidence, they might be compared together; but they not having that, I own, as to point of Law, they cannot give it in Evidence: It is a great Hardship, but where it lies I cannot tell; I think it ought to be censured in a proper Time. The most material of what is said by word of Mouth is detained from us, and not produced; but I think we should allow what was said at other times to be given in Evidence, because the first is no Examination, because no Justice of Peace then present; so that the Examination stands distinctly by it self, and that Evidence is to be laid aside and not produced; but shall we not allow

that to be Evidence which he said at other times, because he had an Examination taken in Writing? Therefore we shall hear no other Evidence, the first was no Examination, only what Mr. *Peters* will take upon him to say passed between them.

*L. C. Just.* Go on with your Evidence.

Mr. *Hungerford*. There can be no doubt of the third Declaration; my Lord, the third Examination was certainly the most honest Examination; as to the second Examination, it had the Solemnity of two Justices of the Peace, one happens to be deaf, the other to be absent; whether what a Man says just as he is going to die, and on his receiving the Holy Sacrament, is not to be regarded?

Mr. *J. Eyre*. He should distinguish between what passed in the first Discourse, without any regard to what is contained in the second Examination.

Mr. *Reeve*. Mr. *Peters*, you hear the Opinion of the Court, that what passed at the writing of this Paper you must not take any Notice of, but give an Account of what passed at any other Time.

Mr. *Peters*. I told your Lordship before I was sent for to visit him the first time, when I found him dangerously ill; after I had talked to him some time to put him in mind of Death, I desired to know of him, how far he had been any way instrumental or accessory to bring this Misfortune upon himself; he said, *As he was a dying Man, and expected to be judged at the last Day, they murdered him barbarously*. I repeated it to him again at the Request of Mr. *Church* a Bailiff, and the last time I came to him, when he received the Sacrament.

*L. C. Just.* Mr. *Peters*, I desire you to consider with your self, did you not ask him whether he had struck any of the Bailiffs?

Mr. *Peters*. I did not.

*L. C. Just.* Did you ask him if he had given them any Provocation.

Mr. *Peters*. I did, to which he answered, *He had given them no Provocation*.

*L. C. Just.* Did you ask who gave the first Blow?

Mr. *Peters*. No, I did not.

*L. C. Just.* Did you see the Wound; did he say he gave that?

Mr. *Peters*. I told him, it appears one of the Bailiffs is wounded in the Hand, and it is probable he was the Person that discharged that Pistol; upon which he assured me, *He fired neither of the Pistols; he neither drew his Sword, nor fired either of the Pistols*.

*L. C. Just.* When you had this Discourse with him, did you reduce it into Writing?

Mr. *Peters*. What I reduced into Writing, was only my Deposition, which I writ with my own Hand, and which Mr. Justice *Harper* swore me to, and I believe he hath it in his Custody.

*L. C. Just.* Here this Gentleman is allowed to give an Account of what Discourse passed between him and Mr. *Lutterell* the first time; the Justice of Peace can't be allowed to give an Account of what is said at his other Examination, because it was reduc'd into Writing, and that Writing can't be produced.

Mr. *Reeve*.

Mr. Reeve. I beg you would give an Account of what he said at any other Time, when this Paper was not written: When you talk'd with him about this Matter, you say he said, *The Bailiffs did barbarously murder him without any Provocation*; that he said, *He gave them no Provocation*: And when you ask'd him about the Wound that one of the Bailiffs had, he said, *He fired neither of the Pistols, nor drew his Sword*; I desire to know at any other time, whether there was any thing material pass'd between you at any other time than at that time when the Paper was wrote: Can you recollect?

L. C. Just. You discours'd him three times, the first you have given an Account of, the second time it was reduced into Writing, that Writing doth not appear; what pass'd the third time, pray repeat it again?

Mr. Peters. As he was going to receive the Holy Sacrament, I beg'd of him to consider whether what he had said was true: He said, *Every Article he had said, as he was a dying Man, and as he hoped to receive Benefit by the Sacrament, every thing he had said was strictly true.*

Mr. Reeve. We shall trouble your Lordship with one Evidence more, that is, the Surgeon, who will give you an Account of his Wounds.

Mr. Sparham sworn.

Mr. Reeve. I think you was sent for as a Surgeon, give an Account in what Condition you found the Deceased, how many Wounds, and of what Nature.

Mr. Sparham. I found him labouring with a Wound under the Right Pap with a Shot; upon this I examined him, and putting him into a proper Posture, found several other Wounds; one near the Liver, the lower part of the eighth Rib, near the Back-bone; several other Wounds with a Sword, three or four on his Belly. Upon opening of his Body I found that the Wound with the Bullet had penetrated about nine Inches towards the Back, which Wound was mortal, the first to be of the Lungs, having a Hole thro', and the second to be torn, and the *Diaphragma* wounded: I found one other Wound with a Sword near the eighth Rib, three Inches and a half broad, penetrating the *Thorax*, and wounding the *Diaphragma*, which was also mortal; I found eight other Wounds with a Sword about a Quarter of an Inch wide each, and a Quarter of an Inch deep, one near the left Pap, four others on the right side of the Belly, two more on each side the Back Bone.

Mr. Reeve. So you look'd upon two of the Wounds to be mortal, one whereof was with the Pistol-shot.

Mr. Sparham. Yes, I saw two leaden Pieces taken out of his Body.

Mr. Strange. Who attended at the same time?

Mr. Sparham. Mr. Gifford.

Strange. Did he or you take out those Bullets?

Mr. Sparham. We both took them out, I think.

Mr. Reeve. My Lord we have done.

L. C. Just. What say the Prisoners? The Counsel for the King have called what Witnesses they think proper, it is now your time to answer for your selves.

Reason. If your Lordship please, we arrested the Gentleman in *Surrey-street*, and he desired me to go to his Lodging; when we came there, he

said he would pay the Money, says he, *Go and see for the Attorney, and I will pay the Money*; upon that *Tranter* went to the Attorney for his Bill, I went up Stairs with the Gentleman into the Dining-Room; when he came up, says he, *My Dear, I am arrested, it is for Mr. Rous's Bill.* He began to look a little angry, with that he went to his Scrutore and took something out of it, a Key, and he went up Stairs and fetched his Pistols, and when he came down again, he clap'd one to my Breast, and threatened to shoot me; I was surpris'd, his Lady runs out of the Room, with that I gave him good words; says he, *Sirrah I will let you live a little till your Partner comes back, and then I will send all your Souls to Hell together*: Then the Foot-boy came back and said, the Gentleman was coming; he ordered the Boy out of the Room, and one knocked at the Door; when the Boy was gone, he clap'd his Pistols one on one side of his Bosom, and the other on t'other, and my Partner came, and when he came into the Room he gave him a Blow over the Head; with that he clos'd in with him, and then one of the Pistols went off and wounded him; then he drew his Sword, and I drew mine, and then the other Pistol went off, which was the Occasion of his Death.

L. C. Just. Have you any Witnesses?

Mr. Twine sworn.

Mr. Twine. My Lord, I was employ'd by the Plaintiff Mr. Carr, to take out a Writ against Mr. Lutterell, on an Indors'd Note; I did take out a Writ and gave it to Mr. Reason, and he got the Warrant upon it, and afterwards came to me, and desired to know where Mr. Lutterell was to be found, and that I would describe him to him, whether young or old, &c. I told him where to go, and described him to them; then they went and arrested him, and after he was arrested *Tranter* came to me and told me the next Morning, they had taken the Captain: they said they took him at the lower End of *Surrey-street*, and that he was very angry, and said they had not used him civilly.

L. C. Just. What *Tranter* said is not Evidence.

Mr. Twine. I know no more, my Lord; *Tranter* came to me for the Bill, and I gave him a Bill of the Debt and Charges.

L. C. Just. Did you give the Bill of the Debt and Charges to *Tranter*?

Mr. Twine. I did; he told me they had just taken the Captain, and then I gave it him; the Bill of Charges was one Pound thirteen Shillings.

Mr. Tims sworn. *The Warrant shew'd to him.*

Mr. Tims. This is the Warrant made out upon the Bill of *Middlesex*, at the Suit of Mr. Carr, to arrest the deceased; *The Warrant read, and also the Bill of Middlesex produced and read.*

Mr. Hickman sworn, and the Warrant shew'd to him.

Mr. Hickman. This I know to be my Hand, I made out this Warrant all of it.

Mr. Hungerford. I would humbly offer it to your Lordship's Observation, here is a Fact we have omitted to prove, here is a Witness in Court, one *Lucas*, can prove that *Reason* shot off the Pistol.

L. C. Just. It is irregular; but altho' you have omitted it, and come out of time, I would have the whole Fact, and if my Brothers please we will hear it.



*Constance Lucas* sworn.

Mr. *Hungerford*. Mrs. *Lucas*, what do you know of shooting off the Pistol?

*Const. Lucas*. I was opposite to the Captain's Lodging in *Surrey-street*, in a Room up two Pair of Stairs, and I heard a Pistol go off, upon that I went to the Window, and I saw a lusty fat Man take a Pistol out of the Window in the Captain's Lodging up one Pair of Stairs, and let it off towards the Fire-side.

Mr. *Strange*. Do you know Mr. *Lutterell*?

*Const. Lucas*. Yes.

Mr. *Strange*. Can you take upon you to say it was not Mr. *Lutterell*?

*Const. Lucas*. Yes, I am sure it was not he.

L. C. *Just*. When you saw a lusty fat Man take a Pistol off from the Window and discharge it, was any Body by him at that time?

*Const. Lucas*. No Body that I saw.

L. C. *Just*. What sort of Man was Mr. *Lutterell*?

*Const. Lucas*. He was a little Man.

One of the *Jury*. Was there any Light in that Room to distinguish one Man from another?

L. C. *Just*. What she said was, she saw a lusty fat Man come to the Window, and take up a Pistol and discharge it, and that she saw no Body else at the Window.

Mr. *Hungerford*. The Coroner's Inquest came into this Room, and was satisfied, that from thence she might see into this Window.

Mr. *Gifford the Surgeon* sworn.

Mr. *Gifford*. On Tuesday the 17th of October last, about ten or eleven o'Clock in the Morning, I was sent for to a Gentleman, Mr. *Lutterell*; when I came to him, I found him sitting on a Chair, and he leaned back with his Shirt and Clothes very bloody; Mr. *Sparham* was with him in order to look to his Wound; we put him to Bed, we found a Wound about an Inch below the right Pap, by Gun or Pistol shot, and we dressed it and all the other Wounds we could find; I went into the Parlour, and there were the two Prisoners at the Bar; I was told one of them was wounded; upon that I went to examine into it: Upon coming into the Parlour I examined *Tranter*, and there I found two pieces of Balls which were lodged in his Hand; we extracted the Balls; I found a small Wound in his Wrist, and a Razure on his Head; that was a small Wound which was on the Wrist, it seemed to be from a Prick, something that had entered the Skin. Then I went to Mr. *Lutterell* again, as he was in a good State of Sense; I ask'd Mr. *Lutterell*, *Whether he had fired a Pistol?* I asked him several Times, he denied it a first, second, and third Time, and he used this Expression, *I call God to Witness, I neither fired a Pistol, nor drew my Sword, but was barbarously murdered.* I was there again when Mr. *Peters* gave him the Sacrament, when he was asked the same Question; he then answered, *He neither did the one or the other.* In the Afternoon Mr. *Keat* and I went together, he was then in a calm State, seemed reasonable, and we asked him, *Sir, you can give some Account of this Matter, your Reason and Judgment are strong; I have heard that you fetched down the Pistols:* He told me, *He had, but with no malicious Design, only he would not be forc'd out of his Lodgings.* I ask'd him, *If there was any Blow given:* He said, *They had given him abusive Language, which induced him to strike one of them; upon that*

*they immediately seiz'd him, the lusty Man seiz'd him and drew his Sword, he tumbled down, and he stab'd him; he often beg'd them to spare his Life; the other said, Damn him, draw his own Sword and stab him.* Mr. *Lutterell's* Finger and Thumb were cut, as if it was with grasping of a Sword. Then he said, *The lesser Man took a Pistol and clap'd it close to his Breast, and shot him in the Body, and the lusty Man held the other Pistol to his Head and shot it off;* which I the rather believe, because he had some Powder Spots or Marks on his Face.

*Reason*. He owned to you that he struck one of us.

Mr. *Gifford*. Yes, but it was upon your giving sawcy Language.

L. C. *Just*. When you ask'd him about bringing down the Pistols, and upon what Account, what said he?

Mr. *Gifford*. He acknowledged he brought down the Pistols, but with no evil Intent; but as he was willing to pay his Debts, he was not willing to be forc'd out of his Lodging and be expelled.

Mr. *Bonner* sworn.

Mr. *Bonner*. My Lord, just as Mr. *Lutterell* was got to Bed I came up Stairs, and asked him, if he had fired the Pistol; he disown'd it, and said, *He had no Design to do them any Harm, or make any Resistance, but (said he) they kill'd me cowardly and cruelly.*

*Reason*. After that he had declared to you that he had no Design to make any Resistance, what followed?

*Bonner*. When I came out of the Room, says Mr. *Gifford* to me, Mr. *Bonner*, Mr. *Tranter* is shot in the Hand; it is certain Mr. *Lutterell* shot him in the Hand; therefore let us go back and ask him; we went and ask'd him both of us, and he said, *No, as God should judge him he did not, nor had he any Design of doing them any Harm, but he did threaten them several times.* He spoke inwardly and seem'd to be faint, and desired we would leave him.

*Reason*. Please to take notice, that my Partner is shot in the Right Hand.

*Tranter*. My Lord, I have lost the Use of my Thumb.

Blake the Surgeon sworn.

Blake. My Lord, Mr. *Tranter* was wounded in the Thumb of the Right Hand, and in his Left he had a Wound here in his Wrist, I did not take the Ball out of his Hand, but I dressed it.

L. C. *Just*. What was that Blow on his Head? what do you think it was done with?

Mr. *Blake*. It seemed to be done with a Cane.

L. C. *Just*. Was it a Wound or a Bruise?

Mr. *Blake*. A Wound, the Skin was broke. Mr. *Reason* had a little Wound in one of his Fingers, which seemed to be done with the Point of a Sword.

Thomas Hargrave called again.

L. C. *Just*. Hark you, young Man, hear the Question and consider well; upon your former Examination you say, when *Tranter* knocked at the Door you went down to let him in; that *Tranter* made up to the Dining-Room, and you follow'd him; you heard a little Bustle before you came in, but the first thing you saw, when you came, was *Tranter* running your Master against the Closet Door, and *Reason* pricking him with a Sword: I ask you this Question, whether or

no, when you was going up Stairs after *Tranter*, before you enter'd the Room, you did not hear a Blow?

*Tho. Hargrave*. I heard a Blow, but did not know who struck it.

*Mr. J. Eyre*. Did you see to whom the Blow was given?

*Hargrave*. No, I saw nothing at all of it.

*L. C. Just.* The Reason of my calling him again, was to be satisfied as to this Particular; for the Coroner informs me, that before him, he had swore to the same Effect; he answered hastily before, but I believe not with any Design; he said he did not hear any Blow, his Meaning then might be, tho' he did hear a Blow, yet not seeing who gave it, therefore he thought it not material; I did not believe he did it with any Design.

*L. C. Just.* Have you any other Witnesses?

*Reason*. My Lord, we had none but ourselves, we are Officers of the Court; he assaulted us and brought down his Pistols and stuck them in his Bosom.

*L. C. Just.* Did he not afterwards take them out and lay them on the Table?

*Reason*. No, my Lord.

*Tranter*. While I was gone, I did not know what happen'd, but when I came back, the Minute I enter'd the Room he struck me over the Head with his Cane, and the Pistol went off, and shot me in the Hand.

*The Clothes were produced, and by the Hole in the Waistcoat is appeared, that the Wound given by the Pistol under the Right Pap could no way happen by any Position of the Pistols in the Bosom of the Deceased, by the Pistol going off of itself.*

*Reason*. My Lord, we are Officers of the Court, and what we did was for our own Security.

*L. C. Just.* What says *Tranter*?

*Tranter*. My Lord, we have no more to say?

*Mr. Reeve*. My Lord, I beg leave to observe a few Things by way of Reply. They have endeavour'd to differ the Case with respect to three Particulars; the first Particular is with relation to the Blow given by *Mr. Lutterell*; they say *Mr. Lutterell* himself being press'd very much, did own that he had given one of the Bailiffs a Blow on the Head; there appears Reason to think that to be true, because the Surgeon says he dress'd him of a Wound received by a Blow with a Cane; we submit it, whether that is a sufficient Justification of the Officers for what followed, to kill *Mr. Lutterell* in this manner, supposing it to be true. What the Boy says, he saw afterwards, immediately upon his coming into the Room, in an instant, as soon as he heard the Blow, he found *Mr. Tranter* running him up against the Wainscot, and the other Bailiff stabbing him, he swears *Mr. Lutterell* had then no Sword or Stick in his Hand, so that whether or no after the Bailiff had received a Blow on his Head, it will be a Justification sufficient for the Bailiffs to murder him? Another Part of the Evidence is in relation to the bringing down of the Pistols; I beg leave to observe, my Lord, he did confess that the Pistols were brought down, but not with an Intention to do them any Prejudice; that he

laid them on the Table; they don't pretend *Mr. Lutterell* fired either of them, but in the Struggle, the Pistols were in his Breast, and there they went off of themselves. One Wounded the Prisoner, the other went into his own Breast. As to what is said with relation to the Intention of *Mr. Lutterell* he did own he did threaten them: If he did, yet he had not Power over the Pistols, one was on the Table, and the other was in the Window, and they say the Pistols were not fired by any of them: Our Witness the Maid-Servant, just a little before the Pistols were fired off, saw *Mr. Lutterell* on the Ground upon his Back, and his Hands lifted up, and them stabbing him, and this before any one of the Pistols went off; there is another Witness swears expressly, she saw a fat Man take a Pistol out of the Window, and fire it towards the Chimney: *Mr. Lutterell* was not a fat Man, so it must be somebody else that fired the Pistol, and not *Mr. Lutterell*, in all probability. It was *Mr. Reason*, as to the Evidence given in relation to the Cloaths, because here is a Hole in the Waistcoat, the Pistol that was in his Breast must go off of itself, and make that Hole. It can be no such Thing, the Jury have seen the Cloaths, and where the Wound is given, and in what Position *Mr. Reason* himself hath attempted to place the Pistols, and it is impossible the Pistols should go off, and give that mortal Wound. We submit it to your Lordship's Discretion upon the whole, whether it is a sufficient Justification, though they are Officers of Justice, and ought to be protected, yet suppose such a Misbehaviour, where there is no Necessity for it, they are not to be justified.

*L. C. Just.* There will be two Points in Law; the one is whether the Officers are to be justified in what they have done; if they have done nothing, but what was proper to secure their Prisoner, and their own Lives when they were assaulted, they are not guilty of Felony; and if they are guilty of Felony, then of what Degree, whether of *Murder* or *Manslaughter*.

*Mr. Reeve*. My Lord, we must submit it whether a Man striking another over the Head be a Justification for him immediately to kill him, and take it with this Circumstance, that they had given him ill Language.

*L. C. Just.* Is ill Language a Justification for Blows? Besides you will consider, whether there was not ill Language on the other Side.

*Mr. Hungerford*. My Lord, I won't take up much of your Lordship's Time, if your Lordship will spare me a Word or two. Here is a Man's Life taken away by two Persons, that had a Precept from a Court of Justice to arrest, the only thing they had to do, was to secure the Person, to make him answerable to Justice, whether that could not be done without this Outrage? Whether Officers of Justice may execute their Process with so much Cruelty? It amounts to as great premeditated Malice as can be conceived. There is a Malice contained in Cruelty; I need not mention the Matter; it hath been fully laid before you; I shall only mention a Precedent or two; one is that of *Holloway's* Case: There was something of a Provocation, but the Judge there in that Case did enter into the Fact, whether the Provocation was sufficient to justify the killing of the Boy. The Boy was stealing Wood in his

Park, and had a Rope about his Middle, and as he was up in a Tree, he bid him come down out of the Tree, and he took hold of the Rope and dragg'd him so, that he was killed, and this was not a sufficient Provocation. Another Case is that of *Mawgridge*<sup>b</sup>, it is reported by my Lord Chief Justice *Holt*, there was a Provocation; *Cope* had desired *Mawgridge* to go out of the Room, and then turned him out of the Room; and there the turning him out of the Room was not a sufficient Provocation, and it is a very just Observation of my Lord Chief Justice *Holt*; when Cases are attended with so much Cruelty and Barbarity (as appears to be here, here are nine Wounds, eight besides that with the Pistol on the same Person, and certainly two lusty Men as the Prisoners at the Bar are, might have made him answerable to Justice, without any such barbarous Treatment.) The Observation my Lord Chief Justice *Holt* made is, that the Law should be so construed. As to the Business of the Cloaths, it seems to be absurd, that the Pistol went off, and made that Wound on the Right Side; by no Position he could put the Pistols in, could their going off make that Wound.

*Mr. Strange*. My Lord, I would only observe two or three Things. If *Mr. Lutterell* at the time they assaulted him with a Sword, had held his Pistols in his Hand, and their own Lives had been in danger, the Case had been different: but when he had put the Pistols out of his Hand, and they were between him and the Pistols, so that it was impossible for him to do them any such Harm (for I do admit if it was in *Mr. Lutterell's* Power at that Time, and he had shew'd an Intention, that if they did not kill him, he would kill them, that might be something of a Justification) they are the less excusable in doing what they did. As to the Circumstance of the Pistols firing of themselves, as they were in *Mr. Lutterell's* Bosom, and so giving this Wound, it seems to be impossible it should be so, and that this must be a Wound given by a Pistol levelled directly at him.

*L. C. Just.* I think you mentioned the Case that is in *Keilyng*, and if you have read that Case lately, you will remember, there a Blow is a Provocation, and if a Blow be first given, it will not be Murder, tho' Death do ensue upon it.

*L. C. Just.* Gentlemen of the Jury, the Prisoners at the Bar, *Hugh Reason* and *Robert Tranter*, are charged by the Coroner's Inquest, and by an Indictment, with the Murder of *Mr. Lutterell*; they say they are not guilty of this Murder, and whether they are guilty or not is your Business to enquire, and receive Satisfaction in. In order to prove them guilty, they have called several Witnesses for the King. The first is *Thomas Hargrave* who it seems was a Servant to *Mr. Lutterell*; he tells you, that upon *Tuesday*, but he doth not remember the Month, or the Day of the Month, but it comes out from the other Witnesses, that it was the 17th Day of *October*, he says his Master was going down to the Water-side in order to take Boat, for it seems he lodged in *Surry-Street*, and he says a little Man ran after him, and clapp'd him on the Back. He did not then know him, but now says his Name is *Tranter*; on that his Master told him, he would pay the Money. He did differ in the Evidence he gave, at first he did not remember, that he desired them to go to his

Lodging, but he desired them to go with him to *Westminster*. But the Officers thought, that was not reasonable; then afterwards he says, that with much Persuasion he prevailed with them to carry him back to his Lodging: and that his Officers did carry him back to his own Lodging; he says his Master went up Stairs, he followed after; when he came up Stairs his Master demanded of the Officer, that was with him, the fat Man, which is *Reason* (for *Tranter* was gone to get a Bill of Costs from the Attorney) he demanded of the Officer his Warrant; the Officer did shew him his Warrant; he said, he took the Warrant in his Hand, and afterwards threw it on the Ground, using a very indecent Expression, *he should take it and wipe his Back-side with it*. He tells you while he was there somebody knock'd at the Door, with that he went down to open the Door, and he says he let in *Tranter*, and he ran up to the Dining-Room, and he followed him. Now he says on his second Examination, before he came into the Dining-Room, he did hear the Noise of a Blow given; formerly the Lad giving his Evidence hastily, and not so well considering, he said he did not hear any Blow given, but on his second Examination, he doth say he heard a Blow given before he came into the Dining-Room. He says when he came into the Dining-Room *Tranter* had got hold of *Mr. Lutterell*, and was running of him against the Wainscot, and that *Reason* had his Sword drawn and was striking at him with his Sword; and he says, as he was preparing himself to make another Thrust, he took hold of his Sword-Arm, and prevented that, and *Reason* with some Passion said, *Damn you, get you out of the Room, or else you shall die before your Master*. With that the Boy went out of the Room, and went down Stairs and cried out *Fire and Murder*, in order to alarm the Neighbourhood, he tells you while he was there he heard a Pistol go off, and before he could get up Stairs he heard another Pistol go off, this is the Evidence given by *Hargrave*. They have called another Witness, *Hester Gerrard*; she says she heard her Master go out in the Morning, and in a little time after she heard him return again, and there came with him *Reason*, one of the Prisoners at the Bar. Observing this, that her Master came in so short a Time after he went out, she had the Curiosity to hearken what the Meaning or Occasion of her Master's returning so soon was; she says, she heard her Master talking of an Arrest, and he seem'd to be in a Passion with the Bailiff, that was with him, and said he had not used him well, but should have given him notice before he arrested him in the Street; she says she withdrew afterwards into her Mistress's Bed-Chamber, which was near the Room where they were, and in a little time she heard her Master go up Stairs, and in a short time after return again; with that she had the Curiosity to go in, and see what was the Matter; her Mistress being big with Child she was therefore more curious than ordinary to prevent the Misfortune falling on her Mistress; she found her Master with two Pistols in his Hand, he stuck one of the Pistols on one Side, and the other on the other Side in his Coat; she says she admonish'd her Master, and desired him to consider the Condition of her Mistress, and not to do any thing to fright her; upon that

he said the Bailiffs had affronted him, and abused him, and called him *Minter*, however he did not design to do them any harm with the Pistols, and her Master at her Desire laid down the Pistols on the Table; with that she went out of the Room; but soon after hearing a great Noise she came into the Room again, and found her Master on his Back on the Floor, and the Bailiffs stabbing him: She says she went out with an Intent to give notice of it to the Neighbourhood, and that she cried out *Murder*; that while she was doing this, she heard one Pistol go off, and presently after another; but before either went off, she saw her Master lying upon his Back, and the Prisoner at the Bar (*pointing at him*) stabbing him. Then they call *Thomas Waters*, a Waterman, he was standing by the Water-side, and seeing Mr. *Lutterell* coming down, who was one that usually employ'd him, he expected a Fare from him, and that he should carry him, as he usually did; he saw Mr. *Lutterell* make back again and go into his own Lodging; but still he said he expected his Master to come down, and go by Water; but he not coming in so short time as he expected, he made towards his Lodging, and as he came near he heard the Boy cry, *Fire and Murder*: He went up into the Room, where he found Mr. *Lutterell* lying in the Room wounded all in Blood. The next Witness is Mr. *Peters*, who is a Reverend Divine, and came to do his Office and Duty on this melancholly occasion; he hearing Mr. *Lutterell* was wounded, and in danger of dying, came to him to perform his Office on that Occasion: He says, that he requested and admonished him to tell him, if he was not accessary to his own Misfortune, and that it may be, if it was not discovered whilst he was living, it might be the Occasion of an innocent Person's Suffering. When he admonished him to tell the Truth, he did with the most solemn Affeuration, as he was to answer at the dreadful Day of Judgment, say, *That he was barbarously murder'd*; but did not you give any Provocation or Occasion for it? *No, I gave none*. With that, says he, I told him I understood one of the Bailiffs was wounded with a Pistol; did not you discharge either of the Pistols? *No, upon the Word of a dying Man, and as he was to answer it to Almighty God, he never discharged either of the Pistols, nor did he run his Sword at them, drew his Sword at them, or give them any Provocation*. The Minister says, he advised him to be very serious and examined him as to the Fact, and said it would be of very dangerous Consequence, if he should die with any Falsity in a Case of this Nature, and it would draw present Ruin on innocent Persons; he said, *He never drew his Sword, nor discharged either of the Pistols, but was barbarously murder'd*. Mr. *Peters* then went away, and a little time after came again, when Mr. *Vernon* and Mr. *Haynes*, two Justices of the Peace, came to take an Examination from Mr. *Lutterell* himself; he says he was present at that Time, that because they had no Clerk with them, he was desired to take an Account in Writing of what was said; he press'd him as formerly, and having taken an Account in Writing, that ought to be produced, but it is not produced, and therefore no regard is to be had to it, for a Person is to give the best Evidence the Thing is capable of, especially where a Person's Life is concerned, and he of his own shewing, says it was

taken in Writing, and that Writing is not produced, and no Account is given that they are disabled to produce it, but the Justice of the Peace that hath it is out of the Way, and it doth not appear, that proper Endeavours have been taken to have him here, that this Examination might appear more perfect than the former. He tells you afterwards he came to him a third Time, and the End of his coming a third Time was to admonish him with respect to his Fate in the other World, and at that Time he desired to take the Sacrament; he told him what was necessary, that he might take the Sacrament worthily, and that it was proper above all Things that he should discharge himself and his Conscience, and give a true Account of what happen'd on this melancholly Occasion, that so no innocent Person might suffer. He still insisted, *That he was barbarously murder'd*, and said, *that every Article of what he had said was true*. He said to him further, before you receive the Holy Sacrament, and as you are going before God, and there hope to have Remission of your Sins, it is necessary for you to forgive even your Enemies; and with that says he, he told me, *He did heartily forgive all the World, and did forgive the Persons that had been guilty of this Indiscretion, and hoped God Almighty would forgive them*: He gives it a soft Term there, *their Indiscretion*. Indeed I should have been very glad if the Examination that was reduced into Writing was here, that it might be laid before you. Mr. *Peters* is a very worthy Person, there is no Reason to doubt, but he swears upon his Memory; and when a Man swears upon his Memory, he may mistake, and the Mistake of a few Words may alter the Sense; therefore it was very proper to have had the Examination here; that might possibly have corrected his Memory; and tho' he hath shew'd himself a Man of great Probity and Worth, yet he might be mistaken in some Particular; and it seems strange, that of two Justices of Peace the one appears, and the other, Mr. *Vernon*, with whom the Examination is left, doth not appear, nor any Endeavours used to have him here; and therefore it must be taken as an Objection, not as to his veracity, but that the Prosecutor hath not produced the Evidence that is proper, and only relies on the Memory of the Witnesses, and this seems to affect the Evidence that is given by Mr. *Peters*. They have called another Witness, whom they called at last after they had closed their Evidence; she lived in an House over against Mr. *Lutterell's* Lodgings; she was in a Chamber two Pair of Stairs, and she saw a lusty fat Man come to the Window, take up a Pistol, and as she thought discharged the Pistol; and she saw no other Person but this Man, and therefore concluded the fat Man fired the Pistol: This is the Evidence given for the King. The Prisoners are asked what they have to say for themselves, in answer to this Charge, which seems to be a weighty one given against them: They tell you they are Ministers of Justice, and they give you an Account not only by their own opening, but by the Evidence they have produced, in what manner they behaved themselves; that upon the first Arrest, at the Request of the Prisoner that then was, they submitted to carry him back to his own Lodging: I must confess this doth seem to make some Impression, it is what Bailiffs are

not bound to do, they are usually rough, and not easy to be intreated, unless well paid for it; this shews, that these Men went beyond the Bounds of their own Duty, for when they had arrested him, they ought to have secured him by carrying him to Jail, or some Place of Safety; it was incumbent on them to give him an Opportunity of paying the Money, or sending for Bail, in Case he desired to be discharged that Way; but when a Bailiff hath arrested a Man, to carry him back to his own Lodging, is an unusual way of treating Prisoners and ought not to have been; but still it is not to be imputed to the Bailiffs, as an Aggravation in the Charge, they were too favourable in trusting him in his own Lodging. What is next? When they had him there, *Tranter* is sent for the Attorney's Bill, this is pretty extraordinary when they had taken him, not only to give him Leave to go to his own Lodgings, but one of them goes upon an Errand, which Mr. *Lutterell* might have sent his own Servant upon, and leaves none but *Reason*; this was extreme civil Usage, and not often done by Men of their Character; what then? *Lutterell* goes up Stairs, what did *Reason* then do? When he had carried him to his own Lodging and sent his Partner away, he gives him leave to go into another Chamber; this doth not seem to be ill Treatment of the Deceased, but shews excessive Favour to their Prisoner, which they could not in Strictness justify: He went up Stairs and returned again, and the Maid Servant of Mr. *Lutterell* tells you, she saw him with a Case of Pistols, one stuck on one Side of his Coat, and the other on t'other; if their Treatment was so extraordinary and civil, this seems to be an untoward return of Mr. *Lutterell's*, when he was trusted to go out of the Room, for to Return with a Case of Pistols; but the Maid-Servant says, he said, *He had no Malice towards them, and would not hurt a Hair of their Heads, he only brought down the Pistols that he might not be imposed upon.* I don't know what he meant, when he was in Custody of the Officers, and had been so civilly used, to bring down a Case of Pistols to prevent his being ill used, seems an untoward Return, and to affright the Officers, that they might not carry him away. This is not all, Mr. *Gifford* says, that he being a Surgeon was call'd to give his Assistance on this very unhappy Accident; he gives an Account of the Wounds, and the Discourse that pass'd on that Occasion, and upon what he had done, and how the Bailiffs had treated him. Says he, *I confess*, although he says he had examined, and asked him several Times before, and that he refused to give any Account then, but did persist in it, that he did not give any Provocation, but at last when Mr. *Gifford* repeated it with some Earnestness, out it comes at last, *That he did give one of the Bailiffs a Stroke on his Head with a Stick.* He goes on, and ask'd him the Intent of bringing down the Pistols; he says, *I did not design any Harm; I have no Malice, but brought them down, that I might not be ill used:* This was ill Behaviour, where he had been treated civilly, to declare that he brought down his Pistols, that he might not be ill used: It was the Duty of the Bailiffs to carry him off, and he brought down his Pistols to prevent that; as to the Blow, say the Bailiffs, the Assault begun on his Side; the young Man hath told you he heard a Blow given:

Mr. *Lutterell* declared, he brought down the Pistols to prevent their carrying him off, and that he did give one of the Bailiffs a Blow with a Cane; it is surprizing, that immediately when *Tranter* came back he should run him against the Wainscot, and the other assault him with a Sword; this Behaviour is not of a Piece with the other, that *Tranter* should come back, and without any Provocation run him against the Wall, and *Reason* should take his Sword and stab him: There must be a Provocation; the Boy says there was a Blow given, but he can't tell who gave it. Mr. *Lutterell* declares he gave a Blow, and another Surgeon confirms it; so that it appears beyond Contradiction, by the Evidence, that the Pistols were brought down with a Design to prevent his being carried off, and that he did give one of the Bailiffs a Blow with a Stick: Then Mr. *Bosmer* hath given you an Account of several Matters, but that which is material is, that he did not discharge any of his Pistols, or draw his Sword; that he did not intend it, but did threaten it several Times. One *Blake*, who was another Witness, says, that upon Examination afterwards there appeared, that there had been a Blow on the Head of *Tranter*. This is the Nature of the Evidence given on the Side of the Prisoners. Upon the whole Matter, I think it is plain beyond Contradiction, that the Prisoners at the Bar did kill Mr. *Lutterell*. It is plain that first of all, when *Tranter* had him against the Wall, that *Reason* stabb'd him, and when lying upon the Floor, that *Reason* stabb'd him; and it appears afterwards by the Evidence of the Witness, who says she saw the fat Man take up the Pistol and discharge it, that *Reason* shot off the Pistol; so that I think there can be no doubt at all, but the Prisoners at the Bar did give these Wounds, of which he died. The Surgeons give an Account, and I think there are some eight or nine Wounds with a Sword, one of them only mortal; a Wound with a Bullet that is mortal; several other Wounds he speaks of, that are but slight. Then the Question will be, whether upon this Evidence the Defendants are guilty of Felony, and if guilty, then in what Degree, whether of *Murder* or *Manslaughter*. Gentlemen, it hath been opened truly, that the Bailiffs are Ministers of Justice; they are arm'd with the Authority of Law, and those, who resist a Bailiff in the Execution of his Office, resist the Law. They are not bound to give way and let their Prisoner Escape, but they being to execute their Warrant, if in doing what is necessary for this purpose, for obtaining their Prisoner, and the Security of their own Persons, Death doth ensue, the Bailiffs having the Authority of the Law on their side, it is not so much as Felony; and it is very necessary it should be so, for without it all our Properties would be precarious. When any Man offers an Injury to another, there is no Remedy but by bringing an Action at Law, and in order to bring the Person to do Justice a proper Officer must be employed; and therefore it is highly reasonable that Bailiffs should have an Authority to carry off the Persons they have arrested, and if in doing of it Death ensues, the Party must thank himself. That being the Question, I would recommend to your Consideration these Circumstances; it appears in the beginning, that the Bailiffs treated Mr. *Lutterell* with all Civility,

gave him leave to go to his Lodging; one of them sends his Companion away, and gives him leave to go up Stairs; but altho' they did do that, that will not justify them for being guilty of any Barbarity, without any just occasion offer'd; therefore you are to consider what happen'd afterwards: It appears Mr. *Lutterell* brought down the Pistols, he did do this to prevent his being carried off; that is, to prevent the Bailiffs from carrying him from his Lodgings, which was their Duty to do in case the Money was not paid, or Bail given in; and if so, this is good introductory Evidence to that, which they offer to prove, namely, that he endeavour'd to rescue himself: He says, he did not discharge either of the Pistols, or draw his Sword upon them; that he did not intend to do any Mischief, but he threaten'd them; then see how this is when taken together: Here is Mr. *Lutterell* under an Arrest, fetches down his Pistols with an Intent to prevent his being carried off; I doubt his threatening must have reference, that he threaten'd to discharge his Pistols, or draw his Sword upon them; then when his Pistols are brought down with that intent, when he threatens what Use he would make of his Pistols or Sword, what is done afterwards? Mr. *Lutterell* gives one of the Bailiffs a Blow with his Cane; it is proved undeniably that there was a Blow given, that is proved by the Boy, that the Blow was given by Mr. *Lutterell*; that appears by what he own'd himself. Then consider, here are Pistols brought down with a Design to make Opposition; that he threatened them, and not only so, but gave one of them a Blow with his Cane; what is the Consequence; *Tranter* runs him against the Wall, and *Reason* stabs him: If this were all that was in the case, when Pistols are brought down, and Threatenings used, and a Blow given, the Officers are not to stand still till they are murdered, nor could they tell what Mr. *Lutterell's* Intention was: As he had made an Appearance of Resistance, and had made an Assault, you are to consider whether this was not a necessary Defence of the Officers to secure their Prisoner. It is of no weight what Mr. *Lutterell* said, that he intended to do them no harm; if he made an appearance of Resistance, and actually assaulted them, the Question is, whether the Bailiffs, in this case, are not justified in what they have done; you will consider their Circumstances. The Maid tells you, when the Pistols were brought down, at her Persuasion her Master laid them on the Table; so one would think that was an Indication that no ill use was intended to be made of them: It doth not appear whether one or both were in the reach of Mr. *Lutterell*. Then it appears, that notwithstanding the running him against the Wall, he had in some measure rescued himself from that Force, and there was a struggling, and throwing down, which shews this Man was not so in the power of the Bailiffs, so as they could be secure of preserving their Prisoner, or their own Lives. It must be left to your Consideration, whether there was any Design of Mr. *Lutterell* to rescue himself; but if you think they had a just Provocation, and they had Reason to be apprehensive of losing their Prisoner, the Law does allow them to do what is necessary for their own Security, and the Security of their Prisoner. This is what I recommend to your Consideration, whether or no it appears to you that this was done out of Heat, and out of a Passion by the Bailiffs, when there was no just Cause for them

to apprehend the Prisoner's being rescued; if you believe that, then the Prisoners will be guilty of Felony: But if you believe there was just occasion for the Prisoners to be apprehensive they were in danger of their Lives, and of losing their Prisoner, then whatever is done in their own Defence to secure their Prisoner, and their own Lives, it will not be Felony. I must confess it looks barbarous to think, that when a Man was in his Blood on the Ground, they should follow their Blows, giving him more Wounds; this is carrying the thing a great way, and it looks like some Barbarity. But if Mr. *Lutterell* gave the first occasion, whatever happened after, if done for the Security of their own Lives, and of their Prisoner, won't make them guilty of Felony; but suppose you should be of Opinion that the Bailiffs have done more than they should, then the next thing to consider is, in what degree they are guilty: It appears a Blow was given, and that by the Boy before he came up Stairs; it appears by Mr. *Lutterell* that he gave the Blow; Gentlemen, I don't know, Men of Honour are not to justify themselves by saying, saucy Language is given them, and therefore I am to be my own Avenger; Mr. *Lutterell* gave one of them a Blow over the Head, afterwards the rest fell out as you have heard.

The Question is, whether it be *Murder*; it must be done maliciously, and without Provocation, or else it is not *Murder*: Blows have always been allow'd to be Provocations, and here this is accompanied with fetching down the Pistols, threatening the Bailiffs what he would do, and afterwards giving one of them a Blow; and if so, the Defendants will not be guilty of *Murder*, but only of *Manlaughter*: First, you are to assert a just and true Authority of the Bailiffs; on the other side you must not encourage the Bailiffs on a few angry Words immediately to fall into a Passion, and take away the Life of a Man. Here it appears, that a Blow was given under untoward Circumstances, after the Bailiffs had been threatned with a Design to prevent his being carried off by them; and if it be so, the most you make of it will be *Manlaughter*.

They did behave themselves civilly at first, shew'd him their Warrant, which he threw down and bid them wipe their back-side with it; that is a Matter which if this Gentleman had not suffered in the manner he hath done, must have been resented in its place; then two or three times they are called *Rogues* and *Rascals*, and that might provoke the Bailiffs: I think this unhappy Business was occasioned by too great a Lenity of the Bailiffs in carrying back their Prisoner to his own Lodging; that was not well done of them. However I must leave it to your Consideration, whether or no they are guilty of Felony; and if they be guilty of Felony, then in what degree, whether of *Murder* or *Manlaughter*. I forgot one thing, the Surgeon did swear that one of the Bailiffs had a Wound in his Hand by a Bullet, each of them had a Wound, tho' it doth not appear how; all this is likewise to be consider'd: you will consider the whole, and give your Verdict accordingly.


*Reason*, as hath been proved, said, he hoped he would give him Civility Money; he said he would give nothing to such Rogues as they were, for they had given him no Notice, but had arrested him in the Street; that is the great Ground

of Complaint, and at that the Offence is taken; they did not give him due Notice, therefore it was not civilly done, which if they had done, and it had come before us, we should have punished with great Severity.

Upon this the Jury withdrew, and after staying out about an Hour, brought them both in *Guilty of Manslaughter*: Upon which they prayed the Benefit of the Clergy, and were immediately burnt in the Hand.



CXCII. *The Trial of John Woodburne and Arundel Coke, Esq; at Suffolk Assizes for Felony, in wilfully slitting the Nose of Edward Crispe, Gent. March 13, 1721. 8 GEO. I.*

 *N* Tuesday the 13th of March 1721, at the Assizes held at *Bury St. Edmunds* in the County of *Suffolk*, *John Woodburne* and *Arundel Coke* were arraigned upon an Indictment found by the Grand-Jury: And the Court proceeded thus.

*Clerk of the Arraignments, John Woodburne*, hold up thy Hand; *Arundel Coke* alias *Cooke*, hold up thy Hand; which they severally did.

You stand indicted by the Names of *John Woodburne*, late of the Borough of *Bury St. Edmunds* in the County of *Suffolk*, Labourer; and *Arundel Coke* alias *Cooke*, of the Borough aforesaid, Esq; for that you, after the twenty fourth Day of *June*, in the Year of our Lord one thousand six hundred and seventy one, viz. the first Day of *January* in the Eighth Year of our Sovereign Lord *George*, of *Great Britain*, &c. intending one *Edward Crispe*, Gent. then and yet being a Subject of our said Sovereign Lord the King, to maim and disfigure at the Borough aforesaid, in the County aforesaid, by Force and Arms, &c. in and upon the said *Edward Crispe*, in the Peace of God, and of our said Sovereign Lord the King, then and there being, on purpose, and or Malice fore-thought, and by lying in wait, did unlawfully and feloniously make an Assault. And that you the said *John Woodburne* with a certain Bill value a Penny, which you the said *John* then had and held in your right Hand, the Nose of the said *Edward Crispe*, on Purpose, and of your Malice fore-thought, and by lying in wait, did then and there unlawfully and feloniously slit, with an Intent by so doing, the said *Edward Crispe* to maim and disfigure. And that you the said *Arundel Coke*, at the time of the Felony aforesaid, by the said *John Woodburne* in manner aforesaid, unlawfully and feloniously done and committed, to wit, the said first Day of *January*, in the eighth Year aforesaid, at the Borough aforesaid, in the County aforesaid, on Purpose, and of your Malice fore-thought, and by lying in wait, unlawfully and feloniously was present, aiding and abetting the said *John Woodburne* the Felony aforesaid, in manner aforesaid, feloniously to commit and do. And so the Jury aforesaid, upon their Oaths say, that you the said *John Woodburne* and *Arundel Coke*, the said first Day of *January*, in the eighth Year aforesaid, at the Borough aforesaid, in the County aforesaid, by Force and Arms, &c. on Purpose, and of your Malice fore-thought, and by lying in wait, the Felony aforesaid, in

manner aforesaid, did, and each of you did, commit, and do against the Peace of our Sovereign Lord the King, his Crown and Dignities, and also against the Form of the Statute in that Case made and provided. [Vid. *A true Copy of the Indictment itself in Latin, at the end of this Volume.*]

*Clerk of the Arraigns.* How say'st thou, *John Woodburne*; art thou guilty of the Felony whereof thou stand'st Indicted, or not Guilty?

*Prisoner.* Not Guilty.

*Cl. Arr. Culprit.* How wilt thou be tried?

*Prisoner.* By God and my Country.

*Cl. Arr.* God send thee a good Deliverance. How say'st thou *Arundel Coke* alias *Cooke*, art thou guilty of the Felony whereof thou stand'st Indicted, or not Guilty?

*Prisoner.* Not Guilty.

*Cl. Arr. Culprit.* How wilt thou be try'd;

*Prisoner.* By God and my Country.

*Cl. Arr.* God send thee a good Deliverance. You *John Woodburne*, and *Arundel Coke* alias *Cooke* the Prisoners at the Bar, hearken to what is said to you. Those good Men that are now called and do here appear, are those that are to pass between our Sovereign Lord the King and you, upon your several Lives or Deaths; if therefore you or either of you will challenge them or any of them, you must challenge them as they come to the Block to be sworn, before they are sworn, and you shall be heard.

<i>Cl. Arr.</i> Cryer, give the Book to	
<i>Thomas Buckingham,</i>	<i>George Cross,</i>
<i>Nicholas Alger,</i>	<i>Samuel Bridge,</i>
<i>Ambrose Gallant,</i>	<i>Jonathan Clements,</i>
<i>George Goddard,</i>	<i>Thomas Taylor,</i>
<i>Robert Gall,</i>	<i>Simon Reeve,</i>
<i>William Scott,</i>	<i>William May.</i>

*Cl. Arr.* Count these.

*Cryer.* Are you all sworn Gentlemen?

*Jury* Yes.

*Cl. Arr.* Make a Proclamation.

*Cryer.* O Yes, If any of you can inform my Lord the King's Justice, the King's Attorney or Solicitor General, of any Treason, Murder, Felony, or other Misdemeanour committed by the Prisoners at the Bar, or either of them, come forth, and you shall be heard, for the Prisoners at the Bar now stand upon their Deliverance: And all Persons bound by Recognizance to prosecute them, or either of them, come forth and prosecute, or you'll forfeit your Recognizances.

*Cl. Arr.*

*Cl. Arr.* *John Woodburne*, and *Arundel Coke* aliàs *Cooke*, hold up your Hands. Gentlemen of the Jury, look upon the Prisoners, and hearken to their Charge: They stand indicted by the Names of *John Woodburne*, late of the Borough of *Bury St. Edmunds*, in the County of *Suffolk*, Labourer, and *Arundel Coke* aliàs *Cooke*, of the Borough aforesaid, Esq; for that they (as in the Indictment before-mentioned) upon which Indictment they have been arraigned, and pleaded severally Not Guilty: Your Charge is to enquire whether they, or either of them, are Guilty of the Felony whereof they stand indicted; or Not Guilty.

*Mr. Lee.* May it please your Lordship, and you Gentlemen of the Jury, I am of Council for the King against the Prisoners at the Bar, who are indicted for Felony on the 22<sup>o</sup> and 23<sup>o</sup> *Car. II.* entitled, *An Act to prevent malicious Maiming and Wounding.* And the Indictment sets forth, that the Prisoners, the first Day of *January*, in the eighth Year of his present Majesty, at *Bury St. Edmunds* in this County, did on Purpose, and of Malice fore-thought, and by lying in wait, make an Assault unlawfully and feloniously upon *Edward Crispe*, Gent. and that the Prisoner *John Woodburne* with a Bill which he then had in his Right Hand, did on Purpose, of Malice fore-thought; and by lying in wait, slit the Nose of the said *Edward Crispe*, with an Intent in so doing to disfigure the said *Edward Crispe*; and that the Prisoner *Arundel Coke* at the Time of committing the said Felony; on Purpose, and of his Malice fore-thought, and by lying in wait, was unlawfully and feloniously present, aiding and abetting the said *John Woodburne* to commit the said Felony: All which is laid to be done contrary to the Form of the Statute. If we who are Counsel for the King prove this Matter, you will find them Guilty.

*Serj. Selby.* May it please your Lordship, and you Gentlemen of the Jury, I am Counsel, *pro hac Vice*, for the King against the Prisoners at the Bar, who stand indicted upon the Statute of the 22<sup>o</sup> of King *Charles II.* the one for maliciously maiming and disfiguring of *Edward Crispe*, the other for abetting that Fact, which by that Act is made one and the same Offence; I said, Gentlemen, I was Counsel for the King, for that his Majesty, as the Father of his People, and for their Safety, out of his natural Goodness, hath been graciously pleased particularly to regard this Prosecution for so horrid and bloody an Assassination. And though, Gentlemen, 'tis difficult to stand in this Place without the greatest Tenderness to our Fellow-Creatures, yet these, who have divested themselves of all Humanity, now cease to be such; 'tis even Cruelty to the King's People not to stand up against them so far as is consistent with Law and Justice. Their Prosecution is become the common Concern of Mankind; for so long as these Prisoners have a Being here, the Life of every Man is precarious, and but at the Will of so infernal a Contriver as the one, and so hellish an Executioner as the other. We shall first, Gentlemen, prove the Fact committed, and that by *Mr. Crispe* himself, who by a particular Providence hath survived this horrid Attempt, and is here to give Evidence of it, and that he was invited with his Wife by *Mr. Coke* (who married *Mr. Crispe's* Sister, and who was to have *Mr. Crispe's* Estate by his Decease) to sup

at his House; that *Mr. Coke* proposed to him to go after Supper to make a Visit to *Mrs. Monke* (whose Name we mention without any the least Imputation) to which *Mr. Crispe* consented; that *Mrs. Monke's* House opens into the Church-yard, which is but cross the Way from *Mr. Coke's* House; that *Mr. Coke* took *Mr. Crispe* along with him about ten or eleven at Night, it being dark; into the Church-yard, and walked him about near *Mrs. Monke's* Door without going in, and then making some Noise or Whistling, a Person came up to him and knocked him down, after which he was not sensible; that being left for dead, after some Time he got up, and returned, he did not know how, to *Mr. Coke's* House, where the Company received him with great Consternation, as did *Mr. Coke* himself, who soon returned after walking out with *Mr. Crispe*, out of Breath, and called for a Glass of Wine; and being asked what was become of *Mr. Crispe*, said he was stumbling home in the dark: This we shall prove by *Mr. Brown*, another Relation. We shall prove by *Mr. Sturgeon*, who was called as his Surgeon, the Condition of his Wounds; and by *Carter*, a Blacksmith, that *Mr. Coke* about the *Friday* before the Fact was committed, sent for him, and asked (after a previous Discourse of *Carter's* Poverty, and how he might live well in the World) if he would cut off ten Men's Heads without Remorse; which when *Carter* said he could not, If he would cut off one Man's Head; and lay it before *Coke*; which *Carter* refusing, *Mr. Coke* bid him consider on't, and come again; then gave him a Glass of Brandy, and dismissed him, bidding him send *Woodburne* to him. We shall prove by one *Moone*, a Taylor; that *Mr. Coke* about three Years since solicited him to the like Effect. We shall prove by *Willet* the Constable, that after *Woodburne* was taken up; he confessed the Fact, said he did it with a Hedging-Bill, and gave him Directions where to find it, and he found it accordingly; which *Woodburne*, when shewed him, acknowledged to be the same, and which we have here to produce. We shall prove by *Mr. Wetherell* the Goaler, that *Mr. Coke*, since he was in his Custody, confessed the whole Fact, and that *Woodburne* was placed in a Porch of an empty House near *Mr. Coke's*; to come out on a Whistle to do the Fact; and that he delivered *Mr. Crispe* to *Woodburne*, and was present when the Fact was committed. And after this Evidence, there can be no doubt, Gentlemen, but you will find the Prisoners at the Bar guilty of this Indictment.

*Serj. Brantley.* My Lord, the Defendants are indicted of Felony, upon an Act of Parliament made 22<sup>o</sup> & 23<sup>o</sup> *Car. II.* by which Act, if any Person or Persons, on Purpose, and of Malice fore-thought, and by lying in wait, shall unlawfully cut out or disable the Tongue, put out the Eye; slit the Nose, &c. with an Intention in so doing to maim or disfigure; the Person or Persons so offending, their Counsellors, Aiders, and Abettors, knowing thereof, are Felons without Benefit of Clergy. The Indictment charges the Defendants with feloniously making an Assault on *Mr. Crispe*; that *Woodburne* slit his Nose with a Bill or Hook; that *Coke* was aiding and assisting therein. We shall be able by undoubted Evidence to prove and make clear the Charge of the Indictment; and every Particular thereof; as has been opened to you; and that the manner



of doing it was attended with such Circumstances of Inhumanity, Baseness, and Villany, as no Instance can parallel. Mr. *Crispe* is Brother-in-Law to Mr. *Coke*, who on the first Day of *January* last, under the Colour of Friendship and Affection, invites Mr. *Crispe* and Family to Supper at *Coke's* House. Before this Invitation he had agreed with *Woodburne* for Hire, to lie in wait on Purpose to effect the designed Mischief. When *Woodburne* was lying in wait, *Coke* came several times to him to encourage him in his vile Purpose. After Supper, Mr. *Coke*, unmindful of all the Obligations of brotherly Love, of Hospitality, and of the Protection due to Mr. *Crispe*, by false and vile Arts and Persuasions entices him into the Church-yard, the Place designed and agreed upon for the Execution of their wicked Purposes. When he had got Mr. *Crispe* into this Place, by Sign he gave notice of it to *Woodburne*, who had follow'd at some distance; and then delivered him into the Possession of *Woodburne*, and was present at the striking several Blows with the Hook. By the Nature of the Instrument every Blow must maim and disfigure; and the Blows being given by the Order and Direction of Mr. *Coke* by *Woodburne*, Mr. *Crispe's* Nose was slit on purpose to maim and disfigure by one lying in wait: Which are all the Circumstances required by the Act of Parliament to make them guilty of the Felony with which they are charged. Which several Facts we shall call our Witnesses to make out, and doubt not but the Jury will find them guilty.

Serj. *Selby*. We desire in the first Place, Mr. *Edward Crispe* himself may be sworn, (*which was done accordingly*.) Mr. *Crispe*, give an Account to my Lord and the Jury of the whole Matter.

*Crispe*. On *New-Year's-Day* last I was invited to sup at Mr. *Coke's*, and being there, he propos'd to me to go to Mrs. *Fanny Monke's*.

Sir *Peter King*. L. C. *Just*. Was this before or after Supper?

*Crispe*. This was before Supper: We supped about seven, and after Supper about ten o' Clock he called me out of his Parlour, I follow'd him; we went into the Church-yard; It was then very dark, the Moon did not shine. He took three or four Turns before the House where Mrs. *Monke* dwelt, then he stood still and made a Noise.

L. C. *Just*. What kind of Noise did he make?

*Crispe*. It was like a Hollowing.

L. C. *Just*. Were you under any Fear or Apprehension from that Noise?

*Crispe*. Yes, my Lord, I was afraid, and made up towards the Wall; but in a Quarter of a Minute somebody came behind me, and knocked me down.

L. C. *Just*. Did you then know who that Man was?

*Crispe*. I did not.

L. C. *Just*. Can you tell what was done to you afterwards?

*Crispe*. My Lord, I cannot, for on that Blow I lost my Senses for some time.

L. C. *Just*. How long was it before your Senses returned?

*Crispe*. My Lord, I cannot tell, but in some time I got up, and returned to Mr. *Coke's*.

Serj. *Selby*. In what Condition did you find yourself?

*Crispe*. I was ready to die and faint, and I was found very much wounded.

Serj. *Brantbw*. Did any Surgeon come to you at Mr. *Coke's*?

*Crispe*. Yes, Sir, Mr. *Sturgeon*.

L. C. *Just*. After the Person came up who knocked you down, did you hear Mr. *Coke* say any thing?

*Crispe*. No, my Lord.

L. C. *Just*. Can you tell whether he staid any time, or what became of him?

*Crispe*. No, I cannot.

L. C. *Just*. Was he there when the first Blow was given?

*Crispe*. Yes, he was.

L. C. *Just*. Will the Prisoners ask Mr. *Crispe* any Questions?

*Coke*. Mr. *Crispe*, was I present when you were knocked down?

*Crispe*. Yes, Sir.

*Coke*. Do you remember that you saw me?

*Crispe*. Yes.

*Coke*. How near was I to you?

*Crispe*. You were close by me when I was knocked down.

Serj. *Selby*. Call Mr. *Brown* and swear him, (*which was accordingly done*.) I think you are a Relation of Mr. *Coke's*?

*Brown*. Yes, Sir, I married his own Sister, and he married Mr. *Crispe's* Sister.

Serj. *Selby*. Was you at Mr. *Coke's* House last *New-Year's-Day* at Night?

*Brown*. A Day or two before last *New-Year's-Day*, I and my Wife and Daughter were invited to sup with him, and accordingly we went. I came about six o'Clock, and found Mr. *Coke* and Mr. *Crispe* drinking a Glas of Wine in the Parlour before Supper.

Serj. *Selby*. Was there any other Company with them?

*Brown*. No, the Women were above Stairs. I sat down with them, and we three staid in the Parlour till Supper-time. When Supper was ready, we went up Stairs. Then after Supper, between eight and nine, we three came down into the Parlour again. Some time after, *Coke* went out of the Room, and then came back again and gave a Call, or beckoned to Mr. *Crispe*, who follow'd him out of the Room.

Serj. *Selby*. At what Time of Night was this?

*Brown*. After nine o' Clock at Night.

Serj. *Brantbw*. How long was it before Mr. *Coke* returned?

*Brown*. He was gone about ten Minutes and then returned.

Serj. *Brantbw*. Was he in any Disorder when he returned?

*Brown*. He seem'd to be out of Breath, as if he had been walking faster than ordinary.

Serj. *Brantbw*. How far distant is the Church-yard, where this Gentlewoman dwelt, from Mr. *Coke's* House?

*Brown*. The Church-yard is about twice the Length of this Shire-House from Mr. *Coke's* House.

Serj. *Brantbw*. What did *Coke* do when he came in?

*Brown*. Immediately he drank a Glas of Wine to me, and after he had sat some time, he went out of the Room. I heard a Noise up Stairs, and being told my Daughter was ill, I went up, and in a little time came down again into the Parlour, where I found Mr. *Coke*.

Serj. *Brantbw.* Did you ask him what was become of Mr. *Crispe*?

*Brown.* I did then ask him what was become of Mr. *Crispe*, and he told me that he believed he was gone home in the dark. In about two or three Minutes after, Mr. *Crispe* came in. He was very much wounded and bloody. I was so surprized that I could not take particular notice of him.

Mr. *Raby.* How long was it from *Crispe*'s going out to his coming in again?

*Brown.* It was near half an Hour.

L. C. *Just.* So then *Coke* returned in about ten Minutes, and *Crispe* in near half an Hour.

*Brown.* Yes, my Lord.

Serj. *Selby.* Did Mr. *Coke* see Mr. *Crispe* when he came back to his House?

*Brown.* Yes.

Serj. *Selby.* What did he say?

*Brown.* He seemed to be in a great Consternation.

Mr. *Raby.* Do you know of any Estate that would have come to Mr. *Coke* after Mr. *Crispe*'s Death?

*Brown.* I cannot positively say it of my own Knowledge.

Mr. *Raby.* We will ask Mr. *Crispe* that Question. Pray Mr. *Crispe*, would any Estate have come by your Death to Mr. *Coke*?

