

his Breeches, and his Hat, but could find no Pins about him.

Mr. *Serj. Jenner*. Did he eat or drink all the Time you were there.

*Webb*. No, my Lord.

Mr. *Serj. Jenner*. Did he vomit?

*Webb*. Yes, I went to him on *Thursday* Morning, and he had a husky Cough, and I thought he would have been choak'd; and at last he made a Crumb of Spittle out of his Mouth, and there were three Pins came from him in the Spittle, as rusty as if they had lain in a Ditch seven Years. About *Saturday* following, he had I believe four Pins more came from him; I took them, and I think the Hands of Man could not join them as those Pins were. On *Sabbath*-day in the Morning, a Gentleman came and desired him to go to Church with him, and desired him to drink a Pint of Ale, but he did not drink half; and about five a-Clock in the Afternoon came Mr. *Sutton* the Apothecary, and I stay'd with him till six on *Monday*, and heard not a Word from him.

*Juryman*. What People came in to see this Fellow while you watch'd him?

*Keeling*. No Man, Woman, or Child came to him the Time I was there, but only that *Sunday* Night that my Masters were there, and I said, you do not put him here to starve him; and they bid me ask him if he would eat any thing; if he would eat any thing, he might have it.

Mr. *Conyers*. Did not you use to carry him out sometimes?

*Keeling*. We never carried him out.

Mr. *Conyers*. Just now you said he was out on *Sabbath*-day.

*Keeling*. Yes, but never otherwise.

Mr. *Broderick*. Was he in a Ground-room, or up Stairs?

*Keeling*. He was in a Ground-room.

L. C. *J. Holt*. Were there any Windows in it?

*Keeling*. Yes.

L. C. *J. Holt*. Was there any Casement?

*Keeling*. Yes, there was.

*Juryman*. We desire to know of this Witness, whether he never was asleep in that Time while he watch'd with him?

*Keeling*. No, I sat just at his Head. I slept in the Day-time.

L. C. *J. Holt*. You that watch'd with him in the Day, did you not sleep all Day?

*Bridges*. No.

L. C. *J. Holt*. How came you to concern yourself in this Business? Are you one of the Masters of the Parish?

*Webb*. No, I am not; but it was my Turn to be Overseer, and his Master spoke to me to speak to the Church-wardens; and I did, and they said they would not put the Parish to the Charge, but do it themselves.

L. C. *J. Holt*. What Trade are you?

*Webb*. A Lighter-man, my Lord.

*Dell* sworn.

Mr. *Serj. Jenner*. Do you know this *Richard Hathaway*?

*Dell*. Yes.

Mr. *Serj. Jenner*. How long have you known him?

*Dell*. Ever since he was an Apprentice.

Mr. *Serj. Jenner*. Did you know him two Years ago?

*Dell*. Yes.

Mr. *Serj. Jenner*. What Condition was he in then?

*Dell*. I was at the Assizes at *Guilford*—

Mr. *Serj. Jenner*. What did you know of him before that Time?

*Dell*. I took no notice of such Things.

Mr. *Serj. Jenner*. Can you say any thing of him?

*Dell*. I can say, that the Night before he was before Sir *Thomas Lane* I watch'd with him, and he went to Stool, and his Excrements there was a Lump of Hair, loose Pins, a Stump of a Nail, half a Nut-shell, and two or three Pieces of Stone.

Mr. *Serj. Jenner*. And this you saw?

*Dell*. I saw him in a very deplorable Condition.

L. C. *J. Holt*. How? In what Condition?

*Dell*. This is all I have to say.

Mr. *Serj. Jenner*. What do you call a deplorable Condition?

*Dell*. He lay in such a Condition as if he were dumb; and if he was not, I believe he is the greatest Villain in the World.

L. C. *J. Holt*. How do you know those Excrements came from him?

*Dell*. I was one of the three Men that watch'd with him that Night. We had two Chamber-pots; these Things were in the first Stool, and when he had the second Stool, he sat on the Pot, and when he had done, we look'd, and there was nothing in it.

L. C. *J. Holt*. And were these Things in the first?

*Dell*. Yes, in the first; in the other there was none. And there were twenty Neighbours more that saw them.

Mr. *Serj. Jenner*. Was *Benn* there?

*Dell*. Yes, he was there.

Mr. *Serj. Jenner*. Mr. *Benn*, was this so?

*Benn*. Yes.

Mr. *Serj. Jenner*. Did you help watch with him?

*Benn*. Yes.

Mr. *Serj. Jenner*. And are you sure those Excrements came from him?

*Benn*. Yes, I am sure. I stood over him with a naked Sword.

Mr. *Serj. Jenner*. Why did you stand over him with a naked Sword?

*Benn*. Because People said he was bewitch'd.

L. C. *J. Holt*. Who employed you to watch with him?

*Benn*. I went into the House, and I told his Master, if they would watch him in the Day, I would in the Night.

*Powel* called.

Mr. *Serj. Jenner*. What do you know of this Matter?

*Powel*. This Man and I went up one Night—

Mr. *Serj. Jenner*. When?

*Powel*. *February* was Twelve-month. We went up and look'd upon him, and he lay as one dead, and he did not wag his Eyes; and presently he hook'd his Neck about in such a manner that I thought he had broke it; and he foamed, and we took the Foam from his Mouth, and in it were five Pins, the crookedest Rams-hornest Things, that I believe no Man could do them so.

Mr. *Serj. Jenner*. That was one Night, did you see the same at any other Time?

*Powel*. Yes, Sir.

L. C. *J. Holt*. But you did not see them come from him?

*Powel*. I took it from his Mouth, and they were rusty.

L. C. *J. Holt*. How should they be rusty?

Mr. *Serj. Jenner*. The Stomach will make them rusty. Call *Madam Davenport* (*she appears*).  
*Madam*,

Madam, pray give my Lord and the Jury an Account what you know concerning *Richard Hatbaway*, when he came to your House, and how he was managed there.

*Mrs. Davenport.* My Lord, one *Saturday* I accidentally went to *Dr. Hamilton's* to visit his Wife, and I saw with the Doctor this Fellow's Master standing there; and I perceived he was come to desire the Doctor to perform a Promise he had made to him formerly—

*L. C. J. Holt.* Was this before the Trial, or after?

*Mrs. Davenport.* It was after the Trial. I came accidentally to the Doctor's, and saw the Fellow's Master with the Doctor.

*L. C. J. Holt.* Was the Fellow there himself?

*Mrs. Davenport.* No, my Lord, I never saw him there. But standing there, I perceived him expecting the Doctor to make good a Promise he had made him about this Fellow. I found the Doctor demurr'd upon it, not knowing where to put him. At last, says he to me, *Mrs. Davenport*, will you let me have a Garret in your House? Doctor, says I, you shall have my whole House at your Service, if you have Occasion for it: I thought nothing of this Fellow, till the Doctor told me it was for him. And the Doctor told me he should come that Night. Says the Fellow's Master, I will not send a Bed, that the Doctor may be satisfied there is no Cheat. And the Doctor, to prevent any Cheat, desired me to go and buy an old Bed. So I went and got a Bed in *Long-lane*, and at Night he was brought by his Master and some of his Neighbours. And truly I was surprized when I saw him, he seemed very weak.

*Mr. Serj. Jenner.* What did you do with him?

*Mrs. Davenport.* They said he had Fits, and I found I must take other Measures with him than I thought of. His Master desired he might be search'd; and my Son and two Men more search'd him. So he went to Bed, and was watch'd with that Night, and in the Morning he was struck blind.

*L. C. J. Holt.* At your House?

*Mrs. Davenport.* Yes, my Lord.

*Mr. Serj. Jenner.* Did you appoint any Persons to watch with him?

*Mrs. Davenport.* Yes.

*Mr. Serj. Jenner.* Did you watch with him yourself?

*Mrs. Davenport.* Yes, several Times.

*L. C. J. Holt.* How long at a Time did you watch with him?

*Mrs. Davenport.* But one Night at a Time myself.

*L. C. J. Holt.* When you did watch with him, did you watch the whole Night?

*Mrs. Davenport.* Yes, several Nights; and this Gentlewoman or myself took care of him always.

*Mr. Serj. Jenner.* What did he eat or drink while he was there?

*Mrs. Davenport.* Nothing. As for his Fasting, the Doctor gave me a great Charge, and said he knew I would do it.

*Mr. Serj. Jenner.* All the Time you watch'd with him, you say he did neither eat nor drink.

*L. C. J. Holt.* How many Nights did you watch with him in the seventeen?

*Mrs. Davenport.* But two.

*L. C. J. Holt.* How many Days?

*Mrs. Davenport.* Every Day.

*L. C. J. Holt.* Did you watch with him every Day yourself.

*Mrs. Davenport.* Either myself, or this Woman, or the Servant, or my Son *Davenport*. He is now gone to Sea. My Lord, I do not tell you I kept him in the Garret all this Time.

*Mr. Serj. Jenner.* When you left him, who reliev'd you?

*Mrs. Davenport.* This Gentlewoman, or my Servant.

*Mr. Serj. Jenner.* What is that Gentlewoman's Name?

*Mrs. Walker.* *Walker.*

*She was sworn.*

*Mr. Serj. Jenner.* *Mrs. Walker*, did you watch with him in this Place?

*Mrs. Walker.* Yes.

*Mr. Serj. Jenner.* Did he eat or drink while he was there?

*Mrs. Walker.* He did neither eat nor drink.