*Crispe.* In case I had died, one hundred Pounds *per Annum* would have come to his Wife, as one of my Sisters.

L. C. *Just.* Have you then no Children, nor Brothers?

*Crispe.* No, my Lord; my next of Kin are three Sisters, one of which is Mr. *Coke*'s Wife, she would have been one of my Heirs.

Serj. *Selby.* Call Mr. *Sturgeon*; (*who appeared, and was sworn.*) What do you know concerning this wounding of Mr. *Crispe*?

*Sturg.* I am a Surgeon by Profession; and the first Day of *January* last at Night, about eleven o' Clock, I was sent for to Mr. *Crispe* at Mr. *Coke*'s House: When I came, I found him very much wounded and cut, and in a very weak Condition, and that he had lost a great deal of Blood. I examined his Wounds: One Wound began at his Right Ear, divided the fleshy Part of his Cheek, and ended on his upper Lip just under his Right Nostril; the Flesh was all divided, and the Jaw left naked. Another Wound divided the Right Side of the Nostril, and made an oblique Cross over the Wound, and ended near the Right under Jaw.

Serj. *Selby.* Was his Nose slit?

*Sturg.* Yes, Sir, the Nose was cut from without into the Nostril; the Edge of the Nose was not cut through, but there was a Cut or Slit in the Nose that went through: I sowed it up: It was indeed but with one Stitch; it is yet visible, and the Nose was cut through.

Serj. *Selby.* Were there any other Wounds?

*Sturg.* There was another deep Wound under his Chin, that reached from one Jaw to the other. There was another Wound, which began at his Chin, crossed the Left under Jaw, and tended towards his Ear. There was also a small Wound on his Left Cheek, another on his upper Lip, and another on his Left Temple.

Serj. *Selby.* How many Wounds had he in all?

*Sturg.* Seven.

Serj. *Selby.* Do you think there were seven

distinct Wounds, that had seven distinct Blows?

*Sturg.* I take it, that every one of the seven Wounds had a distinct Blow.

Serj. *Selby.* With what Instrument did you apprehend those Blows were given?

*Sturg.* It was cut so clean; that I thought it was done either by a Knife or Razor.

L. C. *Just.* Let the Jury see Mr. *Crispe*'s Wounds.

[Then his Face and Wounds were shown to the Jury for their Observation.]

Serj. *Brantbw.* Swear *Charles Willet*; (*which was done accordingly.*) I think you are a Constable in *Bury St. Edmonds*?

*Willet.* I am.

Serj. *Brantbw.* Had you any Occasion to speak to *Woodburne* concerning this Matter, and what did he say?

*Willet.* I had a Warrant from Alderman *Wright* and Mr. Serjeant *Reynolds* to apprehend *Coke* upon *Woodburne*'s Examination.

Serj. *Brantbw.* The Question asked you is, What you know of *Woodburne*'s Confession, and what he hath said to you about this Matter?

*Willet.* After *Woodburne* was committed, I was with him, and asked him, Whether he was concerned in the wounding of Mr. *Crispe*? He told me, Yes, he was. I asked him how long *Coke* staid with him: He said that he had struck *Crispe* three or four Blows before *Coke* left him.

Serj. *Brantbw.* What else did you ask him, or did he say to you?

*Willet.* He told me, that he was walking up and down in the Church-yard when *Coke* whittled to him, and that on that Signal he went up and assaulted Mr. *Crispe*.

Serj. *Brantbw.* Did he give you any Account how long and where he waited before the Fact was done?

*Willet.* He told me, that he was desired by Mr. *Coke* to be up and down in the Church-yard about nine o' Clock that Night; and that being a cold Night, *Coke* gave him a Bottle of Brandy, and told him he could not tell what time *Crispe* would come home, but desired him to be ready and to stay let it be never so long.

Serj. *Brantbw.* Did he tell you with what Instrument he did it?

*Willet.* He told me, he did it with an Hook or Bill, that was new ground for the Purpose, and that it was in his House at the Right Hand of his Door. I went according to his Direction, and found it, and brought it to him; and he said, that was the Hook.—The Hook I have brought with me, and this is the Hook that I have now in my Hand.

Mr. *Raby.* Call *William Wetberel*; (*who was sworn.*) Give my Lord and the Jury an Account what you know of this Matter.

*Wetb.* I am the Goaler; and the Day after Mr. *Coke* was committed to me, about five Minutes after One, he sent for me up into his Chamber, where his Wife was crying and in great Disorder, as he seemed to be likewise. She was desiring her Husband to discover. When he came to himself, he told me, that he and *Woodburne* had had a Design to murder Mr. *Crispe*, and had attempted it several Times; and desired me to go and secure *Woodburne*. I went to the Alderman, and told him of it, and he gave me the like Orders. Coming from the Alderman I met Mr. *Coke*'s Man, who asked me, whether I had found

found him ; on which I asked him, who and what he meant, thinking him to be ignorant of his Master's Confession : But he told me, that his Master had discovered it to him, and had sent him to take up *Woodburne*. Whilst we were talking, we saw *Woodburne* coming up, and we desired one *John Carter*, a Smith, who was shoeing a Horse, to assist us ; which he did, and we secured *Woodburne*.

*L. C. Just.* Did Mr. *Coke* confess any thing to you concerning this Fact, and the manner of doing it ?

*Weth.* Yes, my Lord, he did. He told me several Times, that he had a Design to murder *Crispe*, and that he employed *Woodburne*, and deliver'd *Crispe* into his Hands.

*L. C. Just.* Did he tell you that ?

*Weth.* He did tell me so : He told me also, that it was done with an Hook ; and that he bid *Woodburne* to cut his Weasand or Wind-pipe ; and that if *Woodburne* had not been a cow-hearted Dog, he would have so done, and secured *Crispe* from telling Tales.

*Mr. Raby.* Did *Coke* tell you what Means he used to do this to Mr. *Crispe* ?

*Weth.* He said, that he called him out of his House, went into the Church-yard with him, and there he delivered him into *Woodburne's* Hands.

*Mr. Raby.* Did he say what Signal was given ?

*Weth.* Not that I remember ; but he said, that *Woodburne* was placed there by his Appointment.

*Mr. Raby.* For what Design ?

*Weth.* With an Intent to murder him. When *Woodburne* struck him, *Coke* said, he went away immediately.

*Mr. Raby.* What have you heard *Woodburne* say concerning this Fact ?

*Weth.* I have heard *Woodburne* say, that he and *Coke* had lain in wait several Times, and at several Places to murder Mr. *Crispe*.

*Mr. Raby.* Did *Woodburne* give you any Account what he did at this Time to Mr. *Crispe* ?

*Weth.* Yes he did ; he said that he struck him a Blow with his Hook, and that not quite striking him down, he gave him a second Blow which did ; and that *Crispe*, as he was falling, (who was never used to swear) cried out, God damn him ; and that then it went to his very Heart to think that he should kill a Man with an Oath in his Mouth.

*Mr. Raby.* Did he say he gave him several Blows ?

*Weth.* He said he gave him several Blows, and that he thought he was dead.

*Mr. Lee.* Call *Robert Moon* ; (who appeared, and was sworn.) What did you know of this Matter ?

*Moon.* When I heard what happened to *Crispe*, I said, I knew the Person who did it, or the Person who employed him to do it ; and the Reason was, because three Years, or three Years and a half ago, Mr. *Coke* sent for me, and said to me, at first I thought it to be in a jesting Way, that he wish'd Mr. *Crispe* out of the World, he was a good for nothing Fellow ; his Wife had a Trick of playing away his Estate, and he wish'd somebody would knock him on the Head. Sir, said I to him, what Advantage would that be to you ? He shook his Head, and said, a very good Estate. Said I, I thought *Crispe* had but a small Estate.

Yes, said he, a very good one. Then I began to think there was something in it. After some little time, said he, I do not value ten or twenty Guineas to knock him on the Head. Then I began a little to reflect that he should have such an Opinion of me, that I should be such a Sort of a Person.

*Mr. Lee.* What then did you say to him ?

*Moon.* I told him, that I would not kill the greatest Villain in the World for ten such Towns as *Bury*.

*Mr. Lee.* What did he say afterwards ?

*Moon.* I do not remember, I have forgot if there was any thing else.

*Mr. Lee.* How came you to remember this ?

*Moon.* When I heard of this Fact committed on Mr. *Crispe*, then it came fresh into my Memory.

*Serj. Selby.* Call *John Carter* ; (who appeared, and was sworn.) What Trade are you of ?

*Carter.* A Blacksmith.

*Serj. Selby.* Did *Coke* at any time send *Woodburne* for you, and what past thereon ?

*Carter.* On the *Friday* before *New-Year's-Day* last, which was on a *Monday*, Mr. *Coke* sent *Woodburne* to me, who told me his Master *Coke* wanted to speak with me.

*Serj. Selby.* Did you go ?

*Carter.* Yes, I went to his House, and he ordered me to come up to him in his Chamber. When I came up, he told me that he wanted a good strong Horse to carry his Weight. I told him I did not know of any one then ; but when I did, I would let him know. Upon that he said, by God, how do you go on, Boy ? I hear you have lost most of your Business, you have got no Iron nor Coals, and you are afraid of a Goal ; I have a Thing now in Agitation that will make a Man of you as long as you live. I said I should be very glad of that. Said he, can you keep a Secret ? Yes, said I, as well as any one to serve myself and my Friend. Said he can you keep one of the biggest Secrets in the World ? I told him, as well as any body. Said he, you are pretty much in Debt, and if you will serve me in this, I can make a Man of you as long as you live : Do you think you could cut five or six Men's Heads off without Scruple of Conscience ? I told him, No ; it was too much for a Man's Conscience to bear. Said he, what, a Scruple of Conscience to do such a Thing as that ? There are those above who have done ten times worse. I suppose, Sir, said I, you mean the *South-Sea* Gentlemen. Yes, said he, so I do ; they have ruined Families, and beggar'd Gentlemen : To cut Men's Heads off is but a Trifle to them. Said I, Mr. *Coke*, I believe you speak only in Joke, by way of Merriment. Said he, what do you think I sent for you by way of Joke ? I told him I could not do any such Thing. Then, said he, do you think you can cut off one Man's Head without Scruple of Conscience ? I told him, No. Then, said he, if you can't cut off a Man's Head, and lay it down upon the Table before me, you are not for my Turn : On that he fetched a Bottle of Brandy, and gave me a Glass or two, and then said to me, *Carter*, I would have you go home, and consider of it for two or three Days, and if you can cut off a Man's Head without Scruple of Conscience, you shall have Plenty of Gold and Silver, and any thing else you ask. I told him, I needed no Consideration, for I could

could not do it. Then, said he, send *Woodburne* to me. And as I went out, I saw *Woodburne* at the Door, and sent him in to Mr. *Coke*.

Serj. *Selby*. Did he say any thing else to you, or any thing about Mr. *Crispe*?

*Carter*. I live in a House of Mr. *Crispe*'s, and Mr. *Coke* had been formerly his Steward, and *Woodburne* acted under him. And Mr. *Coke* said, that he heard my House was out of Repair, that it would be his after Mr. *Crispe*, and whether I should not like it better for him to keep it in Repair, as he had done before.

Serj. *Selby*. I think, my Lord, we have done with our Evidence, and have sufficiently proved Mr. *Coke* and *Woodburne* to be guilty not only within the Intention, but the Letter of the Statute of the 22d of *Car. II.* upon which they stand indicted. We have proved the Malice premeditated and fore-thought, the Intention to maim and disfigure, by slitting the Nose (for Mens Intentions must be construed by their Actions) and the maiming and disfiguring accordingly; and that Mr. *Coke* was privy to, and the Aider and Abettor of the Offence: And therefore, Gentlemen of the Jury, we can't doubt but that you will find them both guilty; and that your Verdict and their Conviction will be with the Suffrage of all Mankind.

Mr. *Raby*. My Lord, having gone through our Evidence, you will now permit me to make some few Observations upon what has been offer'd, and from which we humbly apprehend it will most clearly appear, that we have fully prov'd and made out every thing necessary to maintain this Indictment.

My Lord, it must be agreed, that this is an Offence created by a particular Act of Parliament, usually call'd Sir *John Coventry*'s Act, made on the Occasion of the like barbarous Usage he met with, to punish that Offence, and to prevent the like for the future: And I also agree, that the Prisoners must appear to be guilty of those very Facts, which by that Act are made Felony, or otherwise they cannot be punished by that Law. But we humbly apprehend, that when that Law, and the Evidence which has been given against the Prisoners are considered, they will appear to be guilty within the express Words of that Law; for which End I beg leave to mention that Act, which is the 22 and 23 *Car. II. cap. 1.* The Words are these. "That if any Person or Persons, on Purpose, and of Malice fore-thought, and by lying in wait, shall unlawfully cut or disable the Tongue, put out an Eye, slit the Nose, &c. with an Intention in so doing to maim or disfigure, in any the Manners before-mentioned, the Person or Persons so offending, their Counsellors, Aiders, and Abettors (knowing of and privy to the Offence aforesaid) shall be Felons, &c."

From this Clause it appears the Offence must be done;

1. Of Malice fore-thought.
2. By lying in wait.
3. By slitting the Nose, &c.
4. With an Intention to maim or disfigure.

And we humbly submit it, that from the Evidence which has been given against the Prisoners, it most plainly appears, that the Defendants are guilty of this Offence in every Circumstance described by this Act of Parliament.

1. For certainly there cannot be the least Que-

stion, but that this was done of Malice fore-thought, when it appears from the Evidence to have been under Consideration and premeditated for three Years and an half: And Mr. *Coke* had tried several Persons, before he could find any so hardy as to execute his base Purpose, or comply with so inhuman an Attempt: And therefore we apprehend there cannot be any Colour to say, this was not of Malice fore-thought.

2. And that this Offence was also done with lying in wait is as clear: For does it not fully appear upon the Evidence of Mr. *Crispe*; that when he came out of Mr. *Coke*'s House, Mr. *Coke* gave a Whistle or Signal? In vain had Mr. *Coke* given that Signal, if no Person had been in waiting to have heard it: To what end had that Signal been given, if Mr. *Coke* had not known there was some Person to have heard it? It appears plainly *Woodburne* came upon the Signal given; and what ensued you have heard, I need not repeat.

3. The third Thing made material by this Act, is, *That the Nose should be slit*; and that the Nose was slit appears from the Surgeon's Evidence, who has given a very particular Account of the seven Wounds Mr. *Crispe* received in his Face and Head: And he says, the Nose (the Nostril) was cut through.

4. Whether the other Circumstance, that this was done with an Intent to maim and disfigure, does sufficiently appear, or not, is the only Question that remains: And we submit it to your Consideration, as that which is very clear from this Evidence.

Mens Acts are the best Interpreters of their Intentions: If a Man kills another without Provocation, tho' no express Malice or malicious Intent appears, yet the very Act of the Party has always been taken to be a sufficient Proof of his Intent and Malice fore-thought. The Intent is latent in the Mind, and can seldom be known otherwise than by the Act which is done: And as there the malicious Intent is collected from the Act of the Party, so here 'tis as reasonable to collect his Intent to disfigure from the Act which is done, the maiming and disfiguring Mr. *Crispe*; and the very Manner of doing it speaks it.

Whoever looks upon this Gentleman (Mr. *Crispe*) sees too plainly how much he is disfigur'd: And could a Man cut another seven Times on the Head and Face with this Iron Bill, with this Weapon, without disfiguring him? Is it to be imagined? And when he has done the very Act, when he has disfigured him, shall he say, he had no such Intent? The Act done, and the Manner of doing it, speak it too plainly. 'Tis confess'd the Intent was to murder; this is what both the Prisoners admit to be the End design'd; but did they not also intend the Means? It would be in vain to intend the End, and reject the Means to effect it: The Means chosen to effect it have appear'd to be to cut him to death, by striking him with a Bill on the Head and Face: Is it possible to expect to cut him to Death on the Face with the Weapon produced, and not to disfigure him? This is the Act *Woodburne* has done, and *Coke* was present when *Woodburne* struck, even when he did this Fact, and *Coke* was a Counsellor, Aider and Abettor; he was present, and, in the Words of the Act of Parliament, knowing of the Offence. And therefore upon this Evidence we submit it, whether we have not given Satisfaction

faction to the Court and Jury, that the Prisoners are guilty.

This is not a Prosecution of the Party injured, arising from Revenge or Resentment, but is carried on by the Public, by the Crown, for the sake only of Public Justice, that by the Punishment of this Offence, the Subjects may have that Protection they ought to have by a due Execution of the Laws: And all we pray is, that the Jury will give such a Verdict as is agreeable to Justice.

*L. C. Just. Woodburne*, what have you to say for yourself?

*Woodburne*. May it please your Honour, my Lord, the first Time that *Coke* began with me about this Matter was on a *Wednesday* in last *Barley-Harvest*. He sent for me to mend his Copper, and after I had done it, he bid me go to the further End of the *Mill-Lane*, and there he must speak with me, and which came first should stay for the other. I was there before him; when he came he was on *Horse-back*, and his *Horse* kick'd about in a furious Manner, that the People took notice of it. When they were gone, he told me, that he had a Thing for me to do, but not to be done presently, and that if I did it I should want for nothing. I ask'd him what it was. He said about *Mr. Crispe*, to set him aside, that is, to kill him: But he said, it was not to be done presently: So he put his Hand in his Pocket and gave me *Eighteen Pence*. I told him, I never did such a Thing in my Life; I could not do it. Said he, it is not to be done presently, we have Time to consider. A while after he sent for me again, and ask'd me, whether I had consider'd of it. I told him, I could not do it. Said he, we must set *Crispe* aside; for *Mrs. Crispe* hath got a Trick to play; she will make away what there is from me and my Child. I said, I never did any such Thing; I could not do it, and desired him to forbear. I went away and left him in his Chamber. Within a while after he came to my House; said he, *John*, what is the Reason you can't do this for me? Said I, I cannot do it. Said he, what signifies it, I would do it for you. I said, I could not do it. Then he went away very uneasy, and in a Week or Fortnight sent for me again to his Chamber, and there was at me again. I told him I could do no such Work. Said he, why can't you do this Work? I have been a good Master to you, I made myself look little to bail you when you were in Goal. I turned about and cried. Said he, what makes you cry? Your crying signifies nothing? the Money that I shall give you will do you and your Family a Kindness. Said I, I can do no such thing. Said he, it signifies no more the killing of him, than to kill a Dog, for they do no good with what they have. Yes, said I, *Mr. Crispe* is a very good Master; I work'd for him and his Father before him: And so I went away. Afterwards my Wife died three Days before *Gunpowder-Treason* last: She was buried on that Day, and being very poor, I sent my Daughter to desire a little Money of him to have the Bell toll'd for my Wife; but he sent me none. My Wife was buried on a *Sunday*, then on the *Monday* he sent his Boy for me; I went down to him, and when I came, I fell a weeping for the Loss of my Wife, and having ten Children. Said he, what makes you cry? You must pull up a good Heart; tho' your Wife be dead, you may have Friends; here is that which

will do you a Kindness hereafter. Said I; I am very sorry for the Loss of my Wife. Said he, what signifies that? She was carried well into the Church, and is, no doubt, happy; she is gone before you; we must all go in our Time: I was a Friend to you in her Illness; I sent her a good Doctor at my own Charge: This twenty Pounds that I will give you will be a brave Estate for you.

*L. C. Just.* What were you to have this twenty Pounds for?

*Woodburne*. It was to kill *Mr. Crispe*; he told me that I must set aside *Mr. Crispe*; he offer'd me twenty Pounds to do it; but I then refus'd it.

On *Monday, New-year's-day* in the Morning, *Coke* sent his Boy for me to come to him; and between eight and nine in the Morning I went to him. He was in his green Room. Now, said he, *John*, we shall have the fairest Opportunity to kill *Mr. Crispe*. I told him, I was loth to do it; it was very cold, and I had an Ague. Said he, I will give you that which shall warm you. He went to his Closet, and gave me out of the Bottle that he used to carry in his Pocket, half a Pint of Brandy, and told me, that happen how it will I must not come near his House any more that Day, lest afterwards there should be some Suspicion; but said he, whether Ague or not, you must be at *Mr. Morrice's* Porch, which is in the Church-yard, about eight o'Clock in the Evening. I went there between eight and nine; about nine *Coke* came out, and gave me a Whistle: On that I went up to him; he told me, *Mr. Crispe* was very jolly, and he believed it would be late before he came out. I told him, I did not care to stay. Said he, you must stay now; this is the Time that will do it. I staid till ten o'Clock; then he came to me again in *Mr. Morrice's* Porch, and told me, that he believed *Crispe* would not go till eleven o'Clock; but the later the better. Then he went from me again, and a little Time after ten *Coke* and *Crispe* came out together, and on *Coke's* Whistling I came up to them; *Crispe* was then before, and coming to get against the Wall. I came up to *Coke*; he bid me have a care not to hit him instead of *Crispe*, being very dark; so he took me by the Sleeve to lead me up to *Crispe*; and said to *Crispe*, Brother, stand still; on that I hit him two Strokes with my Hook; tho' I never heard him swear before, yet he now swore, God damn him: On that *Coke* said, what! doth he swear? Secure him, down with him. He stood by him till I gave him several Blows, and then he went away. *Coke* desired me to take away his Watch; for, saith he, as to his Money, he don't carry above half a Crown or three Shillings in his Pocket; and when I go to *London*, I will sell the Watch for you.

*L. C. Just.* What *Woodburne* saith against *Coke*, is no Evidence against *Coke*, and should not have been mentioned by him; but what he saith relating to himself before the Fact, is so twisted with *Coke*, that without the Whole it is not so intelligible as to himself. However, the Jury are to take notice, that what *Woodburne* saith, is only Evidence against himself, and not against *Mr. Coke*.

*L. C. Just.* After you had given him those several Blows with your Hook, what did you next?

*Woodburne*. I began immediately to reflect on what I had done, and went away forthwith to my own

own House, where I was about to take a Line to hang my self.

*L. C. Just.* Have you any Witnesses, or any body to speak for you?

*Woodburne.* My Lord, here are my two Daughters in the Court; I desire your Lordship would be pleased to hear them, *Ann Woodburne* and *Sarah Woodburne*; who being called, appeared, and were sworn.

*L. C. Just.* What say you, *Ann Woodburne*?

*Ann Woodburne.* On the *Wednesday* before *New-Year's-Day* *Coke* sent for my Father by his Boy; I told the Boy my Father was in Bed, and sick of an Ague, and could not come. The Boy came again, and said, my Father must by all Means come; but he would not then go, but he went to him on *New-Year's-Day* in the Morning, and came Home again. About five or six a-Clock in the Evening, my Father went out with a Hook in his Hand; and he said, he should not be at home till eleven or twelve at Night; and if any body came for him, he bid us not take any Notice but that he was at home. We thought he took the Hook to cut some Wood with.

*L. C. Just.* Have you any thing more to say?

*Ann Woodburne.* When my Mother died, I went to Mr. *Coke's* to borrow five Shillings of him, to have the great Bell toll for my Mother, and told him, that my Father would pay him again. He said, What signified the ringing out of the great Bell? her Soul would be never the better for it; but if he will satisfy me in my Request, he shall have five times five Shillings.

*L. C. Just.* What say you, *Sarah Woodburne*?

*Sarah Woodburne.* *Coke* did frequently send for my Father at all times, both of Day and Night; and he would often come to my Father, and when he came, they would go out, and walk down the Back-side, and talk together. After this Fact was done, *Coke* sent his Boy for my Father, and the Boy said, they must not go together; for if they did, People would take Notice of them.

*L. C. Just.* *Woodburne*, have you any thing more to say?

*Woodburne.* This Day nine Weeks, which was a Week after the Fact committed, *Coke* sent for me, and said, *John*, I wish you would have done the thing I ordered you; but you have been before Alderman *Wright* and the Recorder, and have told your Story well; but hold you fast, they will examine you again; I shall——

*L. C. Just.* This is subsequent to the Fact, and is not Evidence against *Coke*. If you *Woodburne* have done, then Mr. *Coke* what have you to say for your self?

*Coke.* May it please your Lordship, I am much ashamed, and very unable to defend myself; I am ashamed to think I should be concerned in so heinous a Crime against Mr. *Crispe's* Life; I am even confounded at it; it is indeed a very great Crime, and I know not what to say for myself. As for *Woodburne*, he hath asserted against me several things that are false.

*L. C. Just.* I have told the Jury, that what he hath said is no Evidence against you.

*Coke.* When I first spoke of this Matter to *Woodburne*, he said, he should value it no more than the cutting off the Head of a Dog. I did, indeed, go out with Mr. *Crispe* that Night, but

I was not near him when *Woodburne* struck him; but retreated to my own House in a Moment. My Lord, I am very sensible that a Point of Law may arise on the Statute whereon I am indicted.

*L. C. Just.* Whereon?

*Coke.* With respect to my Intention.

*L. C. Just.* Your Intention is Matter of Fact; and must be tried by the Jury, whether your Intent was to maim and disfigure; this doth not seem to me to be a Point of Law; if there be any Point of Law that shall arise, you shall have Counsel to speak to it; but whether you slit Mr. *Crispe's* Nose with an Intention to disfigure him, is a Matter of Fact.

*Coke.* My Intent was to kill Mr. *Crispe*, and not to maim or disfigure him.

*L. C. Just.* But that is the Question the Jury are to try, whether you did not of Malice slit his Nose, with an Intent to disfigure him. If the Jury do not find that you so did, you must be acquitted on this Indictment. Supposing your Design was to kill, yet your Design might be likewise to maim; and this the Jury must try; this is Matter of Fact for their Consideration.

*Coke.* This is a very penal Statute, and I am unable to plead my own Cause; I beg your Lordship to assign me Counsel.

*L. C. Just.* If any Point of Law doth arise upon the Statute, you shall have Counsel; but as yet there is nothing but Matter of Fact; whether the Fact proved doth support the Charge in the Indictment; or in other Words, whether the Evidence be sufficient to make good the Charge; this must be left to the Jury; I will state the Fact to them, and they are on their Oaths to give in their Verdict.

*Coke.* This is a very penal Statute, and I cannot argue it for myself; I hope your Lordship will assign me Counsel; this is the first Indictment that ever was upon this Statute.

*L. C. Just.* What do the King's Counsel say to it?

*Serj. Selby.* After so full an Answer as your Lordship has given, I think it but vain to say any thing; I always thought that no Matter of Law could arise upon this Fact and Indictment; for *Woodburne* did the Fact of Malice forethought, by lying in wait, and with an Intention to maim; Mr. *Coke* was aiding, abetting, and privy to the Fact: Therefore, though it was an Intent to kill, it must be to maim also; he could not intend to kill him with such an Instrument, without intending to maim him first; and therefore, if there were two Intentions and but one executed, there is no Pretence to say, that what was executed was not intended. Mr. *Coke* says, that never was any Indictment before upon this Statute; if not, it must be because no Man before ever thought of being guilty of so horrid an Action.

*L. C. Just.* If any Point in Law doth arise you shall have Counsel; but the Fact must be agreed and stated, before the Law can come in debate. You say, your Intent was only to murder; but that is not yet agreed or found to be the Fact; It is the Point now in Trial, whether you did it not with an Intention to maim or disfigure; and according as that Intention shall appear to the Jury, so will they either acquit or convict you; therefore if you have any thing more to say, I desire you to go on;

*Coke*. I submit to your Lordship's Judgment.

*L. C. Jost*. Gentlemen of the Jury, this is an Indictment of the Prisoners at the Bar, *John Woodburne* and *Arundel Coke*, for Felony, by lying in wait, and purposely and maliciously slitting the Nose of *Edward Crispe*, with Intention, in so doing, to maim or disfigure the said *Edward Crispe*. *John Woodburne* is indicted for the principal Actor, or the Person who did the Fact; and *Arundel Coke* is indicted for being present, aiding and abetting. This Indictment is founded on a Statute made in the two and twentieth Year of King *Charles* the Second, intitled, *An Act to prevent malicious maiming and wounding*; whereby it is enacted, That if any Person or Persons, from and after the twenty fourth Day of *June*, in the Year of our Lord 1671, on Purpose, and of Malice fore-thought, and by lying in wait, should unlawfully cut out, or disable the Tongue, put out an Eye, slit the Nose, cut off a Nose or Lip, or disable any Limb or Member of any Subject of his Majesty, with Intention in so doing to maim or disfigure, in any the Manners before-mentioned, such his Majesty's Subject, that then, and in every such Case, the Person or Persons so offending, their Counsellors, Aiders and Abettors (knowing of, and privy to the Offence, as aforesaid) shall be, and are thereby declared to be Felons, and shall suffer as in Cases of Felony, without Benefit of the Clergy. Now the Question on this Indictment is, whether *John Woodburne* did on Purpose, and of Malice fore-thought, and by lying in wait, unlawfully slit the Nose of *Edward Crispe*, with an Intention to maim or disfigure him therein? And, whether *Arundel Coke* was feloniously present at the Fact, aiding and abetting *Woodburne* in the Commission and perpetration of it? To make out this Matter several Witnesses have been called; the first Witness was *Edward Crispe* himself, who informs you, that *Arundel Coke* married his Sister, and *Mr. Brown*, *Coke's* Sister; and that last *New-year's-day* they were invited to sup at *Mr. Coke's*; and that before Supper *Mr. Coke* proposed to go to *Mrs. Monke's*; and that after Supper, about ten a-clock at Night, *Mr. Coke* called *Mr. Crispe* out of the Parlour to go to this *Mrs. Monke's*; and that when they had walked three or four Turns before the House where *Mrs. Monke* dwelt, *Coke* stood still, and made a Noise like a hollowing, which made *Mr. Crispe* afraid, being dark, so he made toward the Wall; but in a quarter of a Minute's time a Man came and knocked him down: Who that Man was, nor what was then further done to him, he could not then tell, because by the Blow he lost his Senses for some time; but afterwards he got up again, and returned to *Mr. Coke's* House, from whence he came, but in a sad Condition, much wounded and bloody, where *Mr. Sturgeon* the Surgeon came to him, from whom you have the Particulars of his Case. He says, that *Coke* was close by him when he was knocked down; but did not hear *Coke* say any thing. He also says, that upon his Death one hundred Pounds *per Annum* would have gone to *Coke's* Wife, as one of his Sisters and Co-heir.