*Mr. Conyers.* How often was it that you watch'd with him?

*Mrs. Walker.* I cannot tell whether one or two Nights.

*L. C. J. Holt.* I would be satisfied in some Things. Is that *Davenport* you speak of your Son?

*Mrs. Davenport.* Yes, my Lord. He is now gone to Sea.

*L. C. J. Holt.* How long has he been gone to Sea?

*Mrs. Davenport.* But a Week.

*Mrs. Dorman sworn.*

*Mr. Serj. Jenner.* *Mrs. Dorman*, did you watch with this Man at *Mrs. Davenport's*?

*Mrs. Dorman.* Yes.

*Mr. Serj. Jenner.* Within the seventeen Days that he was there, did he eat or drink?

*Mrs. Dorman.* No.

*Mr. Phipps.* How many Nights or Days did you watch with him?

*Mr. Serj. Jenner.* Give an Account of the Time when you watch'd with him, and no longer.

*Mrs. Dorman.* Two Nights, and every Day.

*L. C. J. Holt.* He might have eat, and you not see him, might he not?

*Mrs. Dorman.* But the Time I saw him, he did neither eat nor drink. And he made Water, and I believe five times more came from him than he took.

*Mrs. Dean sworn.*

*Mr. Serj. Jenner.* *Mrs. Dean*, do you know *Richard Hatbaway*?

*Mrs. Dean.* Yes.

*Mr. Serj. Jenner.* How long have you known him?

*Mrs. Dean.* Not till he was at *Madam Davenport's*.

*Mr. Serj. Jenner.* Was you there all the seventeen Days?

*Mrs. Dean.* Not all the Time. I sat up with him two Nights.

*Mr. Serj. Jenner.* Who sat up with you?

*Mrs. Dean.* *Madam Davenport*.

*Mr. Serj. Jenner.* While you were there, did he eat or drink?

*Mrs. Dean.* No.

*Mr. Serj. Jenner.* Call *Dr. Hamilton*. (*He was sworn*). Doctor, pray give an Account of what you know concerning this *Richard Hatbaway*.

*Dr. Hamilton.* My Lord I have very little to say upon my own personal Knowledge. But happening to be at *Sir Thomas Lane's* when he was brought before him, I heard what pass'd, and I desired *Sir Thomas* to let me try his Throat, — and I did try

it, and found nothing amiss. But at last I found there was nothing to be depended upon, for there are abundance of Legerdemain Tricks, therefore his vomiting Pins, and other Actions, were not to be trusted to; and therefore there was nothing to be depended on but his Fasting; and if you would discover whether he be an Impostor or no, he must be lock'd up in a Room for a Fortnight, and watch'd. And then I said to the Fellow's Master, for my Curiosity, If you please, I will lock him up in a Room a Fortnight, and I shall find out whether he counterfeits or no. And he came to me afterwards, and said, Doctor, you promised you would make this Trial of my Man. I did so, says I, and if I can I will. I had Thoughts of putting him in the Garret; but then I consider'd, if I should put him in the Garret by himself, he might die. But at the same time Mrs. *Davenport* happen'd to come to my House; and I said to her, I dare trust you with an Experiment, for I believe he is an Impostor; and I desired her to let me have her Garret to put him in, and she consented. And I desired her either to go herself, or send to *Long-lane*, and buy Things for him; and that she should strip him, and see that nothing may be about him to hide Bread or any thing else in; and, said I, let none come to him, and let one or two of your Family sit up with him every Night. And she promised me she would. Accordingly she bought a Bed for him and other Things, and he was sent to her; and the next Day they sent me Word that he had strange kind of Motions; but I said, there is nothing to be depended on as to these Things; but I would fain know whether he fasts or no. I have heard of many that have fasted many Weeks, but they have taken Water, or some such thing, which, tho' they are very weak things, yet may keep one alive; but none can live without taking something: And if he should live to the End of the seventeen Days without eating or drinking any thing, I should have something to take hold of. They told me—

Mr. *Serj. Jenner*. That is no matter what they told you. Did you see him afterwards?

Dr. *Hamilton*. I was mightily concerned for the poor Creature when I saw him at Sir *Thomas Lane's*; and I was willing to try him.

Mr. *Serj. Jenner*. Did you see him after that?

Dr. *Hamilton*. Yes, when he was blind for several Days. And I sent to Dr. *Martin*, and desired the Favour of him to call upon me; and I said---

Mr. *Serj. Jenner*. Did you see him after he had been at Madam *Davenport's*?

Dr. *Hamilton*. Yes.

Mr. *Serj. Jenner*. Did you see him while he was there?

Dr. *Hamilton*. Yes. The thing that I depended upon was purely his Fasting. I saw him myself several times, and I could not believe but that he had eat, because his Pulse were strong; that was one Reason that I thought he must eat.

Mr. *Serj. Jenner*. Did you see him the last Day of the Fortnight?

Dr. *Hamilton*. I was just going to Dinner when Dr. *Martin* came to me; and I said to him, Doctor *Martin*, let us try every thing: Will you go along with me to him? Says he, if I go he will fall in Passion. But after I had dined I went, and enquired about him, and they told me he had strange Motions.

Mr. *Broderick*. You say you reject every thing that of his Fasting.

Dr. *Hamilton*. Yes.

D

L. C. *J. Holt*. Doctor, do you think it is possible in Nature for a Man to fast a Fortnight?

Dr. *Hamilton*. I think not, my Lord.

L. C. *J. Holt*. Can all the Devils in Hell help a Man to fast so long?

Dr. *Hamilton*. No, my Lord, I think not; and that made me to suspect him.

Mr. *Phipps*. Do you think the Pulse of a Man can be strong when he has fasted eight Days?

Dr. *Hamilton*. I think not.

Sir *Thomas Lane* called and sworn.

Mr. *Serj. Jenner*. Sir *Thomas*, be pleased to tell my Lord and the Jury what you know of this Man.

Sir *Tho. Lane*. It was above a Twelve-month ago that his Master brought a Woman before me, upon Suspicion that she was a Witch, and that she had bewitch'd his Man; but there having been a Trial, I shall wave that. I enquired what kind of Life he had lived; and his Master said he had behaved himself very civilly, and gave him a very good Character. He told me how grievously he had been afflicted, and that he had been six or seven Months in the Hospital, and had fasted a great while, above eight Weeks, and had voided and vomited Pins; and two Witnesses swore to Chains of Hundreds of Pins that came from him in his Excrements. And it seems they had a Fancy that scratching *Sarah Morduck* would give him Relief, and they were earnest with me that I would command this Woman to be scratch'd; and I appeal to them, whether I did not refuse it. I said, if I should order this, it would be an Assault; but if she will consent, you may do it. Says she, If I may be secured for the future, I will let him. Says I, if you do it, do it in your own way; there are several here that know it was so. And she did give her Consent; and he scratch'd her, and I pull'd away her Arm from him. The Fellow had Bread and Cheese brought him; and as soon as he had scratch'd this Woman, he took the Bread and Cheese and eat prodigiously; and he had about a Quart of Drink, and he drank it up at a Gulp. I ask'd Mrs. *Morduck*, and her Friends, whether they did ever know that this Fellow had got any Money by these Tricks? No, they could not tell of any; so that there appeared to be neither Profit nor Revenge in the Case? And I thought he could not be such a Fool to pretend all this for no End, and run the Hazard of being whipp'd.

L. C. *J. Holt*. The Question is not whether he shall be punish'd for a Fool, but whether he be a Knave; whatever Punishment he may suffer, if convicted, does not belong to you to determine.

Sir *Tho. Lane*. I sent for Mr. *Martin*, and I sent for him, and I sent for the Woman, and I examined them both; and Mr. *Martin* told me he suspected the Fellow might be an Impostor, for he had got a Woman to be scratch'd for *Sarah Morduck*. And he ask'd the Woman that Mr. *Martin* had hired, and she said, in her Opinion he could see no more than a Post.

L. C. *J. Holt*. Call *Jobnson* again. This Man scratch'd you. When he had done it, did you see him afterwards?

Mrs. *Jobnson*. Yes.

L. C. *J. Holt*. Were his Eyes open?

Mrs. *Jobnson*. Yes.

L. C. *J. Holt*. But could he see?

Mrs. *Jobnson*. No. When he scratch'd me they were shut.

L. C. *J. Holt*. Every body can see when their Eyes are open.

Sir

*Sir Tho. Lane.* This Woman said, she believed he could neither see nor hear, any more than a Post.

*Dr. Martin.* It was after I was gone, I heard nothing of it.

*Sir Tho. Lane.* I sent for him after the Examination; all the Evidence that was before was of his Fasting.

*L. C. J. Holt.* *Anne Eaton,* How long did you watch with him?

*Anne Eaton.* Nine Weeks.

*L. C. J. Holt.* Was he dumb and blind so long?

*Anne Eaton.* No, my Lord.

*L. C. J. Holt.* How long did he fast?

*Anne Eaton.* Thirteen Weeks in all.

*Mr. Serj. Jenner.* Did you watch with him all the Time?

*Anne Eaton.* Sometimes by Night, but not by Day.

*Heycock Sworn.*

*Mr. Serj. Jenner.* What do you know of this Man?

*Heycock.* I saw this Man in a very dreadful Condition since the last Assizes.

*Mr. Serj. Jenner.* Where did you see him?

*Heycock.* At *Mr. Welling's*. I saw him blind and dumb, and his Eyes were ready to start out of his Head.