The next Witness is *Mr. Brown*, who married *Coke's* Sister; and he says, that he, his Wife and Daughter were invited to sup at *Mr. Coke's* the Evening of *New-year's-day*; that he came about

six a-clock, and found *Mr. Coke* and *Mr. Crispe* drinking a Glass of Wine in the Parlour before Supper; that he sat down and drank with them till Supper; that after Supper they three came into the Parlour again, and some time after *Coke* went out of the Room, and then came back again, and called *Mr. Crispe* out of the Room, who followed him; that *Coke* returned again in about ten Minutes, and seemed to be out of Breath, as if he had been walking faster than ordinary; that *Coke's* House is distant from the Church-yard about twice the length of the Shire-house; that *Coke*, after he came in, drank a Glass of Wine; and that *Brown* asked *Coke* what was become of *Mr. Crispe*; and that *Coke* said, he believed he was gone home in the Dark; and that in about two or three Minutes after *Mr. Crispe* came in much wounded and bloody; and that it was about half an Hour between the Time of *Mr. Crispe's* going out and returning again.

*Mr. Sturgeon* the Surgeon swears, that being sent for, he came to *Mr. Crispe* about eleven a-Clock that Night; that he had lost a great deal of Blood, and was very much wounded; and that in the whole he had received seven distinct Wounds, which he apprehends were by so many several Blows. He hath given you a particular Description of the several Wounds; the second Wound is that which is alledged to be within this Statute. He tells you, That this Wound divided the right side of the Nostril; and that though the Edge of the Nose was not cut through, yet it was cut through in another Place; the Nose was slit; there was a Cut from without into the Nostril; indeed the Slit was not very great, for he sewed it up with one Stitch; but he is sure that a Slit there was, and you have seen *Mr. Crispe's* Nose. Now the slitting of the Nose is one of the particular Facts mentioned in the Statute.

*Mr. Willet* the Constable swears, That he was with *Woodburne* after his Commitment, and that he told him, he was concerned in the wounding *Mr. Crispe*; that he had been there waiting for that Purpose; and that when *Coke* whistled to him, he went up and made the Assault upon *Mr. Crispe* with an Hook or Bill, that was new-ground for that purpose, and directed him where to find it at his House, which he accordingly did, and brought it to *Woodburne*, who said that was the Hook; and the Hook hath been now produced before you, and you have seen it.

The next Witness is *Mr. Wetherell* the Goaler, who swears, That the Day after *Coke* was committed to his Custody, *Coke* sent for him up into his Chamber, and told him, That he and *Woodburne* had had a Design to murder *Mr. Crispe*, and had attempted it several times, and desired him to go and secure *Woodburne*, which he accordingly did. He hath given you an Account how and in what manner he secured him; and he swears moreover, that *Coke* told him several times that he had a Design to murder *Crispe*, and that he employed *Woodburne*, and delivered *Crispe* into his Hands; that *Woodburne* did it with an Hook, and that he bad *Woodburne* to cut his Windpipe; and that if *Woodburne* had not been a Cow-hearted Dog, he would have so done, and secured *Crispe* from telling Tales. *Wetherell* likewise swears, that *Coke* told him, that he called *Crispe* out of his House, went into the Church-yard with him, and there delivered him into *Woodburne's*

*burne's* Hands; and he farther swears, as to *Woodburne*. That *Woodburne* own'd that he and *Coke* had lain in wait several Times, and at several Places, to murder Mr. *Crispe*; and as to this particular Fact, he gave him this Account; That he struck him a Blow with a Hook; and that not quite striking him down, he gave him a second Blow; and that as *Crispe* was falling, he cried out, God damn him; and that then it griev'd him to kill a Man with an Oath in his Mouth.

*Robert Moon* swears; That when he heard what was befallen Mr. *Crispe*, he said; that he knew the Person that did the Fact, or him who employ'd the Person; and the Reason was, because about three Years and a half before Mr. *Coke* sent for him, and told him, That he wish'd Mr. *Crispe* out of the World, and that some body would knock him on the Head; and that when he ask'd him what Advantage that would be to him? He replied, A very good Estate; and afterwards told him, he did not value ten or twenty Guineas to knock him in the Head: This made *Moon* reflect upon himself, and was concerned that he should have such an Opinion of him, and thereon told him, that he would not kill the greatest Villain in the World for ten such Towns as *Bury*.

*John Carter* swears, That on *Friday* before *New-year's-day* last, *Coke* sent *Woodburne* to him, to tell him that his Master *Coke* wanted to speak with him; that thereon he went to his House, and was ordered to come up to him in his Chamber, which he did; and there *Coke* first enquired, whether he could help him to a good strong Horse? And then told him, that he heard he had lost much of his Business; he had no Iron, nor Coal; and that he had a thing in Agitation that would make a Man of him as long as he lived; and thereon ask'd him, whether he could keep a Secret, and of one of the biggest Secrets in the World? And upon his telling him that he could, he ask'd him whether he could cut five or six Mens Heads off without Scruple of Conscience? And when he told him that that was too much for a Man's Conscience to bear, he told him, there were those above meaning the *South-Sea* Gentlemen, who had done ten times worse, ruin'd Families, and beggar'd Gentlemen; and that to cut Mens Heads off was but a Trifle to them. That hereon *Carter* told him, he believed he spoke only in Joke, and by way of Merriment; but *Coke* ask'd him, Whether he thought he sent for him only by way of Joke? And then ask'd him, whether he could cut off one's Man's Head without Scruple of Conscience? And when *Carter* told him, No: Then *Coke* told him, if he could not cut off a Man's Head, and lay it down on a Table before him, he was not for his Turn; and then gave him a Glass of Brandy, and bid him consider of it for a Day or two, and if he could cut off a Man's Head without Scruple of Conscience, he should have plenty of Gold and Silver, and any thing else he should ask: Whereto *Carter* replying, that he needed no Consideration, he could not do it; then he bid him send *Woodburne* to him, which he did:

In all this discourse between *Carter* and *Coke* I do not find that *Crispe* was the Person named on whom this Outrage should be committed; but *Carter* who is a Tenant of a House of Mr. *Crispe's*, says, That *Coke* told him he heard the House

was out of repair; that it would be his after Mr. *Crispe*; and ask'd him, Whether he would not like it better for *Coke* to keep it in repair, as he had done before, whilst he was *Crispe's* Steward?

This is the Substance of the Evidence given against the Prisoners at the Bar, to prove that they maliciously, and by lying in wait, have slit Mr. *Crispe's* Nose, with an Intent to disfigure him therein.

*Woodburne* doth not deny the general Fact, that is, the designed lying in wait to assault Mr. *Crispe*, nor the cutting or knocking him down with his Hook; his Confession is not Evidence against *Coke*, but it is against himself; and you hear what he hath own'd; that last Barley-Harvest *Coke* sent for him to mend his Copper, and then ordered him to meet him at another Place, which was accordingly done; where *Coke* told him, That he had a thing for him to do, but it was not to be done presently; and if he would do it, he should want for nothing. And when he ask'd him what it was? He said, To set *Crispe* aside, that is, to kill him; and *Coke* gave him eighteen Pence. That then he told him, he could not do it; that *Coke* solicited him several times afterwards to murder *Crispe*; the Particulars whereof I do not enumerate, because they principally relate to *Coke*, against whom it is not Evidence; but yet they so far relate to *Woodburne*, as to shew his Knowledge and Deliberation in this Matter; therefore to come to the Day whereon this Fact was done, *Woodburne* saith; That about eight or nine in the Morning *Coke* sent for him, and told him, that that Day they should have the fairest Opportunity to kill Mr. *Crispe*; and it was agreed between them; that *Woodburne* should be in the Church-yard, at Mr. *Morrice's* Porch, about eight a-clock in the Evening. He accordingly went with his Hedge-Hook or Bill, which hath been here produced. *Coke* came out to him twice by himself, and the third time a little after ten a-clock, *Coke* and *Crispe* came out together; and then *Coke* whistled, which was the Signal between them; and thereon *Woodburne* came up, and owns, that with his Hook he cut and knock'd down *Crispe*, and that tho' he never heard *Crispe* swear before, yet that now, as *Crispe* was falling, he swore God damn him; whereon he gave him those several other Wounds and Blows that *Crispe* received; and then reflecting on what he had done, immediately went to his own House, where he was about to take a Rope to hang himself.

By this Defence of *Woodburne*, you see that he doth not deny the assaulting and wounding of Mr. *Crispe*; but that that he chiefly insists on is, that what he did was by the Solicitation and Procurement of Mr. *Coke*; which is no Justification or Excuse. However, he hath call'd two Witnesses, *Ann* and *Sarah Woodburne*, his two Daughters, to prove that *Coke* did frequently send for their Father, and often came to him at his own House, and would be in private Conference together, which probably was about this Matter; but if it were, this only confirms what *Woodburne* insists on, that he was solicited and hired by *Coke* to do this Fact; which, as I said, will neither justify nor excuse him; for no Man is to obey the unlawful Commands, or hearken to the illegal Advices of any other Person whatsoever.



As for Mr. *Coke*, that which he principally puts his Defence upon is, that his Intent was to kill and murder Mr. *Crispe*, but not to maim him, or to slit his Nose, or to disfigure him in so doing; and therefore, tho' in Pursuance and Execution of the Attempt to murder Mr. *Crispe*, they slit his Nose, or might thereby disfigure him, yet that not being their Intention, and Design, he is to be acquitted on this Indictment, wherein the Intent of the Party is one of the principal Ingredients to make him guilty. This same Defence will serve also for *Woodburne*, that they intended to murder, but not to maim; and if they did maim, it was with an Intention to kill, and not to disfigure. Now this Indictment is, as I told you, founded on the 22d and 23d *Car. II. c. 1.* for that on Purpose, of Malice fore-thought, and by lying in wait, the Prisoners did unlawfully and feloniously slit the Nose of *Edward Crispe*, with Intention in so doing to maim or disfigure him. *Woodburne* is charged as the Actor or principal Agent, *Coke* as being present, aiding, and abetting; which, in Point of Law, is the same, as to the Guilt and Conscience, both being in Law Principals.

That this Attempt on Mr. *Crispe* was designed, malicious, and by lying in wait, the Evidence is very strong; there hath been also very strong Evidence given, that the Nose of Mr. *Crispe* was slit by *Woodburne*, and that *Coke* was present on the same Design with *Woodburne*.

But the Thing chiefly insisted on is, that the slitting of Mr. *Crispe's* Nose was not with an Intention in so doing to maim or disfigure him; and if it were not with that Intent, then the Prisoners will not be guilty upon this Indictment.

Now Gentlemen, what the Intent of these Persons was in slitting Mr. *Crispe's* Nose, you are to try; this is a Matter of Fact for your Consideration and Determination: It is the same in other Felonies, where the Intent of the Party makes the Crime. Burglary is breaking open an House in the Night-time, with an Intent to commit a Felony; tho' no Felony be committed, yet if there was an Intent to do it, it is Burglary; which Intent is to be tried by the Jury. Larceny, or Theft, is taking away another Man's Goods, with an Intent to steal; if it were without such an Intent, it would only be a Trespass, and no Larceny; but whether it were or were not with such an Intent, is a Matter of Fact to be inquired into and determined by the Jury. Nay, the Intent is so necessary in all Felonies, that a Person who hath no Intent or Design, as a Madman, Lunatick, Infant, &c. cannot commit Felony for that very Reason; because he cannot have any Intent or Design in his Actions. So that in this Case you are to try no other Matter than what is tried in other Felonies, *viz.* The Intent of the Party.

Now how is the Intent of the Party discovered in other Cases? By the Facts themselves, by the precedent, concomitant, and subsequent Circumstances of the Facts, by the Manner of doing, and the like.

There are some Cases where an unlawful or felonious Intent to do one Act, may be carried over to another Act, done in Prosecution thereof; and such other Act will be Felony, because done in Prosecution of an unlawful or felonious Intent: As, if a Man shoots at a wild Fowl, wherein no Man hath any Property, and by such shooting

happens unawares to kill a Man; this Homicide is not Felony, but only a Misadventure or Chance-Medley, because it was an Accident that happened in the doing of a lawful Act: But if this Man had shot at a tame Fowl, wherein another had Property, but not with Intention to steal it, and by such shooting had accidentally kill'd a Man, he would then have been guilty of Manslaughter, because done in Prosecution of an unlawful Action, *viz.* committing a Trespass on another's Property: But if he had had an Intention of stealing this tame Fowl, then such accidental killing of a Man would have been Murder, because done in Prosecution of a felonious Intent, *viz.* an Intent to steal. So a Man of Malice intends to burn one House, in Execution thereof he happens to burn another House; this is a malicious and felonious burning of this other House, because sprung out of a malicious and felonious Intent. The like may be instanced where Poyson is intended to be given to one Person, and another takes and eats it, and thereby dies. And other Cases there are of the like Nature, where Acts done in Prosecution of felonious Intents, participate of the Nature of their Original from whence they spring.

But now the Indictment on this Statute is for a certain particular Intent; for purposely, maliciously, and by lying in wait, slitting Mr. *Crispe's* Nose, with an Intention in so doing to maim or disfigure: And you are to consider, whether the Ingredients necessary to make this a Felony within the Statute, have been proved to your Satisfaction. The Facts necessary to be proved on this Indictment are, that on Purpose, and of Malice fore-thought, and by lying in wait, then unlawfully slit the Nose of Mr. *Crispe*, with Intention in so doing to maim or disfigure. As to the Fact of slitting the Nose, that is directly and positively sworn: There can be no doubt but that it was an unlawful slitting. Then the next Thing for your Consideration will be, whether this unlawful slitting was on Purpose, of Malice fore-thought, and by lying in wait. As to this, a great deal of Evidence hath been given; and what pass'd before, and at the Time of the Fact, will guide you herein. And if on a Review of the Evidence, you shall be of Opinion, that this unlawful slitting of the Nose was on Purpose, of Malice fore-thought, and by lying in wait; then the next Question will be, whether this was an Intention to disfigure? Facts do in some measure explain themselves; and the Circumstances preceding and accompanying those Facts, and the Manner of doing them, do many times more fully explain and declare the Intent of the Party. The Prisoner Mr. *Coke*, (which Defence goes both to him and *Woodburne*) insists, that their Intention was to murder, and not to maim; and that if they did maim or slit the Nose, it was with an Intention to kill, and not with an Intention to maim or disfigure. On the other Side, it is insisted on by the King's Counsel, that tho' the ultimate Intention might be to murder, yet there might be also an Intention to maim and disfigure; and tho' the one did not take effect, yet the other might: An Intention to kill, doth not exclude an Intention to maim and disfigure. The Instrument made use of in this Attempt was a Bill or Hedging-hook, which in its own Nature is proper for cutting and maiming; and where it doth cut or maim, doth necessarily, and by consequence

disfigure. The Attempt intended on Mr. Crispe was immediately to his Person, to do him a personal Injury. Besides, the Manner of doing and perpetrating this Fact is proper to be considered; That it was done by Violence, and in the dark, where the Assailant could not well make any Distinction of Blows; but knock'd and cut on any Part of Mr. Crispe's Body, where he could, till he had sunk him down, and done to him whatever else he pleas'd. And if the Intention was to murder, your are to consider, whether the Means made use of, in order to effect and accomplish that Murder, and the Consequences of those Means, were not in the Intention and Design of the Party; and whether every Blow and Cut, and the Consequences thereof, were not intended, as well as the End for which it is alledg'd those Blows and Cuts were given.

All these several Things, which I have mentioned, are proper for your Consideration: You will add to them your own Observations; and if, upon the whole, you are satisfied from the Evidence, that *Woodburne* did on Purpose, and of Malice fore-thought, and by lying in wait, unlawfully slit the Nose of *Edward Crispe*, with Intention, in so doing, to maim or disfigure; and that *Arundel Coke* was feloniously present at the Commission of this Fact, and aiding and abetting therein; then you will find them Guilty: But if this hath not been prov'd to your Satisfaction, then you are to acquit them, and find them Not Guilty.

*Then the Jury withdrew to consider of their Verdict, and in about half an Hour return'd again.*

*Cl. of the Arr.* Gentlemen, answer to your Names.

*Here, and so the rest.*

*Cl. of the Arr.* Gentlemen, are you all agreed on your Verdict?

*Jury.* Yes.

*Cl. of the Arr.* Who shall say for you?

*Jury.* Our Foreman.

*Cl. of the Arr.* *John Woodbourne*, hold up thy Hand; (*which he did.*) Look upon the Prisoner. How say you, is *John Woodburne* Guilty of the Felony whereof he stands indicted, or Not Guilty?

*Foreman.* Guilty.

*Cl. of the Arr.* What Goods or Chattels, Lands or Tenements?

*Foreman.* None to our Knowledge.

*Cl. of the Arr.* *Arundel Coke* aliàs *Cooke*, hold up thy Hand; (*which he did.*) How say you? Is *Arundel Coke* aliàs *Cooke*, Guilty of the Felony whereof he stands indicted, or Not Guilty?

*Foreman.* Guilty.

*Cl. of the Arr.* What Goods or Chattels, Lands or Tenements?

*Foreman.* None to our Knowledge?

*Cl. of the Arr.* Then hearken to your Verdict, as the Court hath recorded it. You say, that *John Woodburne* is Guilty of the Felony whereof he stands indicted: You say, that *Arundel Coke* aliàs *Cooke*, is Guilty of the Felony whereof he stands indicted; and that neither they, nor either of them, had any Goods or Chattels, Lands or Tenements at the Time of the Felony committed, or at any Time since, to your Knowledge. And so you say all.

*Jury.* Yes.

*Mr. Coke.* I desire to know of your Lordship, whether the Nose can be said to be slit within the Meaning of this Statute, when the Edge of it was not cut through?

*L. C. Just.* It is true; the Edge of the Nose was not slit; but the Cut was athwart the Nose; which Cut separated the Flesh of the Nose, and cut it quite through into the Nostril: This I take to be a Slitting of the Nose; and the Surgeon swore the Nose was slit.

*On Wednesday the 14th of March, John Woodburne, Arundel Coke aliàs Cooke, and one Edward Shorter, who was convicted of Burglary, were brought to the Bar, in order to receive their Sentence; and the Court proceeded thus.*

*Clerk of the Arr.* *John Woodburne*, hold up thy Hand; *which he did.*

Thou hast been indicted of Felony, on the Statute; for purposely, maliciously, and by lying in wait, slitting the Nose of *Edward Crispe*, Gent. with Intention in so doing, to maim or disfigure him. Thou hast been thereupon arraigned, thou hast pleaded thereunto Not Guilty, and for thy Trial, thou hast put thyself upon God and thy Country; which Country hath found thee Guilty; what hast thou to say for thyself, why the Court should not proceed to give Judgment of Death upon thee, and award Execution according to the Law?

To which *Woodburne* said nothing.

*Cl. of Arr.* *Arundel Coke* aliàs *Cooke*, hold up thy Hand; (*which he did.*)

Thou hast been indicted of Felony, on the Statute; for being feloniously present, aiding and abetting *John Woodburne*, in purposely, maliciously, and by lying in wait, slitting the Nose of *Edward Crispe*, Gent. with Intention in so doing, to maim or disfigure him. Thou hast been thereupon arraigned, thou hast pleaded thereunto Not Guilty, and for thy Trial thou hast put thyself upon God and thy Country; which Country hath found thee Guilty; what hast thou to say for thyself, why the Court should not proceed to give Judgment of Death upon thee, and award Execution according to the Law?

*Mr. Coke.* Tho' your Lordship did not think it proper Yesterday to assign me Counsel, yet I hope your Lordship will now give me leave to speak for myself; especially since I am the first unhappy Instance of an Indictment on this Statute; no Indictment, as far as it appears by the Law-Books, was ever yet founded on this Statute, and therefore ought to be very well weighed.

*L. C. Just.* Call the King's Counsel, that they may hear what is said. (*Then the King's Counsel were sent for, and being come:*)

*L. C. Just.* *Mr. Coke*, you may now go on with what you have to offer.

*Mr. Coke.* My Lord, I was saying, that I am the first unhappy Instance of an Indictment on this Statute; no Indictment, as far as appears by the Law-Books, was ever yet founded on this Statute; and therefore it ought to be very well weigh'd, especially in the first Instance to which it appears to have been ever applied. It is a very penal Statute, and consequently by the known Rule of Law not to be carried beyond the express Letter

of it; consequently no Crime, of what Nature or Magnitude soever, can fall within the Purview of it, but such as is identically the same in every Circumstance with that described by the Words of the Statute itself.

The Crime describ'd by the Statute is the unlawful cutting out, or disabling the Tongue, putting out an Eye, slitting the Nose, cutting off a Nose or Lip, or disabling any Limb or Member, attended with these particular Circumstances:

First, On Purpose and of Malice fore-thought.

Secondly, By lying in wait.

Thirdly, With Intention in so doing to maim or disfigure in any of the Manners beforementioned in the Statute.

These Circumstances must all concur to constitute that particular Crime described by the Statute; and where any of them are wanting, of what Magnitude soever the Offence may be, it is not the Offence which the Statute has specified.

If the first Circumstance be wanting, no Man can say that any Offence, though attended with the two other, can fall within the Statute; this is sufficiently plain of itself.

As to the second; *A* and *B*, of Malice fore-thought, appoint and meet to fight a Duel; *A* in the Rencounter runs *B* into the Eye, and puts it out; no Body has ever imagined this to be within the Statute, because the Circumstance of lying in wait is here wanting.

As to the third; suppose *A* lies in wait to rob *B*, *B* resists, and in the Scuffle is wounded, as the Statute describes, but gets off. This is a Case which very frequently happens, yet no one ever thought it to be within the Statute, nor was any one ever indicted for this upon it: The only Reason of which must be, because the Intention was to rob, and not to maim and disfigure the Person.

In my Case, if it be taken upon the Evidence of Mr. *Crispe*, nothing more appears than the Assault itself: If my Confession be read, the lying in wait, and the Malice fore-thought will be proved; but then it will be likewise proved, that I had no other Intention but to kill, and had no other part, but by giving Orders to *Woodburne* for that Purpose; and my Confession must be taken together.

Nor is it an Objection to say, that the Crime which is proved by the Evidence is much worse than that which is described by the Statute; for if it is worse, then it cannot be the same. Even in Cases of Crimes by the common Law, if upon an Indictment for a Crime of an inferior Nature, the Evidence proves the Fact attended with Circumstances which brings it within the Description of a Crime of a superior Nature, the Person indicted must be acquitted. At Summer Assizes at *Dorchester*, Anno 1712, a Woman was indicted before Mr. Justice *Eyre*, for the Murder of another Woman; upon this Evidence it appeared, that the Person murdered was her Mistress, which made the Crime Petty-Treason. The Judge directed this Matter to be specially found, and upon Conference with all the Judges it was held, she ought to be acquitted upon this Indictment, as she accordingly was; and was afterwards indicted for Petty-Treason, and convicted and executed thereupon.

Where a new Offence has been created by

Statute, or an old one made more penal, the utmost Strictness has always been us'd to comply with the Letter of the Statute, whatever Inconveniencies might result from such a Restraint.

As for Example:

By the Statute of the 39 *Eliz. cap. 14*. Clergy is taken away from any Person or Persons who shall be convicted of taking any Money, Goods or Chattels out of any Dwelling-house, &c. in the Day time, to the Value of five Shillings. One *Evans* and one *Finch* were indicted on this Statute, 1 *Croke* 473. *Evans* and *Finch's* Case: The Case was thus upon the Evidence, That *Evans* by a Ladder climbed to the upper Window of one *Audley's* House, and took out thereof forty Pounds; and that *Finch* stood upon the Ladder in view of *Evans*, and saw *Evans* in the Chamber, and was assisting and helping to the committing of the Robbery, and took part of the Money: Upon a special Verdict it was adjudged, that because *Finch* did not actually enter the Chamber, and take the Money, though what he did amounted to a taking by Construction of Law, and was such a taking as made him a Felon; yet the very Letter of all penal Statutes must be pursued, and therefore he, *id est*, *Finch*, had his Clergy, and *Evans* was hanged.

Numerous Cases might be put of this kind of Nicety in the Construction of penal Statutes.

To mention but one more: By the Statute of 1 *Edw. 6 cap. 12*. Clergy is taken away from such Persons as shall be convicted for the felonious stealing of Horses, Geldings or Mares.— So scrupulously did the Judges adhere to the Letter of this Law, that there was forced to be another Statute made, *viz.* 2 & 3 *Edw. VI. cap. 33*. to enact, That a Person convicted for feloniously stealing one Horse, should be ousted of his Clergy in the same manner as if he had stole two.

Nor is it in this Case enough to say, the Jury are Judges of all this: For as the Evidence now appears, and is admitted, it is Matter of Law, how far this Evidence thus admitted on all Hands is sufficient to support this Indictment. If it were in a civil Case, the Party might demur to the Evidence. But if he is not allowed that Liberty in criminal Cases, it is upon the common Notion, that the Judges are the Prisoner's Counsel; and are obliged to determine all the Matters in Law arising upon the Evidence, as much as if the Persons had demurred to that Evidence.

And, as in this Case, the Prisoner admits the Evidence given to be true, and insists upon it, that it doth not support the Indictment; and therefore has a Right to have the Opinion of the Judges thereupon, as much as if the Evidence were stated at length upon the Record (as it must be in the Case of a Demurrer to Evidence) and nothing ought to be left to the Jury, but under the Judges Directions as to Point of Law.

In all these Cases therefore, my Lord, it has been usual to allow the Fact to be specially found; which gives the Prisoner the Advantage he might have had by the Demurrer to the Evidence.

Serj. *Selby*. My Lord, I do agree with the Prisoner at the Bar, that this is a very penal Statute, and that these Facts must be made out to bring his Case within the Letter of the Act, *viz.* An Intention or Purpose, of Malice, fore-thought, to maim or disfigure in such a Manner as the Statute describes; a lying in wait for that

that Purpose; a maiming, or disfiguring accordingly; and an abetting and being privy to these Facts: These are all Facts which the Jury only could determine, either by positive, presumptive, or circumstantial Evidence for no Man's Thoughts or Intentions can be otherwise proved than by his Actions. My Lord Chief Justice hath left the whole Evidence of these Facts to the Jury, who by their Verdict have found all these Facts as laid in the Indictment, against which nobody can now open his Mouth: We apprehend therefore that no Matter of Law hath arisen, and that what hath been insisted on by the Prisoner, is beside his Case, and needs no Answer.

Serj. *Brantwait*. My Lord, the Jury have found him Guilty. I apprehend nothing can properly be alledged now by Mr. *Coke*, that is contrary to the Verdict: If there is any Fault in the Indictment, we are ready to answer any Objections he shall make against it. That he does not pretend to. What is now offered by him is against the Verdict, and contrary to what is found by the Jury. I beg your Lordship's Leave to give an Answer to the Objections he is pleased to make against the Verdict, however improperly and out of Time made, for the Satisfaction of himself, and of the Persons here present. I agree a penal Act shall not be construed by Equity, or carried further than the Words or Letter of the Act, as the Cases mentioned by him to prove; but affirm, that this present Case is within the Words and Meaning of the Act: For though the ultimate Intent of Mr. *Coke* might be to murder Mr. *Crispe* (as by him is alledged in Excuse of himself) all the Means made use of to effect that Intent were also on Purpose, and such Blows could not be given by an Instrument, without an Intent to maim and disfigure. They were given by one lying in wait on Purpose; and the Fact and Manner of doing the same sufficiently prove, and are a certain and necessary Indication of the Intent. The Defendants might have an Intent to cut off, or slit the Nose; put out an Eye, or dismember; and an Intent also to kill and destroy; one Intent did take effect, the other not. The Defendants ought not to answer for what was not done, but ought to answer for what was done which was the slitting of Mr. *Crispe's* Nose, on Purpose to maim and disfigure him, by one lying in wait; which is all that is required by the Act.

As to the Objection; that if *A* and *B* go together to fight a Duel, if *A* slit the Nose of *B*, this is not within the Act; the Reason is, because there is no lying in wait.

As to the Case of *A* lying in wait to rob *B*, I with great Submission do say, that if *A* lie in wait to rob *B*, and to effect that Purpose with the greater Ease, *A* on purpose dismembers *B*, or puts out his Eyes, or does any other Fact prohibited by the Act; though *A* be hindered from robbing *B*, he is within the Act of Parliament; for the Intent and Purpose to rob, will be no Excuse to one that shall commit the Facts prohibited by the Act.

As to the Case of *Evans* and *Finch*, Cr. Car. 473. on 39 *El.* which takes away the Clergy from him that enters and steals: *Finch* was not within the Statute, and had his Clergy; for the express Words of the Statute take away the Clergy from him that enters the House, which

*Finch* did not. As to the Indictment of a Servant for Murder, in killing her Mistress; it is plain, that it is a Crime of a higher Degree than Murder, it is an Offence of another Species, it is Petty-Treason and not Murder.

The same Answer may be given to the other Cases mentioned, where the Words of an Act of Parliament are express. No Case shall be construed within a penal Act, but what is within the Words: But as to the present Case, the Jury have found every Fact that the Act of Parliament requires, that an unlawful Assault was made on Mr. *Crispe* by the Prisoners; that his Nose was slit on Purpose to maim and disfigure him, by lying in wait. And all these Facts were proved by plain, clear, and I believe convincing Evidence, to every Person that heard the Trial. I am sure the Prisoners can't complain of any Hardship done them; the Prosecution was carried on for the Sake of Justice, for the Safety of his Majesty's Subjects. This being the first Instance of a Crime so heinous, cruel, barbarous and inhuman, that has been committed since the making the Act of Parliament, it is hoped by this Prosecution a second will never be committed; for which Reason, I pray your Lordship's Judgment for the King against the Prisoners.

Mr. *Raby*. My Lord, I did expect at this time I should have heard, from this unhappy Gentleman, something in Arrest of Judgment; something to shew that this Indictment and Record, now before your Lordship in Judgment, had been insufficient, and such as your Lordship could not have proceeded upon to give Judgment against the Prisoners: But I don't perceive any thing has been objected to this Indictment or Record; and therefore since nothing appears, or is objected they must be taken to be sufficient, and such as your Lordship ought by Law to give Judgment upon against the Prisoners now at the Bar.

But this Gentleman has been pleased to take Notice of the Act of Parliament on which this Prosecution is founded: He has also made some mention of the Facts which have been given in Evidence against him; and cited some Cases (as I apprehend) to shew, that penal Statutes, and criminal Acts of Parliament, ought not in Construction to be carried beyond the Letter and Words of the Act. This which he has offered (as I take it) is now meant to shew (or at least that he apprehends) that from the Evidence given, it has not fully appeared he is guilty of the Offence with which he stands charged, within the strict Words and Meaning of this Act of Parliament: And for this End he has been pleased to make some Observations from the Words of the Statute, what Things he apprehends to be necessary to bring him within the Compass of this Act, *viz.* That such Wound or Maiming, as is described by the Statute, ought to be,

1. On Purpose, and of Malice fore-thought.
2. By lying in wait.
3. With an Intention to disfigure.

All these have been already admitted to him; and he will see every one of these Circumstances not only taken Notice of by us in our Observations upon the Evidence, but also more fully by your Lordship, before the Jury gave their Verdict.