*Mr. Serj. Jenner.* How long since was it that you saw him thus?

*Heycock.* I saw him several times in that Condition. And I was once in Company, when there were four or five to hold him in his Bed, whereas at another time he had not half the Strength of a Man.

*L. C. J. Holt.* When was this?

*Heycock.* Since the Assizes.

*Spurling Sworn.*

*Mr. Serj. Jenner.* What did you see of this Person?

*Spurling.* I saw him at *Madam Davenport's*.

*Mr. Serj. Jenner.* How often did you see him?

*Spurling.* Three Times.

*Mr. Serj. Jenner.* Did you watch with him there?

*Spurling.* I went to see him, because I heard he was under a supernatural Power.

*L. C. J. Holt.* What do you think that was, was it an infernal Power?

*Spurling.* A diabolical Spirit.

*L. C. J. Holt.* Did you ever hear the Power of a diabolical Spirit described?

*Spurling.* But I suppose those that are under Witchcraft are under such a Spirit.

*L. C. J. Holt.* But can a diabolical Spirit enable a Man to fast forty Days?

*Spurling.* I can't tell that. I was acquainted with one that was under a supernatural Power, that was in such a Condition as this Man was.

*L. C. J. Holt.* Did he fast too?

*Spurling.* I know not that?

*L. C. J. Holt.* I never heard that the Devil ever made such a bold Attempt.

*Spurling.* That Person, the Devil, acted him so subtilly, that it was impossible to prosecute him.

*L. C. J. Holt.* How could you know that?

*Spurling.* Because when his Eyes were shut, he could tell any Man's Name that was coming up.

*L. C. J. Holt.* Was not he very well pleased to be bewitch'd?

*Spurling.* No, he was actually possessed.

*L. C. J. Holt.* Was he sick, or out of order?

*Spurling.* No, my Lord; but he had crooked Pins came from him.

*L. C. J. Holt.* Did he accuse any body of bewitching him?

*Spurling.* Yes.

*L. C. J. Holt.* What is become of that Person he accused?

*Spurling.* He accused several.

*L. C. J. Holt.* How many did he accuse?

*Spurling.* Five Women; especially one.

*L. C. J. Holt.* Where is that Woman?

*Spurling.* She is deceased.

*L. C. J. Holt.* Gentlemen of the Jury, you have heard a very long and tedious Evidence. The Information is against this *Richard Hathaway*, for that he with an evil Design to take away the Life of *Sarah Morduck*, pretended to be bewitch'd, and to have fasted for a considerable Time, being not able to take any Sustenance for divers Days; nay, for, several Weeks, which he pretended to fast. And his fasting was imputed to this Woman's bewitching him; that he did not pretend to fast a considerable Time; that he did procure this Woman to be committed for being a Witch; that she was Indicted, Tried, and Acquitted, is plainly proved to you, without all manner of Question. The only Question that you are now to try, is, whether this Man did do this by reason of any Disability of his Mind, or Delusion that was upon him; or did counterfeit (what was the Reason to induce him to counterfeit, does not appear, whether to get Money, or what else, will not be material); but if this Man was under a Delirium of his Mind, and did fancy himself to be bewitch'd, then there will be no Reason to convict him.

Now it is urged, that he did this maliciously, and with a Design to take away the Woman's Life. First they tell you, that this Man had been a Servant to one *Welling* a Blacksmith: He came to him about four or five Years ago; then he had Fits, and was put into the Hospital; and being there, he pretends he could not eat. After that, he was dumb; and after that, he began to be blind; and being blind and dumb, and fasting, these were look'd upon to be the three Tokens that he was bewitch'd. Then the Man had a fancy that he was bewitch'd by this Woman, but for what Reasons does not appear; but his Fancy appear'd to be very strong, that she brought him into these Mischiefs. Therefore he must go and scratch her; which he did, and presently he could see and eat. This was look'd on as very strange, and People concluded that this Woman was the Cause of these Maladies that were upon this Man. It seems that this scratching was thought to be so effectual, that he was well for about six Weeks; after which he appeared to be ill again, and his Sight and his Stomach were gone again, and then it was proposed he should scratch her again. It seems that before that, *Dr. Martin* was desired to come to him, and pray with him, and he did: And to try whether he was sensible or not, he took him by the Hand, and by the Signs he made, found he was sensible; and therefore he did pity his Condition, but could not tell what to make of it. But *Welling* his Master told the Doctor he had received great Benefit by scratching the Woman before; and thereupon desired she might be scratch'd again. But he suspecting this might be a mere Counterfeit, and that it could not have that Effect, he thereupon gets the Woman seemingly to consent to be scratch'd, being resolved to try whether this was

an Impostor or no. And *Hathaway* pretending himself to be blind, gave him an Opportunity to make the Experiment ; for he procured another Woman to represent *Sarab Morduck*, and she consented to be scratch'd in her stead ; *Hathaway* was laid up in a Bed, and *Sarab Morduck* was in the Room, and spake to him. It was observ'd, when this other Woman, whose Name was *Jobnson*, was brought to represent this *Morduck* to *Hathaway*, she put her Hand into his, and then he examin'd it, and her Wrist, and her Arm ; and so it seems he had some Apprehensions of a Design to impose upon him. And then he proceeds to scratch that other Woman, who takes it patiently, till the Blood was ready to come ; and then she was suddenly taken away ; and some of the Company said the Blood is come, and presently his Eyes opened, and he laid hold on *Sarab Morduck*, and seizes her, and did not only appear to see, but to speak. This is proved to you by other Evidence besides *Dr. Martin*. Upon this, says *Dr. Martin*, you are mistaken ; you have deceived the World, you have not scratch'd *Sarab Morduck*, but another Woman. When he understood that, he was very much concern'd, and seem'd to begin to be ill again ; and *Welling* said, he will not be well till he hath scratch'd the right Woman ; so to appearance he fell ill again. You have heard how the Matter had been carry'd on afterwards ; for many looked on this Blindness and Fasting as an errant Imposture. *Welling* and his Wife complained to *Dr. Martin*, saying, you have undone us all, and our Family too. What should be the meaning of that ? What, because he had discovered a Cheat, therefore they were undone. It seem'd likely, that if it were a Cheat, and *Welling* not conscious to himself of carrying it on, he need not have been concern'd at it. But they rest not here, the Woman, *Sarab Morduck*, must be scratch'd again ; which was perform'd with Violence, against her Consent ; and the Woman being pursued by the Rabble, not able to live quietly in *Southwark*, was forced to go on the other side of the Water, and take a Lodging there for her Security ; where she was again pursued, and assaulted by *Hathaway* and others, in a riotous Manner, in order to scratch her again ; and tho' Complaint on her Behalf was made of this Violence to *Sir Thomas Lane*, he did not think fit to give her any Relief, being (as it seems upon some Evidence) possessed with an Opinion that there might be some Grounds for pursuing this Woman in that manner. She was carried before him, and he being informed that this Fellow could not eat nor drink, thereupon it was thought convenient by *Sir Thomas*, in order to make a full Discovery, that she should be scratch'd again ; and accordingly she was persuaded to submit to be scratched, and presently after the scratching, *Hathaway* did eat, and drank very greedily, and thereupon this Woman was committed to Prison. This was thought a great Evidence of this Man's being bewitched by this Woman, *Sarab Morduck*. What Rule they have for it either in Philosophy or Divinity, I cannot tell. There was a Trial, and the Woman was acquitted, and upon full Evidence. He then pretended to have fasted for a long Time. That of our Saviour's fasting forty Days, is mentioned in Scripture as miraculous, and an Effect of divine Power, being one Evidence of the Truth of the Christian Religion. Who can imagine, that without such Assistance, a Man can fast forty Days, or above, and yet continue in Health ? It is not within the Compass of my Understanding to conceive it ; I must leave you

to consult your own, and to consider with yourselves, whether you have any Evidence to induce you to believe it to be in the Power of all the Witches in the World, or all the Devils in Hell, to enable a Man to fast beyond the usual Time that Nature will allow ; they cannot invert the Order of Nature : And if the Thing be impossible, and he endeavour all this while to make the World believe he has fasted so long a Time, it is most evident he is a Cheat ; for he must contrive to have some Victuals some way or other secretly convey'd to him, of which the Impossibility of his being able to fast so long is a Demonstration. But notwithstanding this Trial, and that this Woman was acquitted, yet this Matter must be carried on still. He was bailed out, and then returns to his Firs again ; and tho' then he was not blind, or pretended to be so, yet he seem'd to fast, and to be dumb again for a long Time. This made a great Hubbub about the Town, and the People clamour'd that the Man had Injustice done him in the Trial at the Assizes ; and Reports were spread, that the Woman was acquitted by Favour or Corruption both of Judge and Jury. Upon this Account, the Woman was pursued by a Rabble, and came to be in imminent Danger of her Life. Wherefore it was thought highly necessary that the Prosecution against this Man, and others concern'd with him, should be speedy ; and thereupon he was apprehended, and bound to appear in the *King's-Bench*, and there he pretended still to be dumb. His Bail deliver'd him up, and he was sent to the *Marshalsea*. There he lay without eating or speaking for some short time, till it was consider'd that if he was under any real Affliction, it was proper he should be under the Care of some proper Person : Therefore he was put to the House of *Mr. Kensy* a Chirurgion in *Fetter-Lane*, who was order'd to take care of him, and use him well ; also to watch him, and endeavour to make a Discovery of the Truth of his Condition. He was deliver'd into his Hands the first of *November* last. The People of the House took care of him, and he fasted from *Saturday* till *Monday* ; and *Mr. Kensy* asked him how many Weeks he had fasted, he counted on his Fingers twelve : But *Mr. Kensy* thought he did not deal truly, but had a mind to impose upon the World, and therefore he locks him up. He eat nothing all *Saturday* and *Sunday* : But *Mr. Kensy* found he had made Water, for he discovered the Rug or Counterpane of the Bed to be wet ; and that it appear'd to come from the Tester of the Bed : He made Water it seems in an old Box, and set it over the Bed. Drink was offered him, but he refused it. After this *Mr. Kensy* makes use of this Stratagem : He pretends to quarrel with his Maid, and gives her reproachful Language, in the hearing of *Hathaway* ; calling her Hypocrite, like unto him. At which the Maid seem'd to be provoked ; and out of Revenge, to prevent her Master's Design in making a Discovery, she takes an Opportunity and says to him, Take heed of my Master, he will betray you. And she had insinuated her self so far into him, that he began to trust her. She gave him on the *Monday* a Glass of Brandy, which he drank, and a Piece of Pudding, which he received and put into his Pocket ; and afterwards a Toast and Beer, which he eat and drank, and afterwards he entirely trusted this Woman. And Day by Day he did eat plentifully for several Days together in her Presence, from *Tuesday* to *Friday* Se'ennight following, thinking *Mr. Kensy* did not see him ; but he being in a secret Place, undiscovered by

*Hathaway*, did see him eat and drink several Days, sometimes he drank so much, that he was perfectly drunk; and all this while he pretended to fast, tho' divers others besides Mr. *Kensy* and the Maid were Witnesses to his eating and drinking. Then it was thought to be time to discover this to the World; and he was told plainly by Mr. *Kensy*, that he was discover'd, and if he would tell the Truth, he should be pardon'd, seeing he could carry it on no longer. Now it is plain this Man had counterfeited during the Time he was at Mr. *Kensy's*; tho' that particular Time be not laid in the Information, yet it is a Continuance of that Time which is laid therein.

And if he was an Impostor by pretending to have fasted while he was at Mr. *Kensy's* House, I leave you to consider whether he was not so all the while before. You hear what Management there has been, how he was at *Welling's* Home, how Pins were pretended to come from him, how they were made use of, and Charms sewed to him. You hear how some Time ago one Mr. *Bateman* came to him, hearing at the beginning of this Business, he vomited Pins: He saw some on the Ground; when he vomited a considerable Number, they were linked up together; for it is hard to manage so many loose Pins; but when they are linked together, they are the easier to manage in the Mouth. Here he pretended to vomit Pins, and would be still putting his Hands to his Pocket, and Mr. *Bateman* fancied he pulled them out from thence. Therefore he took the Chamber-pot, and would not let his Hands come near it; then he vomited no Pins there; and he search'd his Pockets, and there were great Quantities of Pins found therein; neither did he at any Time seem to vomit any Pins, until he had drank a Draught of Ale. But notwithstanding all this, there are People that come and tell you that he was sick; he was disturbed, and had these Fits. One Woman tells you she has watched with him several Times; sometimes by Night: Another Woman tells you that she watched with him, when the other did not, and sometimes by Day; and that he did not eat, but was sick, and out of Order. And another tells you, he saw him; that he was in great Disorder, threw himself backward and forward, and would turn his Face round towards his Back; and that he was blind, tho' his Eyes were open. But how could he tell that he was blind? Said he, when I pulled him by his Eye-lids, his Eyes did not stir; and therefore he infers, that he was blind. And then they give you an Account that he was in the Hospital five Months; and that he was weak, and went upon his Ancles, and had Quicksilver given him; and that he lay seven or eight Days, and did not eat; but then there was no Apprehension of Witchcraft. And one Mr. *Smith* an Apothecary, a Witness, called on his part, and a Neighbour, said, he knew him four or five Years ago; and that *Hathaway* was then with his Master, and had Fits, and would fall down, and seem to be dead; whether he was really sick, or counterfeited, he cannot tell; he applied his Cupping-glasses to him, and presently brought him to himself. This is one of his own Witnesses. And then there is Mrs. *Willoughby*; she saw him in his Master's House, and she said his Breath made a Noise like the Barking of a Dog, and she believed he was bewitched, for she herself had been bewitched, and was made to fly, and she fancies he was bewitched because of his breathing in that manner. And then they tell you what Care was taken of him, and he was put

into an empty House about nine or ten Days, and one Man watch'd with him by Day, and another by Night, and how they came to do that: And they swear they never saw him eat or drink all that time; but they say he did several Times vomit Pins in that time; but it seems he was put there merely out of Charity, the Parish would not be charged with him: Then they tell you there were People appointed to watch with him, there were two Chamber-pots; and in one there were Excrements, and there were Pins in it, and Hair, and a Piece of a Nail, but after he sat on the second Pot, there was nothing found therein; but they conclude him bewitched. Then there are others that say he lay as dead, and that they took out of his Mouth several Pins. And then you have an Account after the Trial, what happened at Mrs. *Davenport's*, where he was sent by Dr. *Hamilton* to be tried whether he was an Impostor or not. She says she watched with him herself sometimes, another Woman at other times, and another at other times, and that they could never perceive that he eat any thing. But there is one Mr. *Davenport* that was with him some other times, but he is gone to Sea, and could not appear. Then comes in at last Dr. *Hamilton*, and he tells you he was by when this Matter was brought before Sir *Thomas Lane*, and he could not tell what to think of his Fasting, but as to his Fits and the Pins, he says those may be easily counterfeited by Legerdemain Tricks, but, says he, fasting for so long, as some People did believe he did, is more than Nature can bear; no body can think the Devil has such a Power to enable a Man to undergo it. Tricks the Devil may play, but not work a Miracle, it is not to be thought that God should let him loose so far. This is the Sum of the Matter, his pretending to be dumb and blind, and to fast, and to be restored to his Speech, his Sight, and Stomach, by scratching this Woman, is fully proved. You are to consider whether he did labour under these Infirmities, or counterfeited them, and whether scratching and drawing Blood of the old Woman, could be effectual to cure him of them, if they had been real? If not, then it is a strong Argument that these Infirmities were counterfeited. His scratching and drawing Blood of a strange Woman, instead of *Sarah Morduck*, did seem to avail him, as much as if he had scratch'd her, until he understood he was imposed upon; then he seemed to relapse to his former Condition. You will remember what passed at Mr. *Kensy's*, and the Manner of vomiting of Pins as was pretended. You are to consider whether this Man was *non compos mentis*, or under a Delusion; therefore I shall spare the troubling you with more Words, but leave it wholly to you. If you do believe, upon the whole Matter, that this Man has imposed upon the Magistrate and on the World, or endeavoured by counterfeiting these Infirmities, to persuade People to believe that this Woman was a Witch, and had bewitched him, then there is all the Reason that can be, to find him guilty. But if you believe he did not counterfeit, or that he was *non compos mentis*, or under any kind of Delusions, you must acquit him.

*The Jury consulted, and without going from the Bar, brought him in Guilty.*

## A short Account of the Trial held at *Surrey Assizes*, in the Borough of *Southwark*, *March 26. 1703.*

*In an Information, against Richard Hathaway, Thomas Welling and Elizabeth his Wife, and Elizabeth Willoughby, Wife of Walter Willoughby, upon an Information for a Riot and Assault, &c.*

THE Information sets forth, That the Defendants, with divers other Persons, the 25th of *September*, in the twelfth Year of King *William*, at *Southwark*, in a riotous and unlawful Manner assembled themselves, and made a great Affray and Riot; and upon one *Sarah Morduck*, the Wife of *Edward Morduck*, being an honest Woman, and not a Witch, nor ever using Witchcraft, Inchantment, Charm, or Sorcery, did make an Assault, and under a wicked Colour, against the Law, to try whether the said *Sarah* was then a Witch (the Defendant *Hathaway* then falsely and maliciously affirming himself to be bewitched by her the said *Sarah*, though in truth he was never bewitched, and well knew himself not to be so) her the said *Sarah* did then, and there scratch, wound, &c. against the Peace, &c.

The Information further sets forth, That the said Defendants, the 11th of *February*, in the twelfth Year of King *William*, at *Southwark* aforesaid, assembling themselves together riotously and unlawfully, did then and there make a great Affray and Riot, and also assaulted the said *Sarah*, and beat, scratch'd, and wounded her, in Contempt of the King, and against the Peace, &c.

The Information further sets forth, That the said Defendants, the said 11th of *February*, did Assault the said *Sarah*, and wounded her the said *Sarah*, against the Peace, &c.