But with what Intent this Fact was done, whether of Malice fore-thought, by lying in wait,

and with Intent. to disfigure, are Circumstances only to be collected from the Evidence and the Facts themselves; of which neither we nor the Court can determine, but can only be enquired of, and determined by the Jury; and therefore, though it would be a full Answer to what is now objected, to say, that the Jury have considered of the Evidence, have determined upon it, and found you guilty of the Indictment, with all those Circumstances which the Prisoner objects are necessary to bring the Offence within the Statute; though this, I say, might be Answer; yet for the Justice of this Proceeding, and to satisfy the Prisoner in his own Objections, and that they should not pass unanswered, your Lordship will permit me to take Notice of the Cases cited, and also to recollect the Evidence, so far as the Prisoner hath made it necessary to repeat it.

I confess, it is with Concern I mention it again; for I would not do any thing which might add to the Weight of those Afflictions which this unhappy Gentleman is under, had not he himself made it necessary to take farther Notice of it.

As to the Cases cited, only two of them which he mentions are cited to be adjudged; that at *Dorchester* by Mr. Justice *Eyre*, that a Woman was indicted for Murder, and upon Evidence it appeared to a different Offence, *viz.* Petit-Treason, for she had killed her Mistress; and that thereupon Mr. Justice *Eyre* caused her to be indicted for Petit-Treason, and she was convicted. Certainly, my Lord, that Judgment was right, and very just; for when it appeared upon Evidence that she was guilty of a distinct and different Offence than that of which she stood indicted, could any Thing be more just, than to cause her to be indicted for that Offence, of which, upon the Nature of the Evidence, she appeared to be guilty? The second Case cited of *Evans* and *Finch* (which is reported in *Cro. Car.*) is no more than this: *Evans* went up a Ladder, opened a Chamber Window in the *Temple*, went in and robbed the Chamber in the Day-time; *Finch* held the Ladder, and stood at the Foot of it when *Evans* entered: *Evans* was hang'd, *Finch* had his Clergy, and was only burnt in the Hand; and with great Reason: For the Statute, 39 *Eliz.* which takes away Clergy, takes the Clergy only from him that enters; and therefore to have taken the Clergy from *Finch* who did not enter, had been unjust and reasonable. And as to what is mentioned of the Statute 2 & 3 *Ed. VI. cap. 33.* made in Explanation of the Statute which took Clergy from him who stole Horses, and to take Clergy from him who stole only one Horse, there is such an Act of Parliament; but this Act and the Cases cited, only shew that Regard has always been had, not to extend penal Statutes beyond the Words of them. But before these Cases were mentioned (and indeed had they never been cited) this Rule of Construction had been allowed to the Prisoner; for all the Particulars now insisted on by the Prisoner were before taken Notice of by the Court, as Circumstances necessary to make out the Offence against the Prisoner: Nor has one of those Circumstances passed without Observation; but the Court did with great Justice before declare those Circumstances to be necessary Ingredients to prove this Offence. And as to the other Cases, they

are to the same Purpose, and not cited as Cases adjudged; and therefore I need not take further Notice of them. But certainly no Inferences can be drawn from the Cases cited, or any the least Colour to say, those Cases prove that the Prisoner is not guilty of the Offence he stands charged with, and of which he is convicted.

I am sorry he has given this Occasion to mention again the Fact which has been proved, from whence it appears that the Jury have given an impartial and just Verdict.

It cannot be forgot, that this was consulted and premeditated for three Years and more before it was put in execution; and therefore it was certainly purposed and of Malice fore-thought; also that it was by lying in wait. Certainly this unhappy Gentleman cannot have forgot the Signal he gave: And to what Purpose was that Signal; if none was in waiting to hear it? And that this was with an Intent to disfigure, must be submitted upon the Fact and the Evidence. A Man uses a Weapon fit to maim and to disfigure, he cuts another on the Face and does disfigure him, shall he afterwards be at Liberty to say, it was not his Intent so to do? How dangerous that would be, is obvious to every one; this Act would then be easily eluded, if it should be sufficient, if it should avail an Offender, who has maim'd and disfigur'd another, to say, Prove that I intended it: It would be easy then to be out of the Reach of this Act of Parliament; indeed if that prevailed, none would be within it, it would be an easy Repeal of this Law. 'Tis objected, his Intent was to kill: He that intends the End, certainly intends the Means, especially those Means which he uses; and the Means used were cutting Mr. *Crispe* on the Face, and disfiguring him; and the Weapon is such, that by cutting him on the Face with that Weapon, could less be intended or expected? And if the Intent does not appear from this Fact, sure it never can from any: The Intent of a Man's Mind cannot appear but from the Act which proceeds from his Mind.

It is said, this is the first Indictment on this Statute: I believe there hath not been many; for this is an Offence so barbarous, that I must agree it is such as seldom happens, and that by the general Laws of our Country, there was not a Punishment provided equal to this Offence: For our Laws, (as the Laws of most Nations also do) provide against Offences which most frequently happen: But this is an Attempt so barbarous, that it was scarce imagined any Man could be so base and wicked as to attempt any thing like it, until it happened in the Case of Sir *John Coventry*; and then such an Abhorrence was shewn by the Parliament, that this Law was made to punish it, and to prevent the like for the future: And as this is the like Offence, it ought in Justice to have the like Punishment.

I shall add no more, but pray your Lordship's Judgment.

Mr. *Lee*. My Lord, the Observations made at the Bar being after a Verdict, and therefore out of Time, I shall not trouble your Lordship with a Repetition of the Facts that have been proved, further than the Prisoner has made it necessary for me to mention some Particulars, in order to make the Answers to what he hath insisted on the more clear and plain.

I believe

I believe it has been truly said by the Prisoner, that the present Prosecution is the first Instance of any Proceedings on this Statute; and I hope it will be the last; because it is to be hoped there never will be found any other Person so wicked, as to give Occasion for a Prosecution on this Statute.

I believe likewise, that the true Design of making this Statute was to subject Persons to Death, who intended to maim only, where the maiming was in such manner as is mentioned in the Statute; but I can't think that it does from thence follow, that a Person who intends to murder, and only maims, is not within this Statute; for though it should be taken that there was an Intention to murder, yet from the Fact done, from the manner of doing it, and from the Weapon made use of, it seems apparent that the Prisoner intended to maim; and the Jury have now found that he did so intend.

As to the Cases which the Prisoner has cited, I beg leave to consider each of them, and offer such Answers to them as now occur.

The first Case he has been pleas'd to cite, is thus put:

*A* and *B*, of Malice fore-thought, appoint to meet and fight a Duel, *A* in the Rencounter runs *B* into the Eye, and puts it out: The Prisoner says, such a Case would not be within this Statute.

I agree it would not, because this Case has not the Circumstances which the Statute requires; for in the Case thus put there is no lying in wait, which is a Circumstance required by the Statute.

It is said, that if *A* lies in wait to rob *B*, *B* resists, and in the Scuffle is maim'd in the Manner describ'd by the Statute, that such maiming would not be punishable by this Statute; but I don't observe any Case is cited to prove this Assertion: And I am, with Submission to your Lordship, inclin'd to think, that if there are a lying in wait, with Malice fore-thought, with Intent to rob, and in prosecuting this Intent the Robbers should assault and maim in the Manner described by the Statute, that such maiming would be within this Statute.

It is said, that though the Intent to murder makes the Offence worse than if the Intent had been only to maim, yet such Intent proves it not to be the same Offence which is mentioned in the Statute: And if a Man be indicted of an Offence of an inferior Nature, and upon the Evidence it appears that he is guilty of an Offence of a superior Nature, the Person indicted must be acquitted; and to prove this, a Case is cited, which is said to have been before Mr. Justice *Eyre* at *Dorchester* Assizes. The Case, as put, is this: A Woman is indicted for the Murder of another Woman, on the Evidence it appeared, that the Person murdered was her Mistress, which made the Crime Petty-Treason: This was found specially, and upon Conference with the Judges, they were of Opinion, that the Woman ought to be acquitted upon this Indictment.

Admitting this Case to have been adjudged, I apprehend it does not affect the present Case.

The Law has distinguished Crimes under different Denominations; and as Offences are rank'd under different Species, so the Indictment must be suited to that sort of Crime whereof the Party

is guilty; and therefore proving a Person guilty of a Fact, known in the Law by the Name of Petty-Treason, does not prove him guilty of an Indictment for Murder; Murder being an Offence which the Law has distinguished from Petty-Treason, and to which it has assigned a different Punishment.

But in the present Case, that Offence which is charged in the Indictment, is proved in every Circumstance, and the Facts proved do constitute that Crime which is made Felony without Clergy by the Statute. The Statute requires lying in wait, it requires Malice fore-thought; it requires slitting the Nose, &c. with intent to maim, &c. The Indictment charges these Facts, the Witnesses have proved these Facts to the Satisfaction of a Jury, which have found the Defendant guilty of the Charge as laid.

The Prisoner says farther, that this is a very penal Statute, and that penal Statutes are always taken with the utmost Strictness; and to prove this, cites a Case adjudged on the Statute 39 *Eliz.* by which Statute Clergy is taken away from any Person or Persons, who shall be convicted of taking away Money, &c. in any Dwelling-house, &c. in the Day-time, to the Value of five Shillings: And to prove the same Matter, an Instance is likewise put of the Construction on the Statute, 1 *Eliz.* cap. 12. which takes away Clergy from such Persons as shall be convicted of feloniously stealing Horses, &c. The Case in the Statute 39 *Eliz.* is the Case of *Evans* and *Finch*, *Cro. Car.* 473. in which Case *Finch* had his Clergy, because he did not actually enter the Chamber and take the Money. The Construction on *Ed. VI.* was, that Clergy was not taken away from a Person who feloniously stole one Horse.

But I apprehend neither of these Cases come up to the Case now before your Lordship. As to the Case of *Evans* and *Finch*, which was a Case upon the Statute 39 *Eliz.* By that Statute a Person is ousted of Clergy who takes away Money to the Value of five Shillings in any Dwelling-house, &c. *Finch* did not enter into the House, for he only stood on the Ladder; and therefore he was not within the Words of that Statute, which spoke only of Persons who took away Goods in an House, &c.

As to the Construction upon the Statute 1 *Ed. VI.* it is plain that the felonious stealing one Horse could not be within an Act of Parliament which took away Clergy only from such Persons as feloniously stole Horses. The Reason therefore of these Cases was, that the Facts proved did not bring the Persons accused within the Words of the Statute.

But it is not so in the Case now before your Lordship; for the Prisoner is found guilty of a Fact, which is within the Words of the Statute upon which he is indicted; and every Circumstance required to make him guilty of the Felony mentioned in the Statute has been very fully proved.

My Lord, I am very sensible that the Objections taken at the Bar being after Verdict, did not require these particular Answers; but this being a Case wherein Life is concern'd, I hope the Impropriety will be excus'd.

*L. C. Just.* I do agree with the Prisoner, that this is a penal Law, and not to be extended by Equity: That he that is guilty within this Statute;

tute, must be guilty of all the Circumstances within it; and if any one of the Circumstances prescribed by the Statute be wanting, he is not guilty. And therefore in all those Cases put by you, if any one of the Circumstances prescribed by the Statute be wanting in any one of them, such Case is out of the Statute. But whether all the Circumstances required by the Statute did not concur in your Case, was a Matter of Fact; which the Jury, who are the proper Judges, have tried; and on such Trial they have found them all to concur. You seem to argue upon a Supposition of this Fact to be otherwise than the Jury have found it. The Jury have found you guilty of all the Circumstances within the Statute. There was no Matter of Law in this Case, but Matter of Fact; whether on Purpose, and of Malice fore-thought, and by lying in wait, the Nose of Mr. *Crispe* was not slit, with Intention, in so doing, to maim or disfigure; and whether you were not feloniously present, aiding and abetting. The Jury had the whole Evidence before them; they considered of the whole Matter, of the Preparation and lying in wait to do the Fact, of the Fact itself, of the Means and Instrument made use of to do it, of the Manner of doing it, and of all the other Circumstances and Particulars relating to the Fact: And on the whole, after they had withdrawn, and consider'd amongst themselves for some time, they have found you guilty within the Terms and Circumstances of the Statute; so that tho' all the Cases put by you shou'd be very good Law, yet they do not any wise affect yours, because you are actually found guilty of the Crime itself: Have you therefore any thing to say against the Indictment itself?

Mr. *Coke*. No, my Lord; I hope I have one Glimpse more from the King's most gracious Pardon, that was published in the *Gazette*.

*L. C. Just.* If you offer any Pardon by Act of Parliament, or under the Great Seal, I must take notice of it, and allow it to you; but if you mean only a Promise of a Pardon in the *Gazette*, or other public Advertisement, you must apply for that in another place; this doth not belong to me.

Mr. *Coke*. I hope that I shall have the Benefit of the Pardon that was promised, and that his Majesty will be graciously pleased to grant it me.

*L. C. Just.* If you have a Right to it, you need not doubt but you will have it: His Majesty is so just, that he will make good whatsoever he hath promised; but for this, your Application must be immediately to his Majesty.

Mr. *Coke*. I beg of your Lordship that you will give me Time, that I may not be hurried out of the World presently.

*L. C. Just.* I shall consider of it; and give you a convenient Time.

*Cl. of Arr.* Cryer, make an *O Yes*.

*Cryer*. Our Sovereign Lord the King doth straitly charge and command all manner of Persons to keep Silence, whilst Judgment is giving upon the Prisoners convicted, upon Pain of Imprisonment.

*L. C. Just.* You that are the Prisoners at the Bar, you have been indicted and convicted of very great and heinous Offences; I am very sorry that you have been the Occasion of bringing yourselves to unfortunate Ends, and that there is this melancholy Necessity on me to pronounce the Sentence of Death upon you: But on fair Trials the Jury have found you guilty, and by the Law you have forfeited your Lives.

Mr. *Coke*. My Lord, I am ashamed of myself; I did not expect to appear at this Time in this Place, where I have appear'd in another manner.

*L. C. Just.* I am sure, Mr. *Coke*, you ought seriously to reflect on your past Life: You cannot but own that you have been a great Sinner; you have had Malice in your Heart against this Gentleman above three Years.

Mr. *Coke*. Indeed, my Lord, I know nothing of it.

*L. C. Just.* *Moon* hath sworn, that three Years, or three Years and a half ago, you sent to him, and propos'd to him the knocking Mr. *Crispe* on the Head.

Mr. *Coke*. I do declare it, my Lord, as I shall answer it at the Great Day; I never spoke to *Moon* about any such Thing.

*L. C. Just.* Supposing what *Moon* hath said to be too much, yet the Crimes you own and cannot deny are exceeding heinous. You own that you invited your Brother to sup at your House, on purpose that you might have an Opportunity of murdering him. This is such a Crime as shocks human Nature: The bare mentioning of it is frightful and terrible. The deeper therefore your Crime is, the deeper your Repentance ought to be. You have need to humble yourselves before Almighty God. Besides the Judgment of the Law, there is also his Judgment-Seat, before which you must likewise appear: There all Things are naked and bare, without Colour or Disguise; every Man must there appear, and receive according to the Truth of his Actions; as they were good or bad. How far it may please God to extend his Mercy to you, I know not; he is infinite in Mercy as well as in every other Perfection: And this we are sure, that he never denies it to any who are prepared to receive it. Endeavour therefore to reconcile yourselves to him; improve with Diligence the little Time that may be allotted you: Send for proper Persons who may advise and assist you: For as to the Judgment of the Law which is to be now pronounced upon you all, it is this;

That you, and each of you, go from hence to the Place from whence you came, and from thence to the Place of Execution, where you shall be severally hanged by the Neck till you be severally and respectively dead; and the Lord have Mercy upon your Souls.

Then the Keeper carried away the Prisoners to the Goal to be reserved till their Execution. And on Saturday the 31st of *March*, 1722. they were executed at *Bury St. Edmond's*.



CXCIII. *The Trial of Christopher Layer, Esq; at the King's-Bench for High-Treason, Novemb. 21. 1722. Mich. 9 GEO. I.*

*Die Mercurii 31<sup>o</sup> Die Octobris, 1722.*

**O**N Wednesday the 31<sup>st</sup> of October, Christopher Layer, Esq; was brought to the Bar of the Court of King's-Bench at Westminster, upon a Habeas Corpus directed to the Lieutenant of the Tower of London, in order to be arraigned on an Indictment for High-Treason in compassing and imagining the Death of the King, found by the Grand Jury for the County of Essex before special Commissioners of Oyer and Terminer.

Mr. Serj. Pengelly. My Lord, we pray the Return of the Habeas Corpus may be read.

Mr. Harcourt Clerk of the Crown reads the Return of the Habeas Corpus, by which it appear'd that the Prisoner was committed to the Tower for High-Treason.

Mr. Serj. Pengelly. We pray that the Return may be filed.

Sir John Pratt. L. C. Just. Let it be filed.

Mr. Serj. Pengelly. My Lord, there is an Indictment of High Treason found in the County of Essex against Mr. Christopher Layer, which hath been removed into this Court by Certiorari; the Certiorari, and Return thereof hath been filed, and the Prisoner is now brought into Court in order to be arraigned.

L. C. Just. Read the Indictment.

Cl. of the Cr. Christopher Layer, hold up your Hand.

You stand indicted by the Name of Christopher Layer, late of the Parish of St. Andrew's Holbourn, in the County of Middlesex, Esq; For that you being a Subject of our most serene Lord GEORGE, now King of Great Britain, France and Ireland, Defender of the Faith, &c. not having the Fear of God in your Heart, nor weighing the Duty of your Allegiance; but being moved and seduced by the Instigation of the Devil, as a false Traytor against our said Lord the King; your Supreme, True, Lawful, and Undoubted Lord; withdrawing that cordial Love, and true and due Obedience, Fidelity, and Allegiance, which every Subject of our said Lord the King towards Him should and of Right ought to bear; and designing, and with all your Might traiterously intending the Government of this Kingdom, under our said Lord the King duly and happily establish'd, to change, alter, and subvert; and our said Lord the King of and from the Title, Honour, Royal Estate, Empire and Government of this Kingdom to depose and deprive; and our said Lord the King to Death and final Destruction to bring and

draw; and the Person during the Life of the late King James the Second, pretended to be Prince of Wales; and after the Decease of the said late King, pretending to be, and taking upon himself the Stile and Title of King of England, by the Name of James the Third, to the Crown, Royal State and Dignity of King of this Kingdom, and to the Empire, Government, and Possession of the same, to exalt and bring, the twenty-fifth Day of August, in the ninth Year of the Reign of our said Sovereign Lord the King that now is; and at divers other Days and Times, as well before as after, at Laytonstone in the said County of Essex, falsely, maliciously, devilishly, and traiterously did compass, imagine, and intend, our said Lord the King, your supreme, true, lawful, and undoubted Lord, of and from the Title, Honour, Royal Estate, Empire and Government of this Kingdom to depose and deprive; and our said Lord the King to Death and final Destruction to put and bring. And that you the said Christopher Layer, to accomplish and bring about your said Treason, and devilish and traiterous Intentions and Purposes, did, with divers other false Traytors to the Jurors unknown, on the said twenty-fifth Day of August, in the said Ninth Year of the Reign of our said Lord the King, and at divers other Days and Times, as well before as after, at Laytonstone aforesaid, in the said County of Essex, by Force and Arms, &c. falsely, maliciously, devilishly, and traiterously meet, propose, consult, conspire, consent and agree, to move, raise, and levy Insurrection, Rebellion, and War, within this Kingdom against our said Lord the King, for the traiterous Purposes aforesaid. And that you the said Christopher Layer, for the more effectual compleating and perfecting the said Treason and traiterous Intentions and Purposes, on the said twenty-fifth Day of August, in the Ninth Year aforesaid, at Laytonstone aforesaid, in the said County of Essex, by Force and Arms, &c. maliciously and traiterously did publish a certain malicious, seditious, and traiterous Writing, containing and purporting (amongst other Things) an Exhortation, Incitement, and Promises of Rewards, the faithful Subjects of our said Lord the King, to persuade move and excite, to take up Arms, and to levy and make War within this Realm, against our said Sovereign Lord the King, for the traiterous Purposes and Intentions aforesaid. And that you the said Christopher Layer, for the more effectual compleating and perfecting the said Treason and traiterous Intentions and Purposes, with other false Traytors, to the Jurors unknown, on the said twenty-fifth Day of August, in the ninth Year aforesaid, and at divers other Days



*Days and Times, as well before as after, at Laytonstone aforesaid, in the said County of Essex, by Force and Arms, &c. Falsely, Maliciously, Devilishly, and Traiterously did meet, propose, consult, conspire, consent, and agree, by an armed Force, and by Soldiers to be raised and got ready for the traitorous Purposes aforesaid; the said Person, during the Life of the said late King James the Second, pretended to be Prince of Wales, and since the Decease of the said late King, pretending to be, and taking upon himself the Stile and Title of King of England, by the Name of James the Third, to the Crown, Royal Estate, and Dignity of King of this Kingdom, and to the Empire, Government, and Possession of the same to exalt and bring; and that you the said Christopher Layer, for the more effectual compleating and perfecting the said Treason, and traitorous Intentions and Purposes aforesaid, on the said twenty fifth Day of August, in the ninth Year aforesaid, and at diverse other Days and Times, as well before as after, at Laytonstone aforesaid, in the said County of Essex, by Force and Arms, &c. Maliciously and Traiterously did get ready, raise, and retain several Men, to the Jurors unknown, to take up Arms, and to levy and wage War within this Kingdom, against our said Sovereign Lord the King, for the traitorous Purposes aforesaid; and that you the said Christopher Layer, for the more effectual compleating and perfecting the said Treason, and traitorous Intentions and Purposes aforesaid, on the said twenty fifth Day of August, in the ninth Year aforesaid, and at divers other Days and Times, as well before as after, at Laytonstone aforesaid, in the said County of Essex, with other false Traitors, to the Jurors unknown, by Force and Arms, &c. Maliciously, Devilishly, and Traiterously did meet, propose, consult, conspire, consent and agree, the sacred Person of our now Sovereign Lord King GEORGE, for the traitorous Purposes aforesaid, most wickedly to take, seize, imprison, and detain in Custody, against the Duty of your Allegiance, against the Peace of our said Sovereign Lord the King, his Crown and Dignity, and against the Form of the Statute in that Case made and provided.*

*Prisoner.* If your Lordship will please to indulge me;

My Lord, I am brought here in Chains, in Fetters and in Chains. My Lord, I have been used more like an *Algerine* Captive than a Free-born *Englishman*: I have been dragged through the Streets by the Hands of Goalers, and have been made a Shew and a Spectacle of.

I am now in a Court of Justice before your Lordship, and I hope the Time will come when I shall have a candid and fair Trial, and not be made a Sacrifice to the Rage and Fury of any Party, or the Necessity of the Times. My Lord, I had not said this, but I have been insulted since I came into the Hall: A Gentleman came and told me, Either you must die, or the Plot must die. My Lord, this is Usage insufferable in a Christian Nation; and I think I can lay my Hand upon my Heart and say, I have done nothing against my Conscience.

*Mr. Serj. Pengelly.* If Mr. Layer hath any Objections to the Indictment he may make them, but should not go on in this Manner.

*Prisoner.* My Lord, I hope I shall have these

Chains taken off, that I may have the free Use of that Reason and Understanding which God hath given me. They have given me the Stranguary to that Degree that is very painful, and I am told your Lordship is afflicted with that Dis-temper.

I hope these Chains shall be taken off in the first Place, and then I hope I shall have a fair and a tender Trial.

*L. C. Just.* There have been a great many Things said by which we cannot examine into. You have given a general Charge of some People using you ill, your Expressions are not just and right; you charge no particular Person; we can take no Notice of them.

As to the Chains you complain of, it must be left to those to whom the Custody of you is committed by Law, to take Care that you may not make your Escape; when you come to your Trial then your Chains may be taken off. Consider the Matter of this Day; if you have any Objections to the Indictment the Court will hear them; if not, you must plead.

*Mr. Att. Gen.* I am sure nothing is intended but that he *Sir Robert Raymond* should have a fair Trial; but to complain here of hard Usage, of Chains and Imprisonment, carries with it a Reflection of Cruelty, and we know what Effect these Things may have Abroad.

My Lord, I don't believe there is any Occasion for saying any thing more in answer to this, than that the Prisoner hath been kept, as all Persons in his Circumstances are, when they have been attempting to make an Escape; there was an Attempt of that Nature made by him, and I believe no Body will say, but on such an Occasion, there is Reason to take particular Care that he may not escape. My Lord, as to any other Matters of Hardship, I hope what he says is not so; I very believe it is not, but that he hath as much Freedom and Liberty as is proper and usual. And as to what is said in respect to the Man that insulted him in the Hall, I know nothing of it, nor heard of it before; but can't but observe that it is any easy Matter for People to contrive such a Thing in concert together, with some particular Views; and I don't know but if the Fact was so, it might be some body set on by himself that did it.

*L. C. Just.* Alas! If there hath been an Attempt to escape, there can be no Pretension to complain of Hardship: He that hath attempted an Escape once, if true, ought to be secured in such Manner as to prevent his escaping a second time. The Gentleman Goaler, what doth he say?

*Gentleman Goaler.* My Lord, He never attempted to escape since he was in my Custody.

*Mr. Att. Gen.* No, it was before.

*Mr. Soll. Gen.* My Lord, This Complaint is made for no other *Sir Philip York* Purpose but to captivate the Minds of the By-standers, without any just Grounds in the World; for if the whole of the Complaint made and aggravated in this solemn Manner be considered, it amounts only to this, That a Prisoner who stands charged with so great an Offence as High-Treason (who I admit, notwithstanding the Weight of that Charge, ought to have all the Justice and all the Opportunity of defending himself which the Law allows) I say

it amounts to no more than this, that a Prisoner in these Circumstances is brought up hither under a Guard, and in Fetters, as Persons in that Condition usually are. It is very well known that when this Gentleman was in the Custody of a Messenger, he not only made an Attempt to escape, but actually escaped, got out of a Window two Pair of Stairs high, and from thence over the Water into *Southwark*; and since that is so, can there be any Colour to say that what was done afterwards was unwarrantable? I cannot help saying on this Occasion, that it does not become the Candor a Person in the Prisoner's Circumstances ought to shew, to aggravate and make such a Misrepresentation of the Usage he has received. As to what has happened in the Hall we know nothing of it, nor can possibly tell how true it is. If any such thing was said, it is not impossible to have been by some body that was set there on Purpose by the Friends of this Gentleman. I say thus much, my Lord, not because I think it material to the Business of this Day, but because I would not have it gone away with that there has been any Hardship put upon the Prisoner contrary to Law. No, his Majesty, who makes the Laws of the Land the Rule and Measure of all his Actions, though he will have Justice done to himself and his Government against any Person that shall conspire to overthrow it, yet he will suffer no Hardships to be done even to such Persons, contrary to Law; and nothing has been done in this Case but what was legal and absolutely necessary.

Mr. *Hungerford*. My Lord, I beg to be indulged a few Words; That he is in Chains now is demonstrable; and he hath told me, when in the *Tower* with him, that they are so grievous to him that he cannot sleep but in one Posture, viz. upon his Back, and that he hath not attempted to escape out of the *Tower* is given in Evidence by the Gentleman Goaler, who hath, and will, I verily believe, execute his Authority with all Humanity, for he now helps to hold up his Chains, otherwise the Prisoner could not stand. My Lord, it is said it is nothing but what is usual in Cases of this Nature: My Lord, I believe I might challenge them to give an Instance where any Prisoner was shackled with Irons in the *Tower* before Mr. *Layr*; his Majesty's Prisoners of the *Tower* are such Strangers to this Usage, that they had not the very Materials there, they were sent for from *Newgate*, and I hope they will be carried back again thither. Your Lordship hath hinted it as an Indulgence intended to him when he comes to his Trial, that his Irons shall be taken off: But I humbly insist upon it that by Law he ought not to be called upon, even to plead, till his Fetters are off: My Lord *Coke* \* is clearly of that Opinion in his Pleas of the Crown; and it is admitted on all Hands, that when he comes to be tried his Shackles must be off, and upon a Debate it was so determined † *Trial* 154. in *Cranburne's* † Case. The only Reason assigned for putting off Irons at all upon a Prisoner is to keep him in safe Custody (for the Laws of *England* allow of no

Tortures) and the Reason why they are taken off in the Course of Proceeding against him in a Court of Justice, it seems to be that his Mind should not be disturbed by any Uneasiness his Body or Limbs should be under; and as to the Distinction that his Chains should be on when he Pleads, because but for a Moment, or a short Time, and off when he is Tried, because that will be of longer Duration; it is possible that what we have now to say may be as long as some Trials. I should (with Submission) think that something of the Dignity of the Court might be considered in this Matter, for a Court of Justice, the highest in the Kingdom for criminal Matters, where the King himself is supposed to be personally present, to have a Man plead for his Life before them in Chains, seems to be very unsuitable. He is now before the same awful and just Tribunal which he will be before when he is tried, and why not therefore without Chains as well now as then; and as to the safe Custody intended by the Irons, is the Man like to run away here? Is he not here, too well guarded to escape?

Mr. *Ketelby*, If your Lordship please to favour me a few Words. My Lord, What hath been his Usage in bringing him up hither I cannot tell; what the Usage of the *Tower* is with respect to the putting Chains upon Prisoners, I am ignorant of; but this I must beg Leave to say, that he is entitled to have his Chains off before he pleads\* in point of Law: The Authorities for it are my Lord *Coke* in his third *Instit.* Fol. 34. who says, that *when Prisoners come in Judgment to answer, they shall be out of Irons, and all manner of Bonds, that their Pain may not take away their Reason, nor constrain them to answer, but at their Free-Will*\*; and in Fol. 35. he cites \* *Brit. c. 5. fol. 14.* the Words out of the *Mirroure*, Chap. V. Sect. 1. *It is an Abuse that Prisoners be charged with Irons, or put to any Pain before they be Attainted.* At the Trial of *Cranburne*, when he was brought up here before my Lord Chief Justice *Holt*, he insisted that his Chains should be taken off before he pleaded, and it was ordered. This was likewise mentioned in the Trials of *Dorrel*, *Gorden*, and *Kerr*; when they came up in their Irons to plead, it was moved at first that those Irons ought to be taken off. The Court declared, that *if the Prisoners insisted on it, it ought to be done*: But they did not insist on it, they rather chose to wave that Privilege than undergo the Trouble of having them knock'd off in Court. There is a Resolution in this Case. In the 10<sup>th</sup> Fol. of *Kelyng*, it is expressly declared on a Consultation of all the Judges in *England*, *That a Prisoner ought to have his Irons taken off before he pleads.*

L. C. J. The Case of *Cranburne*, you will find that Authority is when the Party was called upon to plead, and was tried at the same Time.

No doubt when he comes upon his Trial, the Authority is that he is not to be *in Vinculis* during his Trial, but should be so far free, that he should have the Use of his Reason, and all Ad-

\* *Cum autem capti in judicio produci debeant, non producantur armati, sed ut judicium recepturi, nec ligati, ne videantur respondere coacti*, Fleet. Lib. 1. cap. 1.

The Prisoner at the time of his *Arraignment* ought not to be in *Irons*, *Hales*, P. C. p. 212.

Tit. *Arraignment*. See H. P. C. in folio, second part. cap. 28.

See *Hawkins's Pleas of the Crown*. Part 2. p. 308.

vantages to clear his Innocence. Here he is only called upon to plead by Advice of his Counsel; he is not to be tried now, when he comes to be tried, if he makes that Complaint, the Court will take Care he shall be in a Condition proper to make his Defence; but when he is only called upon to plead, and his Counsel by him to advise him what to plead, why are his Chains to be taken off this Minute, and to be put on again the next? It hath been said (I cannot understand the Meaning of it) he is too well guarded, I don't think a Man charged with High-Treason of this Nature, can be said justly to be too well guarded, especially if it be true what hath been suggested, that he hath endeavour'd to make his Escape; that will justify more than what the Law allows in other Cases.

Mr. *Hungerford*. My Lord, I beg leave to explain myself, what I mean by saying too well guarded, I mean sufficiently guarded.

L. C. *Just*. Have you any thing more to offer? This is nothing but to captivate the People, and to make Impressions upon them that are not just, or else what signifies his Chains being taken off this Minute, and afterwards put on again the next? This is nothing but to bring the People to have an unjust Sense of the Crime with which he is charged.

Mr. *Hungerford*. My Lord, we might humbly apprehend and hope that the better to prepare himself for his Trial, he might continue without his Chains 'till after that Time.

L. C. *Just*. I am of another Opinion, and if we should order his Chains to be taken off, and he escape, I don't know but we are guilty of his Escape. As your Client hath said, he shall have a fair and a just Trial; but to make Objections in Matters of this Nature, is to cast a Reflection on the Court, for not doing that which is not in their Power to do.

Mr. *Hungerford*. I am, my Lord, of Counsel with the Prisoner, I have been so appointed by your Lordship, and I assure your Lordship that I, and I dare answer for the other Gentleman that is concerned in the same Service with me, shall make use of that Power and Privilege you are pleased to give us, as we ought.

My Lord, I have read over the Record and the Indictment, we have a Copy of both, according to the Direction of the Act of Parliament: I know we have at present a Right to object to four sorts of Things, *viz.* miswriting, misspelling, false or improper *Latin*: We are confined to make whatever Objections occur to us on these Heads at this Time, and have not the Liberty to make it afterwards; but there are likewise some Objections of another Nature, which we may have Liberty to make at another Time.

I have here in my Hand the whole Record delivered to the Prisoner, in which, not only the Indictment is set forth, but the Commission of *Oyer and Terminer*. After the Commission hath enumerated the Names of the Commissioners, it goes on, and says, what are the Offences that they are authorized to enquire of, as High-Treason, Misprisions of Treason, and other Offences of a lesser Degree; then it goes on and says what the Persons shall be, concerning whom this Enquiry shall be made, *Et per quos vel per quem, cui vel quibus, quando, qualiter, & quomodo, & de aliis Articulis & Circumstantiis, premissa &*

*eorum quodlibet seu eorum aliquod vel aliqua, qualitercunq; concernen', plenius veritat'*. My Lord, I have look'd into this Form, and considered the Words with all the Accuracy I can, and have endeavour'd to render them into *English*, but cannot; I must say I look upon those two Words *plenius veritat'*, as placed in this Record, to be Nonsense, and not capable of being rendered into *English*, for they import no meaning at all. It is a Blemish in the Commission itself, and if so, the Enquiry, taken by Vertue of that Commission must fall to nothing, and consequently this Indictment must be naught. I have been so exact I have looked into the Forms of these Indictments, taken by Vertue of Commissions of *Oyer and Terminer*. My Lord Chief Justice *Coke* hath, for the sake of Posterity, I suppose, given us the Form of the Commission of *Oyer and Terminer* in his Time; in that Form of his these Words are entirely left out; they seem to me to be Words of no Signification, therefore we hope there shall be no further Proceedings till this is set right, and that the Indictment shall be quash'd.

Mr. *Ketelbey*. My Lord, there are other Objections, whether is it your Lordship's Pleasure that we should go on this first, or that we should mention the others, and so go upon them all together?

L. C. *Just*. Make all your Objections together.

Mr. *Hungerford*. Then, my Lord, in the Close of this Commission it is said the Jury were charged to enquire, but doth not say for what; but that Objection may be made another Time, and therefore I will not trouble your Lordship with it now. My Lord, the first Thing that occurs to me in the Indictment itself, and which certainly, if we prevail in, the whole Proceedings are wrong; this Gentleman's Name is not writ nor spelt right, *Jurator pro Duo Rege, &c. super Sacramentum, &c. quod Christophorus Layer, Christophorus* is there writ with an E, whereas it should be *Christophorus* with an O; and if the Dictionaries and Lexicons are any Authority we are right.

These are the Objections which have occurred to me, the Gentleman joined with me in this Service, hath some other Remarks to make.

Mr. *Ketelbey*. My Lord, As it is your Lordship's Pleasure to appoint us to be Counsel for this Gentleman, I shall not make any Apology for our appearing on his Behalf, lest I receive the same Reproof from the Court, which a Gentleman in my Station once received upon a like Occasion.

My Lord, we are at this Time proper to lay these four Points under your Lordship's Consideration, which if we had staid till after Plea pleaded by the Prisoner, would have been too late; that Matter hath been often settled and determined by your Lordship, and I shall say no more to that, I believe they don't object to it; now therefore is the only Time to make these Objections.

My Lord, The first that hath been mentioned by Mr. *Hungerford* is in the Caption of the Indictment as to these Words *plenius Veritatem*; in our Copy, it is *plenius Veritat'* with a Dash, that it may be taken in any Case, but I submit it to your Lordship whether it can be made Sense, or is proper *Latin* in any of the Cases either of the singular or plural Number, that there can be made

made any Grammar of it, or that there is any regular or proceeding *Verb* that can govern it in any Case whatsoever; they might have put in any Words entirely inconsistent with respect to the Part preceding or subsequent; leave out these Words and the other Part of the Sentence is plain and intelligible, but, put in the Words and it is otherwise.

And especially since we have the Authority of my Lord *Coke* where these Words are not in; how they came to be put in, or of what Use they are, your Lordship will observe on reading the Caption of the Indictment, *Ad Inquirend', &c. plenius Veritat'*.

Taking Exceptions to the Caption of the Indictment hath formerly been objected to, but I believe that Right cannot be disputed at this Time.

As to the second Exception, that in relation to *Cristopherus*, we submit it to your Lordship if that be not expressly within the Defects mentioned in the Act of Parliament Miswriting, Misspelling, false and improper *Latin*; nay, whether it is not subject to censure under each of these four Heads.

My Lord, it was impossible to bring all my Authorities, upon this Point, along with me; but I have here in Court several of the best Dictionaries and Lexicons which shew the true Word to be *Christophorus*; and I believe the Gentlemen of the other Side can't produce one Instance in any authentic Book either *Greek* or *Latin*, but it is always spelt with an O and not with an E, it is *Christophorus* from *πρωτα*, the *Præteritum Medium* of the *Greek Verb* *φρω*; and the Rules of Etymology and Formation of *Greek Verbals* evince that it must be so and cannot be otherwise; and by all the *Latin Dictionaries*, the *Latin Word* for *Christopher* is *Christophorus*.

*L. C. Just.* How do we know what his Name is? You must plead it in Abatement; we don't know his Name; he might be christened *Christophorus* for ought we know.

*Mr. Ketelbey.* My Lord, for false Spelling—

*L. C. Just.* How doth that appear to us? You are wrong in making your Objection at this Time, we can't take notice what his Name is; in the Record of the Indictment he is called *Christophorus*. Can we enquire what his true Name is, whether in *English* it is *Christopher* or *Christophorus*? We can't tell what his Name is, perchance his Name may be *Christophorus*, and the Name by which he might be christen'd; I desire I may not be understood as if I would prevent you from offering any thing that is material for your Client, but if I can satisfy you that you are improper in Form, it may save the Time of the Court; but if you can offer any thing material, we are ready to hear it.

*Mr. Ketelbey.* My Lord, I hope your Lordship will pardon me, here is the Life of a Man concern'd, and as I would not willingly offer any thing to your Lordship that in the like Cases hath been over-ruled, so neither would I omit any thing that may be material for the Prisoner, whose Defence the Court has intrusted us with; therefore I will go on to the other Objections that we think to be improper *Latin*; *compassavit, imaginatus fuit, & intendebat*. These are the Words, I don't know whether this *Latin* will go down in *Westminster-Hall*, but I am satisfied it would not in *Westminster-School*.

V O L. VI.

Here is the *Et Intendebat, Et* a Conjunction Copulative between Verbs in several Tenses; here is *Compassavit* the Preterperfect Tense, *Imaginatus fuit* the Preterperfect Tense, and *Intendebat* the Preterimperfect Tense: Why should not the last Verb have been put into the Preterimperfect Tense, according to the Rules of Classical *Latin*, as well as the two former? Therefore we submit it how far it will go as to viciating the Indictment in Point of false *Latin*.

My Lord, there is one Word more, (*Seisend'*) the Overt-Act, as laid in the Indictment, is, that the Prisoner *Conspiravit ad sacram Personam Domini Regis capiend', seisend', & imprisonand'*; by the Words that are coupled with it, I suppose *Seisend'* is intended to mean, the taking or laying violent Hands upon his Majesty's Person; but sure there was never such a Word in any Indictment before, nor to be found in any Author whatsoever; 'tis neither Classical *Latin*, Law *Latin*, nor to be met with among *Littleton's* Barbarisms, never naturalized nor inoculated into antient or modern Use; 'tis a mere fictitious Word Coin'd for this very Purpose without any Precedent, any one Instance to warrant it.

My Lord *Coke*, in his *1st Instit. Fol. 17.* says, That the Word *Seisitus* cometh of the *French* Word *Seisun*, and that in the Common Law 'tis properly applied to Freehold, in Contradistinction to *Possessionatus*, which relates to Chattels: For *Seisitus* and *Possessionatus* are mentioned as Terms of Art, Technical Words in the Law, that by long Use have acquired to themselves one peculiar and determined Signification; for that Reason I don't object against the Word *Compassavit* in this Indictment, it having been always used in Indictments of High-Treason to express compassing the Death of the King, ever since the Statute of *Edward the Third*; so *Murdrare, Felonia*, and several others, are known Terms of Art in the Law. But, where did they meet with the Word *Seisend'*? And if they would fancy it to be a Gerund of some unknown Active Verb, how came they to give it this Sense, to make it signify the same as *Capiendum*?

My Lord, I must beg leave to say, that I apprehend the very Gift of this Indictment, (at least so much of it as relates to this Overt-Act) entirely depends upon this Word *Seisend'*; and if it does appear to your Lordship to be insignificant, barbarous, false or improper *Latin*, I hope we are proper under the Authority of the late Act of Parliament, humbly to insist upon this Objection, and that it is sufficient to overthrow the whole Indictment.

My Lord *Coke*, in *Calvin's Case*, says, that Indictments for High-Treason ought to be drawn with the greatest Accuracy and Nicety; but if *Mr. Attorney* will please to shew me, that this Word was ever once used to this Purpose, I will wave my Objection, and admit it to be as elegant a Word as any in the whole Indictment.

*L. C. Just.* I think before the King's Counsel make any Answer to that, we had best have that Part of the Indictment read, that we may the better judge of it.

*Cl. of the Cr.* reads, *Quod tu Christopherus Layer, &c. ad Capiend' Seisend' & Imprisonand', &c.*

*L. C. Just. Ad Capiend' & Imprisonand'.* Won't these Words do, suppose the other Word *ad Seisend'* insignificant?

H h

Mr.

Mr. Serj. Pengelly. My Lord these Objections have been made with so much Ceremony, and utter'd in with such Pomp, as if something else was meant, than the quashing this Indictment.

We apprehend some of them are improper, and others which may be proper at this Time, are of no Force.

The Objections to the Commission, we apprehend are improper; it is not in the Power of the Court to quash the Commission, and therefore to make mention of Mis-spelling, and of false and improper *Latin* therein, signifies nothing. As to the Indictment itself, the Court hath a Power, and if they think proper, if there be sufficient Cause may quash it; but the Commission issues under the Great Seal, and that Part of it returned here, is not under the Power of this Court to destroy; but upon reading it, we think this Objection will quite vanish; these Words are used in all Commissions of the like Nature, and are inserted in the very Form of the Commission, and the Caption of the Indictment published in the Treatise, allowed by all the Judges of *England*, call'd, *A Collection of Statutes relating to High-Treason, compos'd for the Assistance of the Justices in Scotland*; and because of the supposed Difficulty of understanding these Words, I will, for the Sake of the Gentlemen of the other Side, read them in the Order they are to be construed, thus, *Ad Inquirend' plenius Veritatem per sacrum probor' & legal' Hom', &c. de quibuscunq; Proditionibus Misprissionib', &c. per quoscunq; & qualitercunq; Hic' Fact', &c. ac de aliis Articulis, &c. & ad eisdem Prodition' & al' Premiss' audiend' & terminand'*; here they are to enquire more fully the Truth, of and concerning all Treasons, Misprissions of Treason by any Person whomsoever committed, &c. And if the Words (*plenius Veritat'*) had immediately followed the Word (*Inquirend'*) every Body at first reading must be satisfied that no Objection could be made thereto; and the Objection now is only made on Account of the placing these Words at the End of the Sentence. But it makes no Difference in the Construction or Sense; how otherwise can it be construed or understood? But to enquire more fully the Truth of those Offences, there enumerated, and what Persons are guilty, &c. And therefore I take it, that the Form of the Commission is proper, and will be justified, not only by the Sense of it, but by the usual and common Course of Proceedings.—As to the next Objection, we apprehend that hath been already over-ruled; the Word (*Christopherus*) with an *E*, and not with an *O*: And if there be any Difference in the Name, that it must be pleaded in Abatement, because if they would take Advantage of it, they must plead that his Name is otherwise than is expressed in the Indictment. This Man's Name *Christopherus* may be with an *E* as well as an *O* for ought appears: But we apprehend, that the Name *Christopher* is seldom writ in *Latin* with an *O*, but usually with an *E*; if they think there is any thing material in the Objection, let them plead it in Abatement, and we are ready to answer them.

My Lord, as to the next Objection, that the three Verbs which charge the High-Treason, viz. *Compassavit, Imaginatus fuit, & Intendebat*, that they are not in the same Tenses; we submit that in the strictest *Latin*, there is no Necessity the last Verb should be of the same Tense with

those that go before the Copulative (*Et*): Sure, tho' *Compassavit* and *Imaginatus fuit* be in the Preterperfect Tense, yet *Intendebat* may be well added in the Preterimperfect Tense, and that will make no Difference, they being all three alledged and found in the Time past, before the Indictment exhibited.

My Lord, the next Objection which they seem to rely upon, is at the Conclusion of the Indictment, and that is to the Word (*Seisend', &c.*) They say, the Precedents have been look'd into, and there is no such Word to be found in any Indictment of High-Treason; I beg leave to say in Answer, that since the Assassination-Plot against King *William*, there hath been no such villanous Attempt of this Nature; therefore no Wonder if it cannot be found in other Indictments where there has been no Occasion for the Word. This is an Overt-Act of conspiring and agreeing to take, seize, and imprison, the very Person of the King; and it must be laid according to the Fact itself; but if this be not a proper Word, tho' I think the Word is proper and significant, yet because this is not made use of in alledging the Treason itself, but the Overt-Act or Evidence of the Treason, it will not vitiate that Part of the Indictment: For if any one of these Words alledged is proved upon the Trial, the Prisoner ought to be found Guilty, whether he compassed to take the Person of the King, or to seize his Majesty, or to imprison and detain him; any one of these Attempts is sufficient, if proved, and the Prisoner ought to be convicted. There was an Objection of this Nature taken upon one of the Trials for High-Treason, before my Lord Chief Justice *Holt*, but he was pleased to say, that in alledging the Overt-Acts, where several Overt-Acts are alledged, or several Words are used to express the same Overt-Act, if they were mistaken in one of the Words, yet if there were other Words sufficient in the Indictment to express the Overt-Act; or although one entire Overt-Act was insufficiently alledged, yet if there was another Overt-Act well laid, the Court would not quash the Indictment, because this would be to deprive the Crown of the Right of giving Evidence to prove any other Part of the same Overt-Act, or any other Overt-Act alledged in the Indictment, so that we hope this is not a proper Objection, because the Court cannot quash the whole Indictment if any other Overt-Act is sufficiently expressed, but the Indictment must stand.—But the Word is proper, because the Words *Seisire ad Seisend'* are Terms known in the Law, and it is frequently used in Actions of Trespass, *Quod cepit, seisivit, & abduxit, or asportavit*. My Lord, we think the Word *ad seisend'* is a proper Expression in this Case, to signify the Attempt or Design to seize and apprehend the Person of his Majesty; and we hope there is nothing in these Objections.

Mr. *Att. Gen.* My Lord, we are not against the Gentlemen of the other Side's insisting upon every thing that may be for their Client's Service. But sure these Objections have nothing in them; there is no Colour of Reason to support them. My Lord, as to the Exception taken to the Commission, let us consider, if there was any Weight in it, how it can possibly be taken at this Time.—By Vertue of the Act of Parliament passed in the 7th Year of the Reign of his late Majesty King *William*, it is provided,

That

That no Indictment for any of the Offences aforementioned in that Act, which are Treasons, &c. nor any Process or Return thereupon, shall be quashed on the Motion of the Prisoner or his Counsel for Mis-writing, Mis-spelling, or false or improper *Latin* (under which last Words, the Counsel for the Prisoner would entitle themselves to take this Objection) unless such Exception shall be taken and made in the respective Court, where such Trial shall be, by the Prisoner or his Counsel assign'd, before any Evidence given in open Court upon such Indictment. — But the Commission is a Thing distinct, and neither Indictment, Process, or Return thereupon. And by Consequence no Objection can be made to the Commission at this Time by Vertue of that Act: But however, because they may not trouble us with these Objections at another Time, we beg leave to answer them now.

My Lord, these Words (*plenius Veritatem*) are the very Point of the Enquiry of the Commissioners of Oyer and Terminer, for they are to enquire, by the Oaths of lawful Men of the Country, fully of the Truth of all Treasons, Misprisions of Treasons, &c. committed in that County, and that is the Tenour of the Commission. In the Book printed by the Approbation of all the Judges of *England*, soon after the Union of the two Kingdoms, all the Rules and Methods of Trial in Cases of High-Treason are laid down, there is the Commission of Oyer and Terminer printed at large; and it is exactly in the same Words with this; and your Lordship may please to observe, that immediately after those Words *plenius Veritatem* there is a Comma, and none before; the whole Sentence before is entire, and therefore in Construction these Words, *plenius Veritatem*, refer to the Words *ad inquirendum*, at the Beginning of the Sentence; and the Sense is plain, that the Commissioners are to enquire by the Oaths of good and lawful Men of the Country, and by other Ways and Means, &c. *plenius Veritatem, de quibuscunque Proditionibus, Misprisionibus, &c.* and then the Commission goes on, and there comes after the Comma, *& ad eandem Proditiones & alia Præmissa hac vice audiend' & terminand' secund' leges, &c.* In our legal Proceedings in *Latin*, we are not so nice as to confine ourselves to the *Latin* of the Classics; but this is very proper *Latin*, and the disjoining of the Words *plenius veritatem*, from the Words *ad inquirendum*, by which they are govern'd by the Interposition of so many Words, is no Objection; for nothing is more common in the best Authors, than placing the most material Words at the Close of a very long Sentence, which in Point of Construction must refer to others at the Beginning. And therefore I hope we shall hear no more of this Objection.

As to the *Christopherus* being with an E instead of an O, that is not a proper Objection at this Time. No Man will pretend to say, he may not be christen'd by that Name, as *Henry* is the usual Name, *Harry* is the common Nick-name for *Henry*, yet a Person may be christen'd *Harry*, and so have many Persons been.

But, my Lord, we say this is a Word used in all the Law Proceedings for *Christopher*, and spelt in this very manner with an E.

As to the other Objection; as to the Alteration of the Tense in the Words *compassavit, imaginatus fuit & intendebat*: The Objection is made as if

we were tied down to those exact Forms of Grammar; if the Sense is plain, if the Facts are explained by proper *Latin* Words, it is enough for us, whether they are carried on sometimes in one Tense, and sometimes in another, provided they sufficiently charge the Fact to be done.

The last Objection is the Word *seisend'*, that it is not a Word known in the Law; if that would hold, it would not quash the Indictment, because there are several other Words to the same Effect, which sufficiently express this villainous Overt-Act, without this Word *seisend'*; for it is laid, that the Prisoner did propose, consult, and agree, *ad sacram Personam dicti Domini Georgii nunc Regis, &c. capiend', seisend', impri-sonand', & in Custod' detinend'*. But we insist, that this is a very proper Word. In the Court of Exchequer the Words used in Cases of Seizures is *seisvit*. Writs issue commanding the Sheriff *seisire* such Lands, &c. into the King's Hands, and the Sheriff returns *seisri feci*; so that if this Word was look'd upon as an unknown and unintelligible Word, what must become of many Judgments and Proceedings in that Court? It is a Law Word that is here applied to the Person of our Sovereign, and as it is in the Proceedings before-mentioned applied to seizing Lands, &c. Why may it not be applied to the Seizing of a Person? And then if *seisire* be proper, the Gerund from that must be *seisendum*. And therefore we apprehend, my Lord, that this is a plain Answer, and that there is no Colour of Reason for this Objection.

Mr. *Sell. Gen.* My Lord, as I apprehend these Exceptions have no real Foundation, nor scarce any Colour in themselves, so I don't know whether it would not be giving too much Credit to them, for so many of the King's Counsel as attend your Lordship on this Occasion, to spend the Time of the Court in giving Answers to them. The true Answers, and all the Answers which can be given, have been already offer'd and very fully enforced; and therefore I shall not trouble your Lordship with any thing further.

Mr. *Hungerford.* My Lord, I beg a few Words by way of Reply. As to the first Objection, we hope it is not answer'd: We object against the Words *plenius veritat'* as Words of no Sense or Meaning, as ranged or placed in this Indictment. Mr. *Attorney* hath endeavoured to make them Sense by transposing them, and inserting *plenius veritat'* ten Lines before what the Indictment hath. We must take the Words as they are in the Indictment: And if they are not Grammar or intelligible there, the Objection still holds. I know not what Liberty the King's Counsel hath to transpose the Words. I know School-Boys sometimes pick up Words without Regard to Grammar, to make what they call Nonsense Verses: But I never knew an Attempt before by transposing of Words, to make Nonsense Grammar, Prose, or Poetry. There is one Thing that hath been mentioned, that the Judges have settled the Forms of Proceedings in Cases of High-Treason by Direction of the House of Lords, and this *plenius veritat'* is got into the Form inserted in that Treatise: That Book, my Lord, notwithstanding the solemn Allowance of it by the Judges, is not, with Submission, a conclusive Authority: It was denied to be so in the Case of *Matthews*; which Case I can the better speak to, because I was of Counsel in it. The

Objection taken in the Case of *Matthews* was to the Pannel of the Jury, for that the Addition and Places of Abode of the Jurymen were not inserted in the Pannel, according to the Directions of that Book, the better to guide the Prisoner in his Challenges. My Lord Chief Justice *King*, who presided at that Trial, assisted by all the then Judges of *England*, (except your Lordship who was absent) over-ruled that Exception; and I think the rest of my Lords the Judges, now present, concurred in that Resolution. Wherefore, if we have no Authority to combat with, but the Authority of that Book, which hath been solemnly denied to be a good Authority, we hope this Objection shall stand.

My Lord, as to the Word *Christophorus*, without doubt the Etymology of the Word is as Mr. *Ketelbey* hath opened; and there is this further to justify that way of Spelling which we contend for, even the two first Syllables of the Word in the Indictment are *Christo*, as the *Greek* with an *O*, and not *Christu*; and in Conformity with the *Greek* Spelling in the two first Syllables of the Word, we hope the next Syllable must be spelt so too: But since it is contended, that the Substance of this Objection must be put into a Plea in Abatement, we shall wait the Direction of the Court as to that Matter. As to the Words *compassavit, imaginatus fuit & intendebat*, there is something in that Objection too, they all relate to a Time past, but they are in different Tenses or Time; there is the Preterperfect and Preterimperfect Tense, and there is the Conjunction Copulative between them, as if both Tenses implied the same Times, which it is certain they do not, and therefore they Charge nought; for a Thing cannot be done lately and formerly, and both at the same Time.

As to the other Words *ad capiend<sup>o</sup>, seiscind<sup>o</sup> & imprisonand<sup>o</sup>*, we are upon the Forms of an Indictment, and must be govern'd by the usual Forms: I believe there is no Instance on Record, where these Words are made use of in any Accusation of this Kind; for which Reasons we humbly hope this Indictment shall be quash'd.

Mr. *Ketelbey*. My Lord, I beg leave to offer a Word or two by way of Reply: Mr. Serjeant *Pengelly* is pleased to say, that Sense may be made of these Words, and that *plenius veritatem* as it is, is good *Latin*, by lifting these Words from the Bottom of the Sentence to the Top, and making them follow *ad inquirendum*. I believe four Parts in five of the Caption interfere between the *inquirendum* and the *plenius veritatem*, a whole Catalogue of Offences, several independent Sentences, different Times, Persons, Places, Things all stationed between, and yet these Words are to be united: I would be glad to know by what Rule of Grammar this can be done.

As to the Word *Christopherus*, I shall not further insist upon that as a proper Objection under this Head, because your Lordship seems to be of an Opinion that we ought to have pleaded it in Abatement.

As to the Word *seiscind<sup>o</sup>*, it hath been said it is a Word well known in the Exchequer, but they don't shew one Instance where-ever it was used: Indeed they mention a Precept to the Sheriff *seisiri facias*, and the Return *seisiri feci*, but what is that to *seiscindum*; the one is justified by Usage, the *seisitus* as *seisiri*; besides *seisiri* is there used in the very same Sense which the Law hath im-

posed upon it; it is to be put into Possession, the Lands are so delivered by the Sheriff into the Hands of the King, that he becomes seized thereof, *ut de feodo & in jure Coronæ*, till an *Amoveas manus* be obtained: But if ever that Word was put into any Indictment to signify to seize and imprison the King, 'tis entirely unknown to me.

Indeed here is one Piece of Doctrine offered, that if it holds good puts an End to all our Objections, and even to the Act of Parliament on which they are founded; but I must own it is entirely new to me: We are told there are other Words in the Indictment, and other Overt-Acts, and if one Act is sufficiently expressed by any one Word, though there be Words that are improper and false *Latin*, yet it shall not vitiate the Indictment; what avails then this Act that empowers us to make Objections to Mis-writing, Mis-spelling, false and improper *Latin*? 'Tis impossible to suppose, that whoever hath the drawing of an Indictment should make Faults and blunder on from first to last: No, in an Indictment for High-Treason the greatest Care is, or ought to be taken in the Drawing of it; and where the Life of a Person, and all that is valuable is at Stake, the Law will not subject any one to such dreadful Penalties and Forfeiture for an Offence expressed only by Words of an unknown or dubious Signification; and therefore, we hope that this goes to the whole, and that the Indictment shall be quash'd, or else it would be nugatory for us to be allowed to take Exceptions to one Part of the Indictment if the other were good.

I believe Mr. *Attorney* won't shew any Instance, (I submit it to his greater Experience) where he ever knew one Overt-Act in an Indictment set aside, and the rest of the Indictment held good: Exceptions have ever since the making this Act been taken and argued by Counsel, and determined; but if this be a sufficient Answer, surely they spent the Time of the Court to very little Purpose, in debating whether there were any Faults in the Indictment, when it was so easy to shew it was not faulty throughout. Mr. Serjeant *Pengelly* has been pleased to mention the Opinion of my Lord Chief Justice *Holt*, upon one of the Trials before him, that although one entire Overt-Act was insufficiently alledged, yet if there was any other well laid, the Court would not quash the Indictment; I wish he had told us in what Trial, or where it is to be found, for I don't remember it in any of the printed Trials: As to what was mentioned, with regard to the Authority of that Book, for the Words *plenius veritatem*, Mr. *Hungerford* rightly observed, that the Authority of that Book was utterly denied at the Trial of *Matthews*; your Lordship was not there, my Lord Chief Justice *King* presided then upon the Bench, that Book particularly directed, that not only the Names of the Jurors should be inserted in the Pannel, but also their Additions, and the Places where they lived; instead of that, the Copy of the Pannel delivered consisted only of a long List of bare Names, no Additions, nor where they lived; whereupon we made our Objection, and insisted on the Authority of that Book. Notwithstanding which, the Objection was then over-ruled, and consequently we hope we shall not be pinn'd down to the Authority of this Book any more in this Case, than the other; for these Reasons we hope your Lordship will be

of Opinion that the King's Counsel have not given a full Answer to our Objections, and that the Indictment shall be quashed.

Mr. *Hungerford*. My Lord, I beg leave to hand up this Precedent of my Lord *Coke's*, where these Words are entirely left out.