The Defendants pleaded, Not Guilty, and Issue was taken thereupon. The Council for the King opened the Case to this Effect: That the Defendant's Case was the same in the other Information. *Hathaway* pretended himself bewitch'd, and the Contrivance was carried on by the other Defendants and divers others; but whether for the Hopes of getting Money by it, or out of malice to take away the poor Woman's Life, or what the Design was, was not then known; but it was certain that several Riots and Assemblies were made, and great Numbers of People came together in a Body at several Times to *Morduck's* House, and in a violent Manner enter'd the same, and by Force took her out and carried her away to the Defendant *Welling's* House, where the Defendant *Hathaway* scratch'd her; and the other Defendants also in a very barbarous Manner beat her, pulled out her Teeth, tore her Face, Hair and Cloaths, threw her on the Ground, stamp'd upon her Belly, and threw her into the Street, where she lay as murdered, until taken into a Neighbour's House; which the Defendants and others in a riotous Manner beset, and threatened to pull it down, unless *Morduck* (the pretended Witch) was again delivered to them. These Riots and Assaults happened to be encouraged by an Accident, which fell out as *Morduck* was going through *Newgate-Market*, where the People crying out, A Witch, the Rabble seized her, and threatened to throw her into a Horse-pond; that one of these Rioters being taken away, was carried before a Magistrate in the City, but he was so far from taking notice thereof, that he de-

clared that there was Cause enough for it; and being desired to ask the Person's Name, refused it; but the same Magistrate afterwards ordered the Defendant *Hathaway* to scratch *Morduck* in his Presence, where were also present some of the Aldermen of *London*. These Matters being acted by publick Authority, gave the licentious Mob such a Confidence, that even after the Woman was tried and acquitted, and the Defendant *Hathaway* committed for an Impostor, yet he with the other Defendants, did again in a riotous manner Assault, Scratch, and Wound the said *Morduck*, and pursued her after a cruel Manner from Day to Day, till they were taken into Custody, in order to be punished for the same. For which several barbarous Facts the Defendants were then to be tried.

*Then the Council for the King called their Evidence to prove the several Branches of the Information.*

*Sarah Morduck* being called and sworn, deposed to this Effect: That in *September* last, *Richard Hathaway* came to this Informant in *Surrey*, as she was opening her Window, and being behind, scratch'd her Face in a very cruel Manner, and forc'd out one of her Teeth, and carried away her Cloaths. And upon the 11th of *February* last, *Thomas Osbourn*, *Thomas Hatton*, with four other Persons unknown, all in Disguise, came to this Informant's House in *Surrey*, and forced her out of her House, and carried her to the House of *Thomas Welling*, who is Master to the said *Richard Hathaway*; and there the said *Hathaway*, by the Encouragement of the said *Osbourn* and *Hatton*, and the rest of the Company, did again scratch this Informant in a most barbarous Manner; and afterwards *Elizabeth*, Wife to the said *Thomas Welling*, fell upon her and scratch'd her in a most cruel Manner; and tore her Face, and tore off her Head-cloaths and Hair; and then the said *Thomas Welling* gave this Informant two or three Kicks on her Belly, and threw her on the Ground and stamp'd upon her, and so much bruised her that she was forced to keep her Bed for about a Fortnight. And this Informant further deposes, That in *September* last, one *Elizabeth Willoughby*, the Wife of *Walter Willoughby*, came to this Informant's House in *Surrey*, and brought a great many Persons unknown to this Informant with her; and the said *Elizabeth* gave this Informant several Blows with her Fist, and would have pulled her out of her House, for him the aforesaid *Richard Hathaway* to have scratch'd her, he standing at a Corner hard by, but was prevented by Mrs. *Sarah Hall*. And further saith, That in the Month of *September* last she having occasion to go into *Newgate-Market*, a Boy, his Name is *John Hopkins*, called out, saying, *There goes the old Witch*; whereupon a great Company of People in a riotous Manner, flock'd about her, and threatened to throw her into a Horse-pond; and this

this Informant being got into an Ale-House by the Assistance of some Women, avoided the Fury of the Rabble, otherwise she had been Murdered, as she verily believes; and afterwards Mr. *Burrel* her Landlord, with others his Assistants came and conveyed her home.

*Sarah Hall* was the next Witness, who said, That in *September 1700*, about 8 in the Forenoon, the Defendant *Willoughby* came with *Hathaway* and others, pretending to buy Fruit of *Morduck*, and told *Morduck* she came to have her out, that *Hathaway* might scratch her; and *Willoughby* struck *Morduck* several Blows, and forced her out of Doors, before *Hall* could come to her Assistance, who with difficulty got *Morduck* into her House again; upon which the Defendants *Willoughby* and *Hathaway*, and others, beset her House and threatened to pull it down, unless they had *Morduck* deliver'd to them; but *Hall* calling up her Husband, who was a-Bed, the Person went away.

*Robert Adams*, and *John Bowrer*, both Watermen, declared, That plying for their Fair at *Mason's* Stairs, they saw the Defendant *Hathaway* come behind *Morduck* as she was opening her Window, and took her about the Neck with one Arm, and pulled her almost to the Ground, and scratch'd her Face in several Places till the Blood came, and tore her Mouth, and tore her Hood and Headcloaths from her Head; and being taken off, *Morduck* got into a Neighbour's House, whom *Hathaway* would have pursued in at a Window, had not *Adams* stop't him.

To prove the Riot and Assault in *February 1700*.

*Sarah Morduck* declared, That the 11th of *February, 1700*. *Thomas Osbourn*, *Thomas Hatton*, with four others unknown, all disguised, came to and forced her out of her House, and carried her to the House of the Defendant *Welling*, *Hathaway's* Master; where *Hathaway*, by the Encouragement of the Company, scratch'd her barbarously; and after that *Welling's* Wife scratch'd her, and tore her Hair, and Face, and pulled off her Headcloaths; then *Welling* kick'd her two or three Times on the Belly, and threw her on the Ground, and stamp'd on her, and bruised her so much, that she was forced to keep her Bed for a Fortnight,

*Mrs. Hall* said, That in *February 1700*, in the Evening, several Persons unknown came to her House, and forced *Morduck* from thence, and carried her to *Welling's* (as she was told): That about half an Hour after, *Morduck* was cast into the Street, and being received into a Neighbour's House, *Hall* went to her, and found her Face much torn, in a most barbarous Manner, and her Legs, Arms, and Body cruelly bruised and black.

Then the Council called Witnesses to prove the Third Part of the Information.

*Samuel Burrel* being sworn, deposed, That *Edmund Jones*, in Company with Two more, came to his House, and desired to speak with *Morduck*, who lodged there, who being called to *Jones*, he ask'd her to go over the Water to be scratch'd by *Hathaway*, who declared he was bewitched by her; but she refusing to go, *Jones* said, if she walked *London* he would have her scratch'd; and further, that about *Easter* or *Whitson* Week last, the said *Jones* came to his House with about fourteen Strangers, among whom was *Hathaway*, and would have forced into *Morduck's* Chamber; but a Constable coming, they

all but *Jones* dispers'd, who the Constable took, and carried before *Sir Thomas Lane*; but *Sir Thomas* would take no Notice of it.

*Thomas Knowlton* being sworn, deposed, That in *Easter* Week last, *Jones* and *Hathaway*, and several others, went into *Burrel's* House, and asked for *Sarah Morduck*, who was called down to them, when *Burrel* desired them to go up Stairs into the common Drinking-Room, and desired *Knowlton* to see *Morduck* had no Harm done her. That soon after came in about fourteen Persons, one of which said, they came to give *Hathaway* Ease, and that they would do it before they went, upon which *Morduck*, at *Knowlton's* Desire, retired into her Chamber.

*Thomas Noon* being sworn, declared, That all the Time aforesaid he saw Three or Four Persons, who were of *Jones's* Company, endeavouring to get into *Morduck's* Chamber; and upon *Noon's* asking them their Business, they cry'd they would speak with *Morduck*, but upon his threatening them they went into the Room below Stairs from whence they came.

*Henry Armstrong* declared, That in *September* was Twelve-month he saw a great Number of People following *Morduck*, calling her Witch; and going home afterwards, he saw a Crowd of People at an Alehouse Door, near *St. Paul's* Church-yard, who declared *Morduck* a Witch; and that he assisted *Burrel* in securing *Morduck* from the Rabble.

*James Hearne* being called, deposed, that in *Easter* or *Whitson* Week last, one *Jones* was apprehended for a Riot by him and others committed in *Burrel's* House, and carried before *Sir Thomas Lane*, who discharged *Jones*, saying there was Cause enough for the Riot and tho' often intreated by *Hearne*, yet *Sir Thomas* refused to let him know *Jones's* Name. And the said *Hearne* further declared, That the Day after *Jones* was carried before *Sir Thomas*, he and *Burrel*, by *Sir Thomas's* Directions, carried *Morduck* before him, where were present *Sir Owen Buckingham* and *Dr. Hamilton* and the Defendant *Hathaway*. That *Sir Thomas* would have had *Morduck* scratched by *Hathaway*, which she refused, unless she might be at Peace for the future: And after *Dr. Hamilton* had given *Hathaway* some Beer, *Sir Thomas* would have had *Morduck* scratch'd; but the Doctor said, Let her alone a little, to see what Effect the Drink would have on *Hathaway*; and said, if she was scratch'd it would be said that the Scratching, and not the Drink made the Alteration. And when *Sir Thomas* had heard some more Discourse of *Hathaway's* vomiting Pins, &c. *Sir Thomas* said again, let her be scratch'd; but *Hearne* opposed it; saying, she had been too much abused already, notwithstanding which, *Sir Thomas* ordered *Hathaway* to scratch her, and ordered her to be stript and search'd by some Women in his own House. That *Hearne* seeing *Sir Thomas's* Resolution, bid him satisfy himself. After which *Sir Thomas* committed *Morduck* to *Wood-street-Compter*, and refused 500 *l.* Bail for her Appearance: But upon Application made to him by *Dr. Barton* and *Dr. Martin*, *Sir Thomas* accepted *Hearne's* and his Brother's Bail for *Morduck*.