*L. C. Just.* What is the use you would make of setting up an extrajudicial Opinion of my Lord *Coke's*, as you call it, against the Opinion of all the Judges? Because it is not in my Lord *Coke's* Form; therefore it is not necessary or right; but at the same time you would have us governed by my Lord *Coke's* Opinion, you would have us reject the Opinion of all the Judges. My Lord *Coke* may be wrong; the Opinion of all the Judges in an extrajudicial Case may be wrong; but it would be very strange to give a greater Weight to the extrajudicial Opinion of my Lord *Coke*, because he hath left the Words out, than to the Opinion of all the Judges that have put the Words in; neither is conclusive, but certainly the Opinion of all the Judges of later Times, must have more Weight, than the extrajudicial Opinion of a single Judge at any former Time.

As to the Matter of this Objection, you say that in the Recital of the Commission of *Oyer and Terminer*, in the Caption of the Indictment, it is said the Commissioners had Authority to inquire *de quibuscuq; Proditionibus, &c. plenius veritatem*; *plenius veritatem* comes in afterwards: We have been told of *Classical* and *Ciceronian Latin*, and if there be any Regard to be had to that, is any thing more common in every Part of *Cicero*, than to put Words last, that in Construction must come first? I don't know any Rule that is laid down when the Words coming last, are in Construction to be taken first, but only this, that the Construction is to be according to the natural Sense and Import of the Words; and if so, then in the Authority of these Commissioners, where it is said they were to inquire *de quibuscuq; Proditionibus, &c. plenius veritatem*, in Construction the last Words must be taken first. You say as they stand it is Nonsense and signifies nothing, and the Words are nugatory; 'tis not material where they stand, they must be taken in that manner of Construction as would make them significant, that is, by taking the last Words, *plenius veritatem*, to go first in Construction; then it is very proper and just, and all will be well.

As to the Matter of the Misnomer that you have given up, and very justly, for you are proper to plead that in Abatement.

The next Objection is, you say here is improper *Latin*, *Compassavit* in the *Preterperfect Tense*, *Imaginatus fuit* in the same *Tense*, and *Intendebat* in the *Preterimperfect Tense*; take these Words by themselves, suppose it had been *Compassavit* only, *Imaginatus fuit* only, or *Intendebat* only, would not either of these Words, whether in the *Preterperfect* or *Preterimperfect Tense*, have been sufficient to have charged Mr. *Layer* with having some Time before compass'd and imagin'd the Death of the King? Every one of these Words charge him with the Intent of Compassing and Imagining, and that relates to a Time that is past, whether *Preterperfect Tense*, or *Preterimperfect*, that is not material: Then as to one of the Overt-Acts, as here be a great many to which no Objection is made, the High-Treason is compassing and imagining the Death of the King; the Overt-Acts are several, either is sufficient to maintain

the Treason of compassing and imagining the Death of the King. One of the Overt-Acts is, that he did design, consult, and agree *ad Captivum, Seisicundum, & Imprisonandum*, the Person of the King. Suppose it had been *ad Captivum, & Imprisonandum*, then you say it had been well enough but the putting in this Word *Seisicundum*, will vitiate the whole, because it is an improper and vicious Word. I don't know that, nor dare not say in a Court of Law that it is an improper and vicious Word: You are told of a Court of Law where the Word is used, and hath the same Signification as in the Indictment; as to seize Lands into the Hands of the King, to seize Lands, or to seize the King's Person, the Word is the same, and if *Seisire* is good, and enough to signify to seize Lands, *Seisire* is enough to signify to seize the King's Person; therefore I think it is a proper Word, but whether it is or not, there is sufficient in the Indictment to maintain the Charge against Mr. *Layer*; for he is charged with a Consultation and Agreement to take the King, with a Consultation and Agreement to imprison and detain the King in Prison: These are sufficient without the Word *Seisicundum*, but the Word *Seisicundum* hath been a Law Word, and used in our Proceedings at Law, never objected to; but if we say it would not signify a Seizing, we must set aside half the Proceedings in the Court of *Exchequer*. These are all the Objections you have made, and in my Apprehension they can be of no Use or Service to your Client; they signify nothing.

Mr. *Just. Powys*. I am of the same Opinion, Not the least Doubt remains with me.

Mr. *Just. Eyre*. I think the Caption of the Indictment is in common Form, and the Exceptions to the Indictment itself are fully answer'd.

Mr. *Just. Portescue Aland*. I am of the same Opinion, and think the Objections to be of no Weight.

*L. C. Just.* The Objections being all overruled: Demand of him what he hath to plead.

*Cl. of the Cr. Christopher Layer*, hold up your Hand. How say you, *Christopher Layer*, are you Guilty of the High-Treason whereof you stand indicted, or Not Guilty?

*Prisoner*, I desire my Plea of Misnomer may be received. And I plead Not Guilty as to the Fact.

*Cl. of the Cr.* Reads the Plea.

*Et Christophorus Layer ad Barram hic duct. in propria persona sua venit, & habito auditu Indictament. predict. dicit quod ipse est persona in Indictament. predict. mentionat. & intens. per nomen Christophori Layer, nuper de paroch. Sti. Andre Holberne in Com. Mid. Ar. & versus quem Indictament. predict. prelat. existit pro alt. Proditione predict. & dicit quod ipse ad Indictament. illud respondere compelli non debet, quia dic. quod ipse diu ante tempus caption. Indictament. predict. necnon ante tempus offensi in Indictament. ill. specificat. & fieri supposit. Baptizatus fuit per nomen Christophori, & per id nomen Christophori semper a tempore Baptization. suo hucusque vocat. nuncupat. & cognit. fuit, & hoc parat. est verificare; unde ex quo ipse non nominatur in Indictament. predict. per nomen Christophori, petit judicium de Indictament. illo, & si ipse ad Indictament. predict. ulterius respondere compelli debeat, &c. & quoad prodition. in Indictament.*



*ment. predict. monition. ipse predict. Christophorus Layer dicit quod ipse in nullo est inde culpabilis, & inde de bono & malo ponit se super Patriam, &c.* \*

J. Hungerford.  
Abel Kettelby.

L. C. Just. Your Plea is received. He hath pleaded in Abatement first, and then pleads over to the Treason. What say you to it?

Mr. Serj. *Penzely*. It can't be expected that we should have a Replication ready to their Plea in Abatement: We were not aware of this; therefore we ought to have time to draw up a Replication.

L. C. Just. What say you to it?

Mr. *Hungerford* and Mr. *Kettelby*. My Lord, we have no Objection to it.

L. C. Just. Well, the Plea is recorded. Consider now the Question on this Plea is, whether he was baptized by the Name of *Christophorus* or *Christopharus*.

Mr. Serj. *Penzely*. My Lord, to morrow and next Day being Holidays (else we should have been ready by to morrow) we therefore pray, that he may be brought up again on *Saturday* by Rule of this Court.

Mr. *Hungerford*. I have some doubt whether it can be by Rule, or by *Habeas Corpus*.

L. C. Just. When once a *Habeas Corpus* hath been granted, and he is brought before us, we can order him to be brought again by Rule. He must be taken back again, and brought up here on *Saturday* next.

Die Sabbati 3<sup>o</sup> die Novembris 1722.

The Prisoner was this Day brought to the King's Bench-Bar by the Lieutenant of the Tower, in Obedience to the Rule of Court made the 31<sup>st</sup> of October.

Mr. Att. Gen. My Lord, I have demurred to the Prisoner's Plea in Abatement, and pray the Demurrer may be read.

Cl. of the Cr. reads the Demurrer.

*Et Robertus Raymond Mil. Attorn. Dom. Regis Generalis qui pro eodem Dom. Rege in hac parte sequitur habito audit. placiti predict. in cassation. Indictament. predict. superius placitat. pro eodem Dom. Rege dicit quod idem placit. materiaque in eodem content. minus sufficien. in lege exist. ad ipsum Christophorum a respondend. ad Indictament. ill. excusand. ad quod quidem placit. idem Attorn. General. necesse non habet nec per legem terræ tenetur aliquo modo respondere. Et hoc idem Attorn. General. pro eodem Dom. Rege parat. est verificare prout Cur' &c. Unde pro insufficient. placit. ill. idem Attorn. Dom. Regis General. pro eodem Dom. Rege petit jact. & quod Indictament. predict. bon. & sufficiens adjudicetur, &c.*

Rob. Raymond.

Mr. Att. Gen. We pray they may join in Demurrer immediately.

Mr. *Hungerford*. My Lord, it is altogether a Surprise to us, and as the Clerk hath read it, it is

impossible for us to take the Substance of this Demurrer. We therefore hope we shall be allowed a few Days to consider of this Matter of joining in Demurrer. We shall not ask many. The Precedents are so, the Prisoner was always indulged with some time in a Case of this Nature. Before the Act of Parliament for regulating of Trials, where Matters of Law were started, or any special Pleading did arise, the Prisoner was indulged with a great Number of Counsel. *Fitzbarris* had five, a greater Number than I ever knew engaged on one Side in Deliberations of this kind, unless it were that Number of learned Counsel which met to advise upon and adjust this Demurrer. But I think in the ordinary Course of the Court we are proper to desire two or three Days. Two or three Days is but a little time, especially when the Life of a Man is concerned. Mr. Attorney took from *Wednesday* to *Saturday* to consider of our Plea, we hope at least the same time shall be allowed to us to consider of this Demurrer. I have in my Hand the Arraignment of and Proceedings against *Fitzbarris*, he was indulged several Days.

Mr. *Kettelby*. My Lord, I have brought the Book along with me relating to *Fitzbarris*: As to the Matter of having time to join in Demurrer, whether we are not entitled to it by the Rules of the Court, I must submit to your Lordship. It is a Case of great Consequence; and, as I take it, the constant Practice is, that a four Days Rule is always given to join in Demurrer. This is always done, as I am informed, on the Crown-side as well as the Plea-side. The Tenor of the Rule is either to join in Demurrer within four Days, or to waive the Plea; but Mr. Attorney requires us to do it immediately. In *Fitzbarris's* Case the Attorney General demurred in Court, and the Counsel on the other Side refused to join in Demurrer immediately, and they had from *Wednesday* to *Saturday*. We hope therefore there shall be a four Days Rule for us to join in Demurrer as in all other Cases. If we are not regular in insisting upon four Days, we hope at least your Lordship will indulge us with some time; or if we do immediately join in Demurrer, that we shall have some time to prepare ourselves to argue it.

L. C. Just. How say you, Mr. *Harcourt*? How is the Course of the Court?

Mr. *Harcourt*. My Lord, in criminal Prosecutions for Misdemeanors, two four Day Rules to plead are given, and a peremptory Rule moved for; and then if there be a Demurrer, one four Days Rule to join in Demurrer is given, and a peremptory Rule moved for: But in capital Cases there is no Rule given, either to plead or join in Demurrer; all Proceedings in such Cases being at Bar, the Prisoner is oblig'd on all Occasions to answer immediately, nor can there be any Instance shewn to the contrary.

L. C. Just. The Course of the Court is against you.

Mr. *Hungerford*. As to the Course of the Court, I know no better Description of it, than that it is the uninterrupted Usage of the Court warranted by Reason, or at least not contradicted by it. The Officer tells you that in criminal Cases

\* The right Way seems to be, that *ph* should be followed with an *o*, and *f* with an *e*, the first being derived from the Greek, and the other from the Latin. See *Lowick's* Indictment, Trial 155. where it is *Christophorus Knightley*. See also *Co. Entr.* 51. a. 55. b. 215. c. 309. c. d. 310. a. b. 319. a. 321. b.

which are not capital there are Rules for four Days, and four Days to plead, and likewise a four Days Rule to join in Demurrer; and surely, if in a criminal Case, which is not capital, a Man is indulged four Days; surely in a criminal Case as this is, which is capital, and doth touch a Man's Life, his Posterity, and his Estate, by Parity of Reason, the Indulgence ought to be more than four Days. I beg leave to observe one thing in the Case of *Fitzbarris* now in my Hand. My Lord Chief Justice there asks the Prisoner, will you plead over? If you will, you may have any Time in Reason. Now, my Lord, we have pleaded over, we have pleaded Not Guilty as to the Offence; so that for that Reason we might have till *Hillary Term* next, because we have forwarded them in their Journey already by pleading Not Guilty as to the High-Treason. And we hope therefore the Gentlemen of the other Side won't contend with us for two or three Days in a Case of this Nature.

Mr. *Ketelbey*. My Lord, I only beg leave to mention this single Word, that we don't insist upon this for Delay, or to put off the Trial; we have pleaded over to the Treason, and in case we should join in Demurrer, whatever Time is taken up in arguing it, cannot obstruct the Proceedings in order to the Trial: Nay the Trial may be had before the Matter of the Demurrer be determined.

L. C. *Just*. In case you should join in Demurrer, what can you do else?

Mr. *Ketelbey*. I believe we shall. If we had not thought our Plea would have stood a Demurrer, we had not made use of it.

Mr. *Serj. Pengelly*. My Lord, what he prays is against the Rules of the Court; in all capital Cases there are no Rules given to plead or join in Demurrer, but the Proceedings are all *Instant*, the Prisoner being present in Person, and therefore, my Lord, there is nothing in what they ask. When they put in a Plea in Abatement here at the Bar, which cannot be expected or thought of, it is reasonable that there should be some time to consider of that, to see the Nature of it, and consider what to answer to it. We have demurred to their Plea; no doubt they had considered of their Plea whether it was a good Plea in Law or not; if it be not good, can they amend their Plea in Abatement? It was never allowed: If they can make no Alteration in that, what can they do? They can do nothing else but join in Demurrer; it is all they can do; and when they have joined in Demurrer, we shall see if they have any Reason for further Time. But as to what they say, that as to the Sufficiency of the Plea, it may be argued another time; and as they have pleaded over to the Treason, there needs be no Delay as to the Trial; I would be glad to see whether by this they do not deprive the Crown of the Election to proceed in such Manner as shall be thought most advantageous for the carrying on the Prosecution: But is it advisable to leave a Plea in Abatement to the whole undetermined, and to try the Issue first? I believe they can shew no such Instance, and therefore in all capital Cases, as well as in criminal, the Plea in Abatement goes to the whole, to destroy the whole Indictment, and indeed ought to be determined before the Court goes on with the Trial. My Lord, we are surprized at what they mean by this, when they can do no-

thing else but join in Demurrer, and therefore we hope they shall join immediately.

Mr. *Att. Gen*. My Lord, what we insist upon is not a new thing; the constant Practice in Cases of this Nature has been, that if a Demurrer is put into the Prisoner's Plea, he must join in Demurrer *instant*. I believe the Gentlemen of the other Side can't shew one Instance to the contrary. The Prisoner can do nothing but join in Demurrer. As to what has been said about our having time from *Wednesday* to *Saturday*, the Reason was because *Thursday* and *Friday* were no *Westminster-Hall* Days, for which Reason we could not have the Prisoner brought up before this Day. The putting in a Demurrer to this Plea can be no Surprize to the Counsel for the Prisoner; for Yesterday we sent Copies of our Demurrer to them. Mr. *Pember*, the Prisoner's Clerk in Court, had a Copy of it by two of the Clock in the Afternoon; and the Prisoner himself had one about four o'Clock. As to the Case of *Fitzbarris* which has been cited, it was a Plea looked upon to contain Things of very great Difficulty; the Time asked for there was not to join in Demurrer, but the time applied for was for settling the Plea; but as soon as Mr. *Fitzbarris* had pleaded, and the Attorney-General had demurred to it, the Court ordered the Prisoner to join in Demurrer *instant*. As to what has been said, that we may proceed to Trial on the Plea of Not Guilty before the Demurrer to the Plea in Abatement is determined, that is by no Means adviseable; the Consequence of that may be very mischievous; for if the Court should be of Opinion that the Plea in Abatement is good, after we have disclosed the whole Evidence against the Prisoner upon the Trial, though we obtained a Verdict for his Majesty, the whole must be set aside; and therefore we hope your Lordship will not break into the common Method of Proceedings, but make the same Rule for the Prisoner as always has been made in Cases of the like Nature; which is, that he shall join in Demurrer immediately.

Mr. *Sol. Gen*. My Lord, I agree with the Counsel for the Prisoner that we are in a Case of Life, and that is the Reason why their Client should have all the Indulgence the Law will allow him. But I beg leave to observe, that we are not now on a Question that directly concerns the Merits of the Case, nor whether a Prisoner who is to answer for his Life at this Bar, should have time to send for his Witnesses, or prepare for his Defence. That indeed might be of a different Consideration. But we are now barely upon a frivolous dilatory Plea, as frivolous a Plea as ever was offered in any Case whatsoever; and the Question is, whether they, who have prepared and put in this dilatory Plea, shall have time given them to consider whether they will join in Demurrer upon it or not. As to the Case of *Fitzbarris*, whatever they have inferred from it, I think it rather turns against them. Was that a Plea of *Misnomer*? A Letter pretended to be mistaken in a Name, which I beg leave to say, when considered, will appear to have been always so written in legal Proceedings? No, it was a Plea of the Pendency of an Impeachment for the same Offence, sent up by the *House of Commons* to the *House of Lords*, and by Consequence, in that Case, the Prerogative of the Crown, the Jurisdiction of the Lords, and

and the Privileges of the Commons were highly concerned. This was a Question of as great Weight, and perhaps of as great Difficulty, as could come before the Court, and therefore the Prisoner had time given him to plead that Matter; but when the Attorney General demurred to it, the Prisoner joined in Demurrer instantly: And as Mr. *Harcourt* acquaints your Lordship, the Practice is, that there is no such Rule for proceeding upon Demurrers in capital Prosecutions as in other Cases; and this appears by their never being set down in the Paper to be argued, as Demurrers always are in other Causes. So it was in the Case of *Fitzbarris*. That was argued by four or five Council of a Side, without being set down in the Paper. In the Case of the Prisoner, which is your present Consideration, more hath been done for him than was done for *Fitzbarris*. Here is not only a Demurrer given in by Mr. *Attorney* at the Bar, but the Prisoner's Attorney had a Copy of the Demurrer at Noon the Day before, and consequently they could not want Notice that we intended to demur, nor be under any Surprize from it. What then would they take time for? Can they do any thing but join in Demurrer? Can they amend in capital Cases? Or could they amend a Plea in Abatement in any Case? They know very well that they cannot. Can they withdraw their Plea? I believe they cannot do that neither without the Consent of Mr. Attorney General. If this be so, would they take time to consider whether they shall join in Demurrer, when they have no Choice, when it is impossible for them to do any thing else? But, my Lord, the Method of proceeding we are now insisting upon, hath been always taken in capital Cases. I agree when the Question has concerned the Merits of the Prisoner's Case, or when he has been to prepare and consider of some Matter which has been, strictly speaking, his Defence, time hath been allowed, but not in other Instances. Where the Exception taken hath been to the Jurisdiction of the Court, and time has been desired to make it good, it hath been denied; as in the Case of my Lord *Preston*, who was tried before my Lord Chief Justice *Holt*, and other Judges at the *Old-Baily*. My Lord *Preston* insisted, that he was a Peer created by Letters Patent of King *James* the Second, and consequently that the Court at the *Old-Baily* had no Jurisdiction to try him, and he prayed time to produce his Letters Patent in order to prepare and make good his Plea; but the Court refused to give him time for that Purpose. And I believe it will be found, that in all Instances where Pleas have appeared on the first View of them to be merely dilatory, and offered for no other Reason but to delay that Justice which ought to be done to the Crown, the Judges have refused to assist the Prisoner with any time beyond the ordinary Rules of the Court.

Mr. *Reeve*. I shall not take up your Lordship's time much in this Case. My Lord, we think in Civil Actions the Court on Motion would set this Plea aside, but in a Case of Life it is received, and Mr. *Attorney* has thought fit to demur to it. Is any Advantage lost, for the Prisoner to join in Demurrer instantly? I apprehend what they move for is to have time to join in Demurrer. Are they not as ready to do that now, as if they had a Week or ten Days

time given them? Is there any thing else can be done? And is there any Occasion for time to do that which must be done? And cannot they as well join in Demurrer now, as if they had more time to do it? Certainly they may, my Lord, since by the Rules of the Court (as Mr. *Harcourt* informs your Lordship) there is no Rule given, but they are to join instantly. There is no Reason to allow them Time, since they can lose no Benefit or Advantage by joining instantly. So then, as we apprehend, we are in the Course of the Court, and there is no Reason why the Course of the Court should be altered in this Case, we therefore hope that they shall join in Demurrer immediately.

Mr. *West*. My Lord, I think there is nothing in the Exception of his Council not being ready to argue his Plea: No doubt they considered of it before they brought it in; and when they had produced their Plea, Mr. *Attorney* demurred to it. I can't see why they should insist so much for time, when they can do nothing else but join in Demurrer; therefore we hope that they shall instantly join in Demurrer.

Mr. *Hungerford*. My Lord, I beg leave to set a Matter of Fact right, that is as to the Case of *Fitzbarris*, which was mentioned as an Authority against us by Mr. *Attorney*, but in truth is not so; for though *Fitzbarris*'s Council did join in Demurrer immediately (or *instantly*, as 'tis called) yet that was not by the Coercion of the Court, but they voluntarily offered to join in Demurrer, upon an Opinion (as I presume) of their own great Abilities and Self-sufficiency in the Matter. But we have not that Opinion of our *extempore* Performances, but desire time to consider of this Matter. As to my Lord *Preston*'s Case, quoted by Mr. *Solicitor*, it is true the Court did not give him leave to send for his Letters Patent, because, as my Lord himself had opened them, and the Truth was, his Letters Patent were dated at St. *Germain*, and granted by K. *James* there, after his Abdication; and it would have been the highest Indignity both to the Court and the Government, to have such Letters Patent pleaded, or insisted on; and I believe no Gentlemen at the Bar then, or now, would have signed such a Plea, which if allowed would have implied that the Government was not well settled in their Majesties King *William* and Queen *Mary*, and that King *James* (though at St. *Germain*) had a Right to create Peers, and consequently was really King. But if my Lord *Preston* had had Letters Patent regularly granted by King *James* or King *William*, in his Chambers, can any one say they would not have given him leave to send for them? Most certainly they would; but it appeared they were dated at St. *Germain*, and granted to him there; that, with humble Submission, was the Reason why they would not indulge him with Time, and that Precedent therefore, I hope, is of no Weight in this Case. It is said we are tied down by our Plea; we knew our own Strength when we pleaded it, and therefore ought to be ready to argue it: But if my Memory doth not fail me (and therefore I speak it with some Doubt) I believe there are Instances where even in a criminal Case a Plea hath been amended. I believe it was so done in the Case of my Lord *Banbury*, which was a Plea to the Jurisdiction of the Court.

My

My Lord, we shall desire but a very little Time, which I hope will be granted us.

Mr. *Ketelbey*. My Lord, as to *Fitzbarris's* Case, the Plea was amended there: The first time it was brought in by Mr. *Fitzbarris* himself to the Bar, the Plea was brought in and read in Court; after the Plea was read the Court assign'd him Counsel, and gave him from *Saturday* to *Wednesday* to put the Plea in a regular and legal Method, and it was altered and brought in again on *Wednesday*. As to what the *Attorney* says, that the Court compelled him to join in Demurrer instantly, the Words of the Book which I have in my Hand are; "We that are assign'd Counsel for the Gentleman at the Bar, we don't design to delay the Proceedings, but to declare that we will join in Demurrer with them immediately." These are the Words of the Book; so that it was the voluntary Act of the Counsel, and they were not at all compelled to it by the Court. As to what Mr. *Harcourt* observes to be the Course of the Court, and that we can't shew one Instance to the contrary; I don't know whether they can shew one Instance for it, except in the Case of *Fitzbarris*; if they can shew in any capital Case one Instance, we shall submit.

It is called a frivolous Plea, the Variation of one Letter, and never writ otherwise. Whether it is frivolous or not will appear when it comes before your Lordship in Judgment: As to its never being wrote otherwise than with an *E*, I don't believe they can find it in any Book either great or small spelt so, unless they have met with it in *Instructor Clericalis*: All the Books of Authority are otherwise; I believe that one carries with it but little Weight. As to my Lord *Preston's* Case, which Mr. *Solicitor* is pleased to cite against us, that the Court would not allow him time to make out his Plea, Mr. *Hungerford* hath given an ample Answer to that, and a true one as to the Circumstances; but if the Case of that Lord had been such as the Gentlemen of the other side are pleased to state it, What doth it prove, but the contrary to what the Court did in *Fitzbarris's* Case, and therefore the most that can be made of it is one Authority against another? and where Authorities are equal, we hope the Indulgence of the Court will interpose in favour of Life, and grant us such reasonable time as the Nature of the Thing requires, and not compel us instantly to join in Demurrer.

Mr. *Att. Gen.* My Lord, I beg leave to state one Fact right, and that is as to *Fitzbarris's* Case: They say the Plea was put in, and afterwards amended; that is a Mistake; the Fact was that his Wife brought a Plea into Court, and offer'd it to the Court, and press'd it might be received; but Mr. *Fitzbarris* was advis'd to consider what he did, and thereupon he took it back, and afterwards brought a Plea in, which was receiv'd, and after that it was never alter'd.

*L. C. Just.* I dare say it is the first time that ever in a capital Case; when a Plea in Abatement was pleaded, and the *Attorney-General* thought fit to demurr to it, that the Party desir'd time to join in Demurrer. You are not entitled to any time by the Course of the Court, you can't shew any Instance to prove it: The Question then is, Whether you have given any Reason for us to indulge you with time, that never was granted in a Case of this Nature.

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You have pleaded in Abatement; you were enabled so to do by having a Copy of the Indictment; you brought your Plea ready engros'd, and put it in. Mr. *Attorney* not being aware of any such Plea, it could not be expected he should be ready with a Demurrer in his Hand to this Plea, and therefore he desired time to consider of it. The next Day it could not be; nor the next after that, they being Holy-Days; but then the very first time that he had an Opportunity to come, he comes and demurrs to your Plea: But you desire time, and why should you not have time, when they had time, to consider whether you shall join in Demurrer.

Do you want time to consider whether you shall join in Demurrer, after you have had time to plead and to draw up your Plea, and have brought it in to Court? Why should you have time? Can you do any thing else but join in Demurrer? You can do nothing else: And unless you can shew any Reason why the Court should indulge you, if you don't think fit to join, we must give Judgment against your Plea. You tell us of the Case of *Fitzbarris*; that is as widely different from this Case as any thing can be. It was a Case of great Difficulty, that required great Consideration, when a Party comes and informs this Court, and insists he is not within the Jurisdiction of the Court. When a Matter is urged to us as a Question of Law, if we were not bound as we are by Act of Parliament, we would certainly assign Counsel to the Prisoner to plead a Matter of that Nature; and when the Court in *Fitzbarris's* Case had assigned him Counsel, were those Counsel to argue immediately? It was nothing but Justice to give them time after they were assigned, to argue a Plea of that Nature; a Plea in which the Prerogative of the Crown, the Jurisdiction of the House of Lords, and the Rights of the Commons were concerned. The Court would not run hastily into the determining of that Matter, without hearing it debated by Counsel; and therefore they gave the Counsel time, upon which they might be able to give a just Judgment. Is there any thing in this Case like it? You have pleaded in Abatement. Mr. *Attorney* hath demurred to your Plea, and you desire we would give you time to do that which you must do, or do nothing at all. Is there any Pretence? Could you in this Case come with any Colour or Pretence of Justice, and desire of us to amend your Plea? Is there any thing else you can do? This is nothing but a pure dilatory Plea, and he puts in this Plea. The Question is, whether it should be an *O* instead of an *E*. You are not entitled to any thing of this Nature; it is nothing but an affected Delay; and it cannot be thought to be for any other Reason; therefore you must join in Demurrer immediately: If not, we must give Judgment against your Plea.

Mr. *Just. Powys*. My Lord Chief Justice hath given so full and clear an Account of the Matter, that I am satisfied, and do think you must instantly join in Demurrer.

Mr. *Just. Eyre*. I am of the same Opinion. In capital Cases the Party is obliged to plead *instantur*; for the Proceedings are carried on at the Bar without giving Rules: This is the constant Course; and the Course and Practice must be the same, in regard to the time for joining in Demurrer; But the Court is still at liberty to allow

further time, if it be necessary to the Justice of the Cause; and if it could be of any Use to the Prisoner in the next Step he is to make, I should not be against it: But as the Case now stands, that he has nothing to deliberate upon, that he can lay no new Matter before the Court, but is obliged to abide by his Plea, and can neither withdraw nor amend it without Consent, but must necessarily join in Demurrer, and has no other Choice; I think it would be a manifest Delay of Justice to allow further time; and am therefore of Opinion, that he ought to join in Demurrer immediately.

Mr. *Just. Fortescue Aland*. I am of the same Opinion. The Prisoner can have no Benefit by our giving him time to join in Demurrer, except it be to put off the Trial: The Court makes a Difference in all Cases, both Civil and Criminal, between dilatory Pleas and other Pleas. An affected Delay is never to be suffered, more especially in a capital Case; and here it is plain, that when the Counsel for the Prisoner brought in this Plea, that they had consider'd it before, and thought it of Service to the Prisoner, and nothing more remains now than to join in Demurrer. The *Attorney-General*, by his Demurrer, says it is not a good Plea; and the Prisoner has nothing further to say, but that it is a good Plea; and if he does not think fit to say that, we must give Judgment against him. I remember in the Case of the King and *Gordon*, when the Prisoner came to the Bar, having lapsed the time of taking Exceptions, in order to quash the Indictment, he moved the Court for time to plead in Abatement; but the Court refused it, alledging they would give no Opportunity for a dilatory Plea: and I think there is the same Reason, if not stronger, in this Case, where the Prisoner has nothing to do but to join in Demurrer; that is to say, to submit to the Judgment of the Court, whether this be a good Plea or not; and that may be done immediately, as well as if the Prisoner had never so much time for it.

*Prisoner*. My Lord, I know not how consistent this Rule of Court may be, that in a capital Case of the highest Nature whatsoever that I should not be allowed time to join in Demurrer, when in criminal Cases of an inferior Nature there is a Four-days Rule given. The Counsel for the King were indulged from *Wednesday* to *Saturday*: I hope I shall have the same Indulgence on my Part, to consider whether I shall join in Demurrer or not.

I am so far from desiring to give any Delay, tho' I am satisfied how maliciously this Prosecution is carried on, and am pretty well acquainted with every Step taken in the Management in *Essex*; and I am willing, rather than to continue to be thus hunted up and down the World, to retract my Plea, and plead generally Not Guilty.

*L. C. Just.* If Mr. *Attorney* consents to it.

*Prisoner*. I am obliged to my Counsel for the Care they have taken of me, and have here in my Hand a Joinder in Demurrer engrossed and signed by them, and ready to deliver in; but I won't offer it, because I won't give any Delay to the Justice of the Court.