The Witnesses for the Defendants being called and heard, and the Right Honourable Lord Chief Justice Holt having spoken to the Jury, they withdrew, and soon after brought them all in Guilty.





CLXXVIII. *Proceedings against JAMES BOUCHER, \* Gent. at the Queen's Bench for High-Treason, February 28. 1704.*  
Hil. 2 Ann.

THE Court being set, the Prisoner was called, and the Clerk of Arraignments ordered Proclamation to be made, for the Under Sheriff of *Suffex* to return the Precept, and the Keeper of *Newgate* to bring into Court the Body of *James Boucher*. Accordingly the Precept was return'd, and the Prisoner set to the Bar.

*Clerk of Arr.* *James Boucher* hold up thy Hand. (Which he did).

Then the Grand Jury of *Suffex's* Presentments were read.

*Suffex*. ff. "THE Jurors for our Lady the Queen, upon their Oaths do present, That *James Boucher*, late of *London*, Gent. who was a Subject of the late King *William* the Third, and now Subject of *Queen Anne*, after the 11th Day of *December* 1688, viz. the first Day of *August* 1689, was in the Kingdom of *Ireland*, and after and before the Third Day of *December* 1697, viz. the first Day of *December* 1694, the said *James Boucher* did voluntarily go into the Kingdom of *France*, without Licence from the late King *William* the Third, or from the late *Queen Mary*: And that the said *James Boucher*, on the said third Day of *December* 1697, was not within the Dominions of the late King *William* the Third: And that he the said *James Boucher*, not having the Fear of God in his Heart, nor weighing the Duty of his Allegiance towards our said Lady the Queen, that now is, his Supreme, True, Legitimate, Lawful and undoubted Lady; and as a false Traitor against our said Lady *Anne*, the Queen that now is, after the 14th Day of *January* 1697, viz. the tenth Day of *December*, in the second Year of the Reign of our Lady *Anne*, the Queen that now is; did Traiterously return and come into the Kingdom of *England*, viz. at *East Bourne* in the County of *Suffex*, without Licence from the late King *William* under his Privy Seal, or from our said Lady the Queen under her Privy Seal, obtained; against the Duty of his Allegiance, and against the Form of the Statute in this Case provided, and against the Peace of our said Lady the Queen, her Crown and Dignity, &c."

*Clerk of Arr.* What sayest thou, Art thou guilty of the said Treason, whereof thou art indicted, or not guilty?

*J. Boucher.* Guilty.

*L. C. J. Holt.* What say you? Speak out.

*J. Boucher.* Guilty.

*Clerk of Arr.* *James Boucher* hold up thy Hand. (Which he did.)

Then the Second Presentment was read.

*Suffex*. ff. "THE Jurors of our Lady the Queen, upon their Oaths, present, That

"*James Boucher*, late of *London*, Gent. who was a Subject of the late King *William* the Third, and now a Subject of her present Majesty; after the 13th Day of *February* 1688, and before the 3d of *February* 1697 (viz.) the first Day of *August* 1689, was in Arms in the Service of the late King *James*, in *Europe*, viz. in the Kingdom of *Ireland*; and that the said *James Boucher*, afterwards and before the said third Day of *December* 1697 (viz.) the first Day of *December* 1694, did voluntary go into the Kingdom of *France*, and the Third Day of *December* 1697, was not within the Dominions of the late King *William*. That the said *James Boucher*, not having the Fear of God in his Heart, and not regarding the Duty of his Allegiance to our Lady the Queen, his Supreme, True, Lawful and undoubted Lady, and as a false Traytor against the said Lady the Queen, after the 14th Day of *January* 1697, viz. the 10th Day of *December*, in the second Year of the Reign of our said Lady the Queen, did Traiterously return and come into this Kingdom of *England*, viz. at *East Bourne* in the County of *Suffex*, without Licence from the late King *William* under his Privy Seal, or from our said Lady the Queen, under her Privy Seal obtain'd; against the Duty of his Allegiance, and against the Form of the Statute in this Case made and provided, and against the Peace of our said Lady the Queen, her Crown and Dignity, &c."

*Clerk of Arr.* How sayest thou, art thou Guilty of the said Treason whereof thou art indicted, or not guilty?

*J. Boucher.* Guilty.

*J. Boucher.* My Lord, I humbly beg that I may have leave to speak Two or Three Words.

*L. C. J. Holt.* What would you say?

*J. Boucher.* My Lord, I humbly beg leave to speak Two or Three Words.

*L. C. J. Holt.* Ay, let us hear what you have to say.

*J. Boucher.* My Lord, it is very well known, that I have solicited this Two Years for Leave to come over into *England*. And while I have been in *France*, I have done all that I could to subsist the *English* that were brought Prisoners to the *French* Camp, and have to my Power assisted them with Money, and other Necessaries, especially one Troop of Horse. I apply'd my self to Colonel *Lumly*, and he promised to lay my Case before the Queen. But not hearing from him, I went to his Son, and he told me he had no Opportunity to acquaint the Queen with it. Afterwards I was taken going for *Holland*, and then I sent to Colonel *Lumly*, and he promised to Remember me. And I continued still to solicit the Service of Her Majesty's Subjects, and have procured their Horses that have been taken from them, to be restored to them. I spoke to Colonel *Godfry*, and he promised to speak to—

\* See *State Trials*, vol. viii. p. 519.

who promised to make it their Interest to procure my Return. And after the Camp was over, I came over into *England* at Noon-day, with my Children, and sent up a Letter to my Lord *Nottingham* to acquaint him where I was. It's true, I followed King *James* into *Ireland*, but had no Commission, only served the Duke of *Berwick* as *Aid du Camp*. And afterwards I went into *France*, but never served there with any Commission, but as Master of the Horse to the Duke of *Berwick*. And I did hope that the Articles of *Limerick* would take off a great Part of my Offence. My Lord, I hope you will represent my Case favourably to the Queen.

Dr. *Sandys*. My Lord, I beg leave to speak a Word or two on Behalf of the Prisoner. My Lord, I solicited —

*L. C. J. Holt*. What you can say to us will signify nothing; but if you have any thing to say for the Prisoner, you must apply yourself elsewhere.

Mr. *Att. Gen.* My Lord, as it is my Duty, I demand Judgment against the Prisoner, upon his Confession of the two Indictments.

*Clerk of Arr.* *James Boucher*, thou hast been indicted on two Indictments, and confessed thyself Guilty of both. What hast thou to say why Sentence of Death should not be pronounced against thee?

*J. Boucher*. I hope your Lordship will be pleased to intercede for me to the Queen.

*Clerk of Arr.* My Lords, the Queen's Justices do strictly command all Persons to keep Silence while Judgment is giving, on Pain of Imprisonment.

*L. C. J. Holt*. Mr. *Boucher*, you are, by your own Confession, convicted of High-Treason, for which Judgment of Death is to be pronounced upon you, and which you are to suffer under those Circumstances which the Law hath appointed.

The Fact of which you were Accused, and have now Confessed, is, That since the Eleventh Day of *December*, 1688, you went into *France* without Licence either from the late King or Queen, and have returned since the Fourteenth of *January*, 1697, without any Licence under the Privy Seal, either from the late King, or her Majesty that now is; which Fact is made High-Treason by the Statute of the ninth Year of the late King.

The Wisdom and Justice in making that Law, will be very evident to any one that will but reflect upon the Posture of our Affairs at that Time: For in the Year preceding to that of the making thereof, there was an horrid Conspiracy formed from among that Party of Men who had so left the Kingdom, to assassinate the late King; to introduce a *Popish* and *French* Power, for the Subversion of the *Protestant* Religion, and the Liberties and Properties of the People of *England*: Which was managed with that Privacy, carried on with that Secrecy, that it was not discovered, nay, not so much as suspected, until it arrived to that Maturity, that it was come to the very Point of being put in Execution.

The Truth of which is very clear, as well as by the Proofs produced at the Trials of several of the Malefactors, as even by their own Confession.

In the following Year the Peace of *Ryfwick* was made, whereby the Intercourse was restored between *England* and *France*. From thence it was evident, that divers of that Party of Men would return into the Realm, and thereby have an Opportunity to revive and carry on that horrid Design, in the Success whereof they had been so disappointed; for which, no doubt, they were not a little enraged, and it could not be otherwise expected but they would make use of it: For those of the same Principles will be guilty of the same Practices.

Therefore it was necessary to make a Returning into *England* by any of those who were under these Circumstances, to be so very penal, unless they should first give Satisfaction to the Government, either of their Innocence or Repentance, and obtain a Licence and Approbation for their Return, under the Privy Seal; for their Returning in any other Manner, is a Danger to the Queen's Person, and her Kingdom.

This Treason, tho' it seems, and is new in the Form, yet it is compounded of an old Treason, known in the antient Law of the Kingdom, which is, that of adhering to the King's Enemies. For what can be thought of those who, in Time of War, shall abandon their own Country, be harboured and protected in any Enemy's Country, for being of an Interest inconsistent with, even repugnant to, that of their own?

What your Design might be in returning in this Manner, whether to revive and pursue those wicked Practices, your own Conscience is your Witness, and will be your Judge; and if that shall acquit you, it will be for your Advantage in the World to come. But you are an Offender against the Law of the Land, which hath made this your Offence to be High-Treason, and therefore that Judgment appointed for one guilty thereof must be pronounced; the Court therefore doth award, *That you be conveyed from hence to Newgate, the Prison from whence you came, and from thence you are to be drawn upon a Hurdle to Tyburn; where you are to be hanged by the Neck, and while you are alive to be cut down, your privy Members to be cut off, and your Bowels to be cut out of your Body, and burnt in your View; your Head is to be cut off, and your Body is to be divided into four Parts, and your Head and your Quarters are to be disposed as her Majesty shall appoint.* And the Lord have Mercy upon your Soul.