Mr. *Hungerford*. He stands upon his Plea of Not guilty to the Indictment.

*L. C. Just.* You have pleaded Not guilty; you have likewise pleaded a *Misnomer*, which hath

been demurred to: Your Plea therefore now must be as pleaded in chief, and as put in at the time when it was first pleaded; you don't desire you may plead the same Matter again this Day?

Mr. *Hungerford* and Mr. *Ketelbey*. We do not.

Mr. *Att. Gen.* If I understand the Prisoner right, he pretends to be desirous that his Trial may come on, and therefore he is willing to withdraw his Plea in Abatement, and abide by his Plea of Not guilty: 'Tis what we desire likewise; and I wish we could go on in this Case as we ought, in a decent Manner, without having groundless Reflections continually made. Something hath been said of the Maliciousness of this Prosecution, and indirect Management, by some Body, 'tis not said whom, in the County of *Essex*. My Lord, I defy any Man to shew any single Step taken in carrying on this Cause, but what is perfectly right and justifiable.

I wish, out of Charity, that the Prisoner would consider the Circumstances he is in; if he did, he would not say this Prosecution is carried on by Malice; for if I know any thing of Evidence, I have no Reason to doubt but at the proper time there will enough appear against him to convict him.

Mr. *Hungerford*. I dare say the Prisoner did not entertain a Thought of reflecting upon any of the Profession concern'd in carrying on this Prosecution. But pray, my Lord, give me leave humbly to represent, that the Man's Case is hard; he tells you he is in Chains, and I see he is in great Pain even now; and I earnestly wish that he were eased in that Matter. I do not pronounce these Words out of any Affectation of Popularity, or to captivate the Auditory, as was insinuated in the Beginning of this Proceeding, but in mere Compassion I have to the Prisoner, and to all Mankind, which Temper I have shewn thro' all the Stages of my Life.

*L. C. Just.* You have been told by the Court already our Opinion, that it is not in our Power. We were told, and I perceive it is not denied, that he did once escape after he was taken; and if so, for the better securing him he was put in Chains: Do you ask us to take those Chains off? Can we do it? Or should we do it? If he should escape out of the *Tower*, shall not we be guilty of that Escape? The Circumstances of the Case ought and must govern. He says he is Innocent, and I hope he is; and if he be, he takes the properest Measures to knock his Chains off, let him make his Innocence appear; and it will appear whether he is Innocent or not, when we come to try the Cause.

*Prisoner*. If I thought it was contrary to Law to take off these Chains I should not mention it. I desire to observe, that these Chains were not put on till after a fourth or fifth Examination.

As to the Escape out of the Messenger's Hands, he never shew'd me his Warrant, and I did not know any Authority he had to keep me. As to escaping out of the *Tower*, it is not in my Power, neither is it my Inclination. I desire therefore to be eased of these Chains.

And another thing I desire is, that I might have an Opportunity to see my Relations, my Wife, that she might come to me.

Mr. *Ketelbey*. That was granted in *Fitzbarris's* Case.

*L. C. Just.* As to the taking off the Chains you have had the Opinion of the Court, we cannot, we ought not to do it, it is a Breach of our Duty; as to the other Matter, he desires to see his Relations, what do you say to it?

*Mr. Att. Gen.* My Lord, as to *Fitzbarris's* Case, there was a great Deal of Caution used as to the Persons permitted to see the Prisoner; before they went in they were to be searched, and they were to be with him only in the Presence of the Keeper.

*Mr. Ketelbey.* It is mentioned there, that the Wife had misbehaved herself, and that a particular Caution ought to be taken with respect to her; but the Access of a Wife to her Husband under such unfortunate Circumstances was never denied, I believe, in any Case whatsoever.

*L. C. Just.* Upon a proper Application to the Court, the Court hath sometimes ordered that Persons named in their Rule may have Access to the Prisoner in the Presence of the Jaylor, and not otherwise, and that they should be searched before they come in. If you think fit to desire it on those Terms, the Court will consider of it.

*Prisoner.* My Lord, I must desire upon those Terms as the Court thinks fit, and that my Sister may have Liberty to come with my Wife.

*L. C. Just.* Your Wife and Sister: It may be reasonable for them to have Access to you, but they are not to be with you but in the Presence of the Jaylor\*.

*Mr. Scrj. Pengelly.* My Lord, I beg leave to observe whether it is usual for the Court to make such Rule: On the Trial of Sir *John Friend*, there it was only intimated by my *Lord Chief Justice Holt*, but the Court did not order it by making any Rule; they know they may apply properly, and there may be Directions given to the Lieutenant of the *Tower*: As to the Council that is allowed in the Act of Parliament; and as the Court hath a Power to assign Counsel, it is proper for the Court to give Directions for them to be admitted at all Seasons, and at all times.

*L. C. Just.* Why the Wife and the Sister?

*Prisoner.* Yes, my Lord, my Wife and Sister. I don't put in a Number of Relations.

*L. C. Just.* I do think, Brother *Pengelly*, that the Court are trusted in a Matter of this Nature, and may regularly give Directions with what proper Cautions they think fit. Why, he says, he is denied the Comfort of his Wife; he desires that his Wife and Sister may be admitted to come to him. You say it hath been sometimes intimated, but not ordered; if it was intimated by us, and not complied with, I believe I should make no Difficulty to order it, provided it be with a reasonable Caution, and no Inconvenience in it.

Whether is it the Wife or Sister you desire? I think one is enough, and she must submit to be searched †.

*Mr. Scrj. Pengelly.* Before your Lordship makes any Rule in this Case for the Prisoner, I beg that he may be obliged to amend his Plea of Not guilty, and that he may plead by the Name of *Christopherus*, by which he is indicted. You have been brought to the Bar, and have put in a Plea by the Name of *Christopherus*; if you are in Earnest that you desire to wave your Plea in Abatement and have it withdrawn, you must change the Name wrote in the Commencement of the

Plea; and make it as it is in the Indictment, that there may be no Embarrassment in the Proceedings at the End.

*L. C. Just.* You consent to have it amended?

*Mr. Hungerford.* The Prisoner at the Bar hath consented to withdraw his Plea in Abatement; and though the Plea were such that he might have prevailed upon it, yet after his pleading *Not Guilty* in general, there is not in the Course of this Proceeding any Period of time wherein he can avail himself with the Matter of this Plea in Abatement; and therefore we submit it to the Court, and to the King's Counsel themselves, to put this Matter into such a Form, that the Prisoner may come to a fair Trial upon the Issue of *Guilty* or *Not Guilty*.

*Mr. Ketelbey.* I believe the Prisoner is willing to come into the Method offered; and though this Plea hath been called a frivolous Plea, yet the Precaution taken by the Gentlemen of the other Side seems to give a Sanction to it, and makes it not so frivolous as hath been represented.

*L. C. Just.* What do you mean, *Mr. Ketelbey*? Here is nothing asked of you: You do desire to wave and withdraw your Plea; we desire to know, if you do, whether you will plead by the Name as it is in the Indictment.

*Mr. Ketelbey.* My Lord, we do.

*Mr. Att. Gen.* We desire the Plea of Not guilty may be amended, upon the Consent of the Prisoner.

*Mr. Hungerford.* We offer now, let the Piece of Parchment be entirely abolished, take it entirely out of the way, and we plead Not guilty:

*L. C. Just.* Your Plea must be now *Et predictus Christopherus ductus hic ad barram. &c.*

*Mr. Ketelbey.* We submit it.

*Prisoner.* I desire to withdraw and retract the other Plea, and do plead Not guilty.

*L. C. Just.* No, it must be mended; you will hear how it is when it is struck out and amended, and then you will tell us whether it is mended according to your Intent or no.

Cl. of the Cr. *Et predictus Christopherus Layer allocutus existens per Curiam hic de al. proactione predicta per Indictamen. praeterit. ei superius impos. qualiter se velit inde acquietari, Idem Christopherus Layer dicit quod ipse in nullo est inde culpabilis Et inde de bono Et malo ponit se super Patriam.*

*L. C. Just.* Is this according to your Intention?

*Prisoner.* Yes.

*Mr. Scrj. Pengelly.* My Lord, I believe it is usual in these Cases for the Court to appoint a Time for the Trial; the last Return but one in this Term is the 19th of *November*, so if you please it may be the *quarto die post*, which I think is *Wednesday*, if that be suitable and convenient to the Court.

*L. C. Just.* What say you to it?

*Prisoner.* I desire your Lordship would give me a longer Day to prepare for my Trial. I have a great Number of Witnesses, twenty or more, most of them People of the first Quality. I hope I shall have the common process of the Court to bring them here; and, my Lord, another thing I desire is, that I may have a *Habeas Corpus ad testificand.*, to bring my Lord *North* and *Grey* and my Lord *Orrery* at my Trial. That,

\*See *Hambden's* Trial, No. 136. and *Reokwood's* Trial, No. 153. *harris*, No. 102.

† See the Proceedings against *Fitz-*

my Lord, you would please to give me as long a Day as you can to prepare for my Trial; if your Lordship please it may be *Monday* the 26th, and then your Lordship will have a Day of Rest between.

*L. C. Just.* That will be out of the Return.

*Mr. Hungerford.* They must appear, and then may be adjourned.

*L. C. Just.* It cannot be adjourned over beyond the Return.

*Mr. Ketelbey.* My Lord, the Prisoner hath shewn that he hath in no Respect afflicted Delay.

*L. C. Just.* It cannot be.—God forbid that we should deny the Prisoner to have a reasonable time to prepare for his Defence; it is three Weeks from hence; you have been aware of it long before; you have known the Indictment was found; you have had a Copy of it; you have known your Charge; and is not all this Time enough? Consider, the Term draws toward an End, and it interferes with the common Business of the Term if we carry it to a further Day: we do agree the *Venire* to be returned *Octab. Martini*, and the Trial then must be the *quartodie post*, which will be *Wednesday* the 21st. And it is proper for us to give you an intimation now, not to expect any further time, or the Jury to be adjourned; do but consider what a Multitude must be brought up, eighty at least: The Prisoner hath a Privilege to challenge thirty five peremptorily, and after, for Cause, as many as he pleases; so that a great Number must be brought up; and for them to be forced to attend here the 21st, and still the Trial to be put off, it will be a great Inconvenience and a great Charge, therefore that must be the Day, we shall not consider to put it off till any farther Time.

*Prisoner.* I beg leave for one Word more; I have a Witness that is to come from *Edinburgh*, and I can hardly have him here by the 21. If I could but be indulged a few Days longer——

*L. C. Just.* We cannot do it without making an Error in the Proceedings.

*Prisoner.* Is there no other Return for a *Venire* to be returnable?

*L. C. Just.* No, there is none but that, and the last Return of the Term; and it is impossible to try him that Day, without doing a manifest Wrong and Injustice to the People of *England*.

*Prisoner.* My Lord, where a Man's Life is at Stake, if I should not be indulged over till the last Day of the Term, for want of a Witness I may be in danger of my Life: I hope therefore your Lordship will please to indulge me.

*L. C. Just.* You have had a great deal of Time already, Time sufficient to bring your Witnesses from *Edinburgh*, or any other Place, and we cannot do it. To put you off to the last Day of the Term, is to do a manifest Wrong to the People of *England*.

*Prisoner.* The Reason why I mention it over and over again, is because I would not give your Lordship the Trouble to be turned over to another Day, on troubling your Lordship with Affidavits.

*L. C. Just.* In what you say before us as Matter proper for Consideration, we shall do what is just. It is not proper for you to tell us what we have to do, and to make Bargains with us: That is the Day of Trial; it must be on *Wednesday* the 21st: Your Counsel will tell you it is im-

possible to comply with your Request, without doing the manifestest Injustice in the World. Or else, whether to try you upon the 21st, or in two, or three, or four Days after, I don't think the Consequence worth disputing, but we can't do it without doing Wrong and Injustice to the People of *England*.

*Prisoner.* I hope I shall be indulged two or three Days.

*L. C. Just.* We can do no more. The Time you have had for Preparation for your Trial we think abundantly sufficient to prepare your self, therefore we are of Opinion that the Trial go on at that Day; and we order it accordingly.

*Mr. Ketelbey.* Your Lordship will please to order a Rule for his Wife and Sister to come to him.

*L. C. Just.* No, not for his Wife and Sister.

*Prisoner.* My Lord for a single Woman to come thro' the Courts and the Guards, to be examin'd by her self, it's not so proper, my Lord.

*L. C. Just.* You shall have a Rule from the Court for your Wife to come; as for your Sister, we must leave that to the Direction from another Place. We must not be too forward in granting Women to come, we remember an Escape occasion'd by a Woman coming thither.

*Mr. Att. Gen.* There must be a Rule to bring him up at the Day of his Trial.

*Mr. Ketelbey.* My Lord, as to having his *Habeas Corpus ad Testificand* for my Lord *North* and *Grey*, and my Lord *Orrery*.

*L. C. Just.* You must give Notice, and then move what you please.

*Mr. Hungerford.* By what was said, I did understand, I must confess, that though the Rule was made for the Wife only, yet that it might be in the Power of the Gentleman Jaylor to permit her Sister to come with her.

*L. C. Just.* We give no Direction concerning it. He will have a Rule from the Court that will be his Direction, unless he receives any additional Direction from another Place, but the Court names his Wife only.

*Mr. Ketelbey.* There was another thing mentioned, that he may have Copies of his Papers that were seized.

*L. C. Just.* Give Notice for what you think fit, and move it.

*Die Mercurii 21 die Novembris 1722.*

THIS Day *Christopher Layer*, Esq; was brought to the Bar, in Custody of the Lieutenant of the *Tower*, in pursuance of the Rule of Court made for that Purpose, in order to his Trial.

*Cl. of the Cr.* You *Christopher Layer*, now Prisoner at the Bar, these Men which you shall hear called, and personally appear, are to pass between our Sovereign Lord the King and you, upon Trial of your Life and Death: If you will challenge them, or any of them, your time is to challenge them as they come to the Book to be sworn, and before they be sworn.

*Heneage Norton*, Esq;

*Mr. Hungerford.* My Lord, we desire that his Irons may be taken off.

*L. C. Just.* The Irons must be taken off; we will not stir till the Irons are taken off.

*Prisoner.* I hope, my Lord, that the Irons shall be now taken off.

*L. C. Just.*

*L. C. Just.* They shall be taken off.

*Mr. Hungerford.* The poor Man hath been so oppress'd by these Chains, that he was not able to prepare his Brief. I had it not till late last Night; and it is ten Sheets of Paper.

*Mr. Att. Gen.* Whose Fault is that? You have had Time enough.

*Mr. Hungerford.* It is the Fault of the Irons, *Mr. Attorney*, the Brief was not brought to me till Eleven of the Clock last Night.

*L. C. Just.* It was an Omission; they should have been taken off before he came to the Bar.

*Mr. Att. Gen.* There was Direction given for their being taken off before; how they came not to be taken off, I can't tell.

*L. C. Just.* Are the Irons taken off?

*Gent. Taylor.* Yes.

*L. C. Just.* Go on.

*Cl. of the Cr. Heneage Norton, Esq;*

*L. C. Just.* You must call over all the Jury.

*Mr. Hungerford.* I thought they would be all called over once, before any one is endeavour'd to be sworn.

*Cl. of the Cr.* They have been called over already.

*Mr. Hungerford.* When? Not since the Court sat, I am sure. I would know whether the Intention is, that all the Pannel be called over before any one of them is sworn, or that the Pannel is to be called over but once, and the Jury-men sworn as they then appear. What I have observed is, the Clerk calls over the whole Pannel first, to see how many appear; and then calls it over again, and swears them as they answer to their Names if not challenged.

*L. C. Just.* What you observe is what hath been done at the *Old-Bailey*; there they call them over first; and then they call them over again, and as they appear they are sworn presently. But by the Course of the Court here they are called over before the Court is sitting, and they mark those that appear. That is not sufficient; but they are called over again in Court, and then their Appearance and Non-appearance being marked, they do call those over again that did appear; and as one appears, if there is no Objection to him, he must be sworn.

*Mr. Hungerford.* I have observed them to be called over when no body is by, in civil Cases; but in such a Case as this, a Case of High-Treason, where peremptory Challenges is allowed, it is some Guide to the Prisoner in making his Challenges, to know before-hand who do and who do not appear.

*Mr. Ketelbey.* My Lord, with Submission, in all criminal Cases there is no other Method than calling over the Pannel according as it is transmitted into Court. 'Tis probable several of the Jurors who did not appear at their being called over before the sitting of the Court will now appear; and therefore what we pray is that the whole Pannel may be now called over in the Order as it stands, not only those who answered to the first Call, but those also who then made Default.

*Mr. Att. Gen.* I can't imagine what they mean.

*L. C. Just.* This Debate arises from not understanding one another: You have the Direction of the Court; the Pannel is to be called over, if any Man doth not appear, his Default is marked and recorded. When any one doth appear, and he is not challenged, he is to be sworn.

*Mr. Ketelbey.* I came thro' the Hall just now, and there is such a Crowd that it is almost impossible for any one to hear when they are called.

*Prisoner.* My Lord; I hope they shall be once called over before they come to be sworn; for as to their being called before, that was before I came; it will spend but a little time to read over forty or fifty Names.

*L. C. Just.* Call them over. I would not deny any thing that is desired in Reason by or on the Prisoner's Behalf; consider what you are doing; the Prisoner hath had a Copy of the Pannel, he hath examined it, and considered who are proper for him to challenge peremptorily, and he hath considered who they are that he may challenge with Cause.

I can't imagine; it was never done in this World: We have asked our Officer: They ought to call over all the Pannel; but if they do not appear, their Default is marked; if they do appear, the Prisoner knows whether he likes them or not.

Therefore when they come to the Bar, if not challenged they must be sworn.

Consider what this Demand is; we shall be an Hour calling them over the first time, that it may appear to the Prisoner whether they appear or not; then afterwards you are to call them over again, and to have them brought up again when they come to be sworn. But if it ever hath been done, it is fit it should be done now; but our Officer tells us it never was done, and why should you insist upon it now? you have had all the Indulgence the Law allows you.

*Prisoner.* I have not had a Copy of the Pannel above two Days before. Here hath been in this Cause all the vile Practices—

*L. C. Just.* You must keep within due and proper Bounds. You are come now to be tried for an Offence you are charged withal; but you are not to arraign and challenge every body else; you have no Right to do it. If in proper time it appears you have been ill used, the Court will do you Justice, and punish those that have been guilty of any Misbehaviour.

*Mr. Serj. Pengelly.* My Lord, if they have any Objection to the Jury, they are to challenge them peremptorily, when the Jury come to be sworn. Then is their time; they are not to entertain the Court with Speeches before.

*L. C. Just.* No it is not proper.

Consider how unreasonable it is for the Prisoner to arraign somebody's Misbehaviour without naming him. But in this Method he is insinuating Objections, which we can't examine whether they are true or false, on purpose to captivate People; and it may be, mislead them in the Trial of the Cause.

*Mr. Ketelbey.* As I came in, I observed that all the Avenues to the Court are barricadoed up, and only a narrow Place left on the Stone Steps, and a Guard kept there to keep out whom they don't think fit to let in.

*Mr. Att. Gen.* I know nothing of it; and I dare say nobody will give any Countenance to hindering either Jury-men or Witnesses coming into Court, when their Attendance is required here.

*Mr. Ketelbey.* I had much ado to get in myself.

*L. C. Just.* There shall be due Care taken, that any of the Jury that appear, we will order Way to be made for them.

*Mr. Hungerford.*



*Mr. Hungerford.* My Lord, I will take up but very little of your Time in this Matter; I find I was not understood before; that which I contend for is, that the Pannel be read thro' once in the Prisoner's Presence, to see what Jury-men appear, before any Jury-man is sworn. The Prisoner hath a Right to challenge thirty five peremptorily, or without assigning any Cause at all. Now, my Lord, this is a Favour, an Indulgence granted to him by Law, and he is therefore entitled to it in Justice. It is of great Use to the Prisoner, in order to enjoy the true Benefit of this Indulgence that the Law gives him, that he knows who doth and who doth not appear, for this Reason perhaps, if he did know that such an one appears he will take him, and if he knows that such an one appears he will challenge him. And if he know that such an one, who perhaps stands low in the Pannel, and of whom he has a good Opinion for being an honest Man, will appear, he will challenge as many as he can of the preceding Persons, in order to have him, that honest Man, of his Jury. And as to the Time the reading of the Pannel will take us, (though by the way it might have been over by this time) I am sure your Lordship and the Court will not regard what Proportion of Time you spare us, to let the Prisoner enjoy the Benefit of the Law in this Case, and to have a full Enjoyment of the Indulgence of the Act of Parliament in its full Latitude, that he may know and judge (as far as the Law hath enabled him) who is to pass upon him as to his Life and Death. I beg therefore, my Lord, that the whole Pannel may be called over once before the Prisoner is put to challenge.

*Prisoner.* My Lord, What we humbly move for is what is every Day done at the *Old Bailey*, that they may be once called over.

All I desire is what is done there, and by the same Reason ought to be done here in the same Case where a Man's Life is concerned. I humbly move it that they may be called over.

*L. C. Just.* We shall grudge no Time to do the King and you Justice. It is dangerous to make a Precedent, an Innovation; But if you desire it, I don't find the King's Counsel object to it.

Call over the Pannel.

You don't expect all should be brought into Court, but only to know if they do appear?

*Mr. Hungerford and Mr. Ketelbey.* No, no.

*L. C. Just.* The Prisoner hath a Solicitor; let some Body go down upon the Steps, the Solicitor be present, and then he will hear who do and who do not appear.

*Mr. Hungerford.* We humbly thank your Lordship; this is a real Indulgence, and we humbly thank your Lordship for it.

*Cl. of the Cr. Calls over the whole Pannel.*

You the Prisoner at the Bar, these Men which, &c.

*Mr. Ketelbey.* If your Lordship pleases to stay till the Solicitor comes in, because he went out to observe who did appear, and who did not appear.

*Cl. of the Cr. Henage Norton.* Have you ten Pounds a Year Freehold and Copyhold in the County of *Essex*?

*Norton.* I have no Freehold, only Copyhold.

[Then he was set aside.]

*John Wilks.* [Ask'd the same Question, as were all the others who appeared, before they were either challenged or sworn.]

*Prisoner.* I challenge him.

*Mark Frost.*

*Prisoner.* I challenge him.

*Thomas Clarke.*

*Prisoner.* I don't challenge him.

*Crier.* *Thomas Clarke.* Sworn.

*Henry Longbotham.*

*Prisoner.* I say, I think his Name is wrong spelt.

*Mr. Soll. Gen.* We are not now upon Exceptions for Mis-pelling. If his Name is written as he is usually called, it is right.

*Prisoner.* He says his Name is with an *o*, and it is written here with an *a*.

*L. C. Just.* Doth the Copy delivered to you agree with the Pannel? if it doth, as long as it hath the same Sound it will do.

*Prisoner.* With humble Submission in the Case of *Francis* there it was allowed.

*Mr. Hungerford.* My Lord, it is not the same Sound *Longbotham* and *Longbothom*, and in *Francis's* Case the Difference of a Letter was allowed to be a good Exception.

*L. C. Just.* You are by Law to have a Copy of the Pannel delivered to you; if that Pannel varies from the other, it is a just Exception; but if you object against a Jury-man because his Name is not right spelt, and that hath the same Pronunciation, and he may be called sometimes one and sometimes another it is well enough.

*Mr. Ketelbey.* My Lord, as to this Objection, whether the *Longbotham* is right, or the *Longbothom*, whether it is with an *A* or an *O*.—

*Cl. of the Cr.* You mistake, it is *Longbotham*, and not *Longbothom*.

*Prisoner.* The last should be an *O* instead of an *A*, *Longbothom*.

*L. C. Just.* Therefore we will ask the Gentleman how his Name is usually pronounced, whether it is not pronounced sometimes *Longbothom* as well as *Longbotham*.

*Mr. Longbothom.* Yes, my Lord, it is.

*Prisoner.* He says he spells his Name with an *O*, and here it is with an *A*.

*Longbothom.* I always spell my Name with an *O*, but my Letters are generally directed to me with an *A*.

*Mr. Hungerford.* He hath a Copy of the Pannel delivered him by virtue of the Act of Parliament; if the Copy be not a true Copy, it is not right according to the Direction of the Act.

*L. C. Just.* Right.

*Mr. Hungerford.* Now the Pannel which the Prisoner hath is spelt with an *A*, and the Pannel of which this is a pretended Copy, is, I take it, spelt with an *O*.

*Cl. of the Cr.* No, they are both spelt alike.

*L. C. Just.* You know it, Gentlemen, as well as can be. Don't let us spend Time where there is nothing in it; we will hear what is proper for our Consideration.

Suppose a Man is called and writ sometimes *Longbothom*, and sometimes *Longbotham*; and suppose he was called by either of these Names, may he not therefore be called by one as well as the other? Is that an Objection to say he writ with an *O*, but People write to him with an *A*? there is nothing at all in it.

*Prisoner.* Then I challenge him.

*Cl. of the C.* *Isaac Buxton.*

*Prisoner.* I challenge him.

*Cl. of the Cr.* *Richard Scot.*

*Prisoner.*

*Prisoner.* I challenge him.

*Cl. of the Cr.* John Wormlayton.

*Prisoner.* I challenge him.

*Cl. of the Cr.* John Andrews.

*Prisoner.* I don't challenge him.

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

*Cl. of the Cr.* Thomas Waterhouse.

Stephen Huff.

John Thorowgood.

Christopher Baily.

Challenged by the Prisoner.

*Isaac Potter.* Sworn.

*Cl. of the Cr.* William Lord.

*Prisoner.* I challenge him.

*Cl. of the Cr.* Hezekiah Haynes, Sworn.

Thomas Heckford, jun.

*Prisoner.* I challenge him.

*Cl. of the Cr.* Richard Waglett.

*Prisoner.* I don't challenge him.

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

*Mr. Ketelbey.* *Mr. Attorney* is pleased to challenge him for the King; we humbly insist on it, that *Mr. Attorney* is to shew his Cause of Challenge immediately. I own it has been otherwise in one or two late Instances; but I submit it, if that Practice should prevail, whether the Act of Parliament made on that Occasion would not be in Effect thereby abrogated. The Act is the 33 *Edward I.* and the Words of it are: "If they that sue for the King will challenge any Juror, they shall assign of their Challenge a Cause certain, and the Truth of the same shall be inquired of according to the Custom of the Court." Now, my Lord, I beg leave to observe upon this Pannel there are a hundred and odd Persons, if *Mr. Attorney* is not obliged to shew his Cause of Challenge, when he challenges for the King, till all the Pannel is gone through, this Act of Parliament will be of no Validity whatsoever. If there had been but a few returned (twenty four, or such a Number) then there might have been some Colour for going through the Pannel before there was any Cause assigned for the Challenge; but since this modern Practice has obtained to make so numerous a Pannel, if they are not obliged to shew Cause till the Pannel is gone through, that Law is intirely a dead Letter, and of no Significancy.

*L. C. Just.* You know your Objection is of no Validity; you cite an Act of Parliament, and you know the constant Practice is against you.

*Mr. Just. Eyre.* Though the Counsel for the King must assign their Cause of Challenge, yet they are not obliged to do it till the Pannel is gone thro', and the Jury-men returned, who are not challenged, are all sworn: This is a Rule laid down in *Hale's Pleas of the Crown*, and has been always the constant Practice in Cases of this kind.

*Mr. Hungerford.* What your Lordship directed in the last Case is certainly precedent; but I would propose it as a Convenience that the *Attorney* should, as he is every ways entitled, have the Precedence, and might challenge first, and then we will determine after him.

*L. C. Just.* No, we must not do that.

*Cl. of the C.* John Lowry. Sworn.

*Cl. of the Cr.* John How. Set aside for want of Freehold.

*Cl. of the Cr.* Thomas Pratt. Sworn.

*Cl. of the Cr.* Richard Rogers.

*Prisoner.* I don't challenge him.

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

*Cl. of the Cr.* Edward Pierfon.

Thomas Bland.

William Spilltimber.

Alexander Weller.

Thomas Rand.

John English.

Joseph Urwin.

George Frye.

Challenged by the Prisoner.

*Cl. of the Cr.* Weston Stileman.

*Prisoner.* I don't challenge him.

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

*Cl. of the Cr.* John Crush.

*Prisoner.* I don't challenge him.

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

*Cl. of the Cr.* Thomas Howlett.

*Prisoner.* I challenge him.

*Mr. Serj. Pengelly.* I don't know this Method of proceeding: If the Prisoner makes any Challenge, it must be before he comes to the Book to be sworn; but when he comes to lay his Hand upon the Book, he is too late to challenge then.

*Prisoner.* Whenever I make a full Stop and don't say I challenge, you do.

*Mr. Att. Gen.* My Lord, the Prisoner is to declare whether he challenges or not; afterwards the King's Counsel are to declare whether they challenge for the King, and the Jury-man is not to put his Hand on the Book till then.

*L. C. Just.* He ought not to put his Hand on the Book till he is allowed a Jury-man; that if the King or the Prisoner challenge him, they may do it before he lay his Hand on the Book.

*Cl. of the Cr.* Joseph Capon.

*Prisoner.* I don't challenge him.

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

*Mr. Hungerford.* More have been challenged for the King, than hath been known in any public Trial in my Remembrance.

*Mr. Att. Gen.* I am surprized at this Observation, when the King has an undoubted Right of challenging whom he pleases, without shewing Cause till the Pannel is gone through.

*L. C. Just.* It is always done.

*Cl. of the Cr.* John Clarke.

*Prisoner.* I challenge him.

*Cl. of the Cr.* William Chandler. Set aside for want of Freehold.

*Cl. of the Cr.* William Burrowes.

*Prisoner.* I challenge him.

*Cl. of the Cr.* Francis Aylett, Sen. Sworn.

*Cl. of the Cr.* George Bailey.

John Weekes.

Thomas Ruggle.

Challenged by the Prisoner.

The Prisoner spoke to the Jury-man.

*Mr. Sol. Gen.* My Lord, it hath been intimated to the Prisoner once already, that he ought to propose his Questions to the Court.

*L. C. Just.* You are to ask no Questions your self, if you will tell us the Question, we will propose it.

*Prisoner.* Only to know how he spells his Name.

*Cl. of the Cr.* William May.

Abraham Lake.

Challenged by the Prisoner.

*Mr. Hungerford.* My Lord, it will be of some little Use to know for certainty how many he hath challenged; they differ here in the Computation.

*Cl. of the Cr.*