*Clerk of Arr.* Goaler, look to your Prisoner.

*J. Boucher*. My Lord, I beg that my Friends may have Leave to come to me.

*L. C. J. Holt*. You shall have such as is usual, and as is fitting.

*Clerk of Arr.* Take away the Prisoner.

*Accordingly he was carried back to Newgate, but was reprieved.*



CLXXIX. *The Trial of DAVID LINDSAY, at the Old-Bailey, for High-Treason. April 19. 1704. 3 Ann.*

THE Court being set, Proclamation was made.

**T** Clerk of Arr. David Lindsay, hold up your Hand (which he did). Thou standest indicted by the Name of David Lindsay of London, Gent. for that thou being a Subject of the late King William, and now a Subject of her present Majesty, after the Eleventh Day of December, 1688, viz. the 26th Day of March, 1689, was in the Kingdom of England, viz. at the Parish of St. Martins in the Fields, in the County of Middlesex; and afterwards and before the Third Day of December, 1697, viz. the First Day of October, 1696. Thou the said David Lindsay did voluntarily go into France without Licence from the late King William or the late Queen Mary; and that thou the said David Lindsay, on the said Third Day of December, 1697, was not within the Dominions of the late King William; and that thou the said David Lindsay not having the Fear of God in thy Heart, nor weighing the Duty of thy Allegiance towards our Lady the Queen that now is thy Supreme, True, Legitimate, Lawful and undoubted Lady; and as a false Traytor against our said Lady Anne, the Queen that now is, after the 14th Day of January, 1697, viz. the 10th of December, in the second Year of the Reign of our Lady the Queen, did traiterously return and come into the Kingdom of England, viz. at the Parish of St. Martins in the Fields, in the County of Middlesex, without Licence from the late King William under his Privy Seal, or from our said Lady the Queen, under her Privy Seal obtained; against the Duty of thy Allegiance, and against the Form of the Statute, and against the Peace of our Lady the Queen, her Crown and Dignity, &c.

Mr. Lindsay (taking a Paper out of his Pocket, read it to the Court). My Lord, I am very sorry I am so unfortunate as to fall under the Displeasure of the Government; and being willing to save the Court all unnecessary Trouble upon my Trial, I have therefore resolved to confess most of the Facts charged upon me in the Indictment, viz. As to my being in France, and coming into England without Licence. But I am advised that there is something so singular for my Benefit in this Case, that I beg your Lordship to hear me by Council before my Arraignment; the Council I desire, are Mr. Williams and Mr. Raymond.

\* Mr. Att. Gen. My Lord, he might have had Council assigned him before, if he had desired it.

L. C. J. Trevor. You shall have these Council assigned you which you desire.

\* Mr. Sol. Gen. My Lord, I suppose this is not desired now, with any Design to delay the Trial; the Prisoner must first plead to his Indictment.

L. C. J. Trevor. If his Council be here, we are willing to hear what they have to say.

Clerk of Arr. Call Mr. Williams and Mr. Raymond (who came into the Court).

L. C. J. Trevor. Mr. Raymond and Mr. Williams, the Prisoner here desires you may be of Council for him, and the Court have assigned you to be of Council for him accordingly.

Mr. Att. Gen. He has heard the Indictment read to him, but he has not yet pleaded to it.

Mr. Lindsay. My Lord, I desire to be heard by my Council first.

Mr. Raymond. My Lord, I apprehend Mr. Lindsay's Intention is, to give the Court as little Trouble as may be, and therefore the Facts, of which he is Guilty, and that are charged upon him in this Indictment he will confess. But, my Lord, he has been advised by his Friends, and other Council, that his Case has something particular in it, which he hopes will be for his Advantage, and desires to have the Benefit of what can be pleaded, besides Guilty or not Guilty.

L. C. J. Trevor. Is there any other Plea, that he can plead specially?

Mr. Williams. My Lord, not any that we know of; I desired him to advise with some other Persons about it; I hope he has done so. As to the Prisoner's Confessing, or pleading Not Guilty to the Indictment, it's a Matter of Prudence, and not of Law.

L. C. J. Trevor. Let him plead then.

Clerk of Arr. David Lindsay, art thou Guilty of this High-Treason, whereof thou art indicted, or not Guilty?

David Lindsay. Not Guilty.

Clerk of Arr. Culprit, how wilt thou be tried?

David Lindsay. By God and my Country.

Clerk of Arr. God send thee a good Deliverance.

Mr. Lindsay. My Lord, I have one Favour to beg, that my Wife and Children may come to me.

L. C. J. Trevor. I think he may have that Liberty, in the Presence of the Keeper, if you have nothing to object against it.

Mr. Att. Gen. My Lord, we are willing they should come to him, in the Presence of the Keeper. We will not abridge any Man of what he can reasonably and justly desire.

L. C. J. Trevor. Have you pitch'd upon any Time to appoint for the Trial?

Mr. Att. Gen. Yes, my Lord, on Monday next, if it suit the Court. He shall have a Copy of the Pannel, and all other Things that are fit for him. I suppose, my Lord, the Prisoner is now committed to the Sheriff, as is usual on these Occasions.

L. C. J. Trevor. Yes; he is committed to the Care of the Sheriff.

Clerk of Arr. Where is the Keeper of Newgate? (He appeared, and took Charge of the Prisoner. And then the Court adjourned till Monday, Nine of the Clock).

Monday, April 24, 1704.

THE Court being set, and the Pannel called over, as usual, the Prisoner making no Exceptions; the following Gentlemen were sworn upon the Jury.

|                      |                           |
|----------------------|---------------------------|
| Timothy Lenoxy, Esq; | Tho. Ellis, Esq;          |
| Richard Brown, Esq;  | Nich. Goodwin, Esq;       |
| Joseph Forey, Esq;   | Tho. Blackmore, jun. Esq; |
| Tanner Arnold, Esq;  | Will. Snelling, Esq;      |
| Arthur Bayly, Esq;   | Peter Lekeux, Esq;        |
| George Ford, Esq;    | Jo. Pack, Esq;            |

L. C. J. Holt. You, Gentlemen, that are sworn, go within the Bar.

Clerk of Arr. David Lindsay, hold up thy Hand (which he did). Gentlemen of the Jury, look upon the Prisoner, and hearken to the Charge. He stands indicted by the Name of David Lindsay, of the City of London, Gentleman, &c. as before in the Indictment. Upon which Indictment he hath been arraigned, and hath pleaded *Not Guilty*. Your Charge is, to enquire whether he be guilty of the said Treason, whereof he stands indicted. If you find him Guilty, you are to enquire what Goods and Chattels he had at that Time, or if he fled for it. But if you find him *Not Guilty*, you are to say so, and no more. And stand together, and hear your Evidence.

Mr. Morley. May it please your Lordship, and you Gentlemen of the Jury, This is an Indictment preferred against David Lindsay, the Prisoner at the Bar, for High-Treason; for that he being a Subject of the late King William, and now a Subject of her present Majesty, after the Eleventh Day of December, 1688, viz. the Twenty-sixth Day of March, 1689, was in this Kingdom of England, viz. in St. Martins in the Fields, in the County of Middlesex, and afterwards and before the Third Day of December, 1697, viz. the First Day of October, 1696, the Prisoner did voluntarily go into France, without Licence either from the late King William, or the late Queen Mary: And that the Prisoner, on the Third Day of December, 1697, was not within the Dominions of the late King William. But the Prisoner, not weighing the Duty of his Allegiance towards our Sovereign Lady the Queen, did, as a false Traitor, after the 14th Day of January, 1697, viz. the 10th Day of December, in the second Year of the Reign of her now Majesty, traiterously return and come into this Kingdom of England, viz. in the Parish of St. Martins in the Fields, in the County of Middlesex, without Licence either from the late King William under his Privy-Seal, or from her now Majesty under her Privy-Seal; and this he hath done against the Duty of his Allegiance, and against the Form of the Statute in this Case made and provided. To this Charge he hath pleaded *Not Guilty*.

If we prove him Guilty, I doubt not but you will find him so.

Mr. Lindsay. I shall give your Lordships, and the Court, as little Trouble as may be. I shall only beg Leave to state my Case truly before you, and then I shall submit to your Judgment.

L. C. J. Holt. Mr. Lindsay, if you had a mind to confess, you should have done it before; now the Jury are to enquire whether you are Guilty or not.

Mr. Lindsay. My Lord, I only desire to be heard as to the Fact.

L. C. J. Holt. You must stay till the Queen's Evidence is heard, and then you may say what you can.

Mr. Williams. My Lord, his Intentions may be as to some Things to save the Time of the Court; and perhaps to ease the Queen's Council of some Trouble.

L. C. J. Holt. Let the Queen's Council state the Evidence first, and then it may be proper for him to say what he will.

Sir T. Powis [the Queen's Serjeant]. You must either confess the Treason wherewith you are charged, or else we must proceed to prove it.

L. C. J. Holt. If you open the Evidence, then it may be he will confess; but it must be first opened.

Sir T. Powis. My Lord, there is nothing meant by us to restrain him in any thing that he has to say; all that we design is, to put him in a proper Method. It is proper that he should understand the Case. He has pleaded *Not Guilty*, and we are under a Necessity to shew what Evidence we have to prove him Guilty. My Lord, this Indictment is founded on an Act of Parliament made in the ninth Year of the late King William. And it is grounded on very good Reasons; for, as it is taken notice of in this Act, there had been a former Act made in the third and fourth Years of the Reign of the late King William and Queen Mary, by which it was made High-Treason for any to repair into France without Licence; that any one that did so, should fall under the Guilt of High-Treason. But that Act was calculated only for the Time the War lasted, and was of no longer Continuance; and there being a Peace concluded, the Preamble of this Act takes Notice, that thereby it would become necessary for the carrying on of Trade and Commerce between England and France, that there should be a Freedom of going and coming out of, and into the said Kingdoms respectively. And therefore the Act further says, That whereas several Persons who had been in Arms, or had been engaged in treasonable Practices against the King and Government, and other disaffected Persons (as all that resorted into France without Licence, during the War, were supposed to have sufficiently shewed themselves disaffected to the Government) therefore the Act goes on, and provides against the Mischiefs that might ensue; and says, If any of his Majesty's Subjects, who had voluntarily, since the Eleventh of December, 1688, gone into France without Licence, and should at any Time, after the 14th of January, 1697, return into England without Licence, that such Person, so doing, should fall under the Guilt and Penalty of High-Treason. This is the Substance of the Act upon which the Indictment is formed. Now, that which we have to charge and prove upon the Prisoner, is, That he was here in England after the 11th of December, 1688. We are ready to prove that he was here in the Beginning of March, 1689, that he went into France in October, 1696, that he afterwards returned into England in December last. We say, he went into France without Licence, and returned without Licence; and it will be his Part, if he can, to make it appear otherwise. If he does not admit these Facts, we shall call our Witnesses to prove them upon him. If they are Facts that he admits, then he may regularly proceed.

Mr. Lindsay. My Lord, may I speak now?

L. C. J. Holt. Yes, you may.

Mr. Lindsay. My Lord, I do confess, that being a Native of Scotland, and never having had any Office in England, I did go into France without his late Majesty's Licence, after the Time mentioned in the Act; and I did continue beyond Sea

Sea, till I was informed that her Majesty did, according to her usual Clemency, by her Gracious Proclamation in 170<sup>2</sup>, give a general Pardon to all her Subjects; and being desirous to take the Advantage of it, and to return to my native Country, I came into *Scotland*, where I presented myself before the Government, and had the Benefit of the Queen's Proclamation allowed me. Whereupon, my Lord, being advised by some eminent Council there, that I was as free to come into *England*, as any other Subject; and having my Wife and Children here, I came to *London* by the Way of *Berwick*. Therefore, my Lord, humbly conceiving, in these Circumstances, that I am not guilty of Treason within the Intent of this Act, I desire to be heard by my Council.

*L. C. J. Holt.* You own you went into *France* since the 11th of *December*, 1688.

*Mr. Lindsay.* Yes, my Lord.

*L. C. J. Holt.* From what Place did you go into *France*, from *England* or from *Scotland*?

*Mr. Lindsay.* From *England*.

*L. C. J. Holt.* Then he confesses the whole Fact.

*Mr. Soll. Gen.* But, my Lord, he was there before 1697.

*L. C. J. Holt.* You must agree on the Fact. He says he did go into *Scotland* within the Time mentioned in that Proclamation. And being in *Scotland*, he says, he did advise with some learned Council, and they told him he might safely come into *England*. Now, do you admit that he did go into *Scotland* on that Occasion of the Queen's Proclamation?

*Mr. Att. Gen.* My Lord, as to that Fact, we cannot admit it. There was no Licence mentioned in it, the Proclamation gives no Licence to come into *England*, only a general Pardon. What his Council will make of it, I cannot tell.

*L. C. J. Holt.* Do you expect it should be proved?

*Mr. Att. Gen.* If he will shew us the Proclamation, if it be the same that I have I will allow it.

*L. C. J. Holt.* Produce that Proclamation, look upon it, it may be you will admit it without any further Proof.

*Then the Proclamation was produced, and Mr. Attorney General looked on it.*

*Sir T. Powis.* Will they have it read?

*Mr. Att. Gen.* It may be read if they desire it.

*Mr. Williams.* My Lord, we desire it may be read.

*Sir T. Powis.* My Lord, we would not have it look'd on as a Thing of Right to be read, without further Proof.

*L. C. J. Holt.* No, that is of Grace, it is a voluntary Offer of yours.

*Mr. Att. Gen.* Then I shall not oppose the reading of it.

*L. C. J. Holt.* Then you do admit that to be the Queen's Proclamation for *Scotland*.

*Mr. Att. Gen.* Yes, my Lord.

*Mr. Williams.* I desire to know, whether they admit the Prisoner to be a Native of *Scotland*?

*Mr. Att. Gen.* We do not know that.

*L. C. J. Holt.* Then you must prove it, if you think it material.

*Sir T. Powis.* My Lord, he went from *England* into *France*, and returned from *France* into *England* again.

*L. C. J. Holt.* He must be taken for a Native of *England*, unless he can prove the contrary.

*Mr. Williams.* My Lord, shall we first read the Proclamation, or prove him a Native of *Scotland*?

*L. C. J. Holt.* Read the Proclamation first.

*[Then the Clerk read the Proclamation.]*

*A Proclamation of Indemnity.*

ANNE R.

“ ANNE by the Grace of God, Queen of  
 “ *Scotland, England, France and Ireland*,  
 “ Defender of the Faith, &c. To all and sundry our good Subjects, to whom these Presents  
 “ do or may concern, greeting. Forasmuch as it  
 “ has been, and is, our constant Resolution and  
 “ Design to establish the Peace, and promote the  
 “ Welfare of our People; not only by procuring  
 “ the equal and impartial Administration of Justice,  
 “ but also by such a Mixture of the benign  
 “ Influences of our Goodness and Clemency, as  
 “ may best compose all Distempers, and give a just  
 “ Assurance against all Fears and Jealousies: And  
 “ for that Effect, we being desirous to complete  
 “ the Indulgence that hitherto we have shewed,  
 “ and to reclaim even such Offenders as might  
 “ justly have expected the deserved Effects of our  
 “ Displeasure. And that for Time to come, we  
 “ may by a Gracious Pardon and Act of Oblivion,  
 “ establish firm Peace and Concord amongst  
 “ all our Subjects. Therefore we, of certain  
 “ Knowledge, and by Virtue of our Sovereign  
 “ Power and Authority, Pardon, Remit, Indemnify,  
 “ and for ever Acquit, all and every one  
 “ of our Subjects, of all Crimes of Perduellion,  
 “ Rebellion, *Treason*, Concealing of *Treason*, Har-  
 “ bouring, Receipt, Supplying, *Corresponding* and  
 “ Intercommuning with *Rebels*, and *Deceived*  
 “ *Enemies*, the impugning the Dignity and the  
 “ Authority of the Estates of Parliament, and all  
 “ other Kinds of *Treason* or *Lese Majesty*, whether  
 “ Common or Statutory, and of all Crimes  
 “ of *Lefing-making*, whether to us or our Subjects,  
 “ or to our Subjects of us, *Depraving* or  
 “ *Misconstruing* our Laws, or of any of our Proceedings,  
 “ or *Misrepresenting* or *Slandering* us  
 “ or our Proceedings in any Sort; and all Breaches  
 “ or Abuses of, or *Malversations* in publick Trusts,  
 “ with all other Crimes, *Delinquencies* or *Transgressions*  
 “ of whatsoever Nature or Quality, committed,  
 “ acted or done by any of Her Subjects  
 “ by Word or Writ, or incurred by any other  
 “ Act either by Commission or Omission, preceding  
 “ the Date of these Presents, and which directly  
 “ or indirectly are, or may import the  
 “ *Contravention* of any Law or Act of Parliament,  
 “ Custom or Constitution of that our  
 “ antient Kingdom; and that in so far as the  
 “ same may infer any Pain or Punishment against  
 “ any of our Subjects, either in their Lives, Fortunes,  
 “ Estates, Fame or Reputation. All which  
 “ we by Virtue of our Royal Power and Authority  
 “ aforesaid, Will, Declare and Ordain to be  
 “ hereby Pardoned, Acquitted and Indemnified,  
 “ and put in perpetual Oblivion; and that this  
 “ General Pardon and Indemnity shall be as valid  
 “ and effectual to all our Subjects for their Exoneration  
 “ and Discharge of all Pains and Punishments,  
 “ as if every particular Crime, Offence, Delinquency  
 “ or Misdemeanor were here set down, and as if Remissions,  
 “ under our Great Seal were past and granted for the same,  
 “ wherewith we for Ourselves and Successors dispense for ever.  
 “ Like as we hereby Prohibit and Discharge

“ charge any of our Ministers or Judges to call in  
 “ Question, or proceed against any of our said  
 “ Subjects for the said Crimes, and their Crimes  
 “ and Punishments in any Time coming; *Declaring*  
 “ *and Ordaining this our general Pardon and*  
 “ *Indemnity to be interpreted and understood in the*  
 “ *most benign, favourable and comprehensive Sense the*  
 “ *same can admit, for the Security of our Subjects.*  
 “ Excepting always forth and from this general  
 “ Pardon and Indemnity, all *Fore-faulters,*  
 “ and Sentences, and Dooms thereof, and all pec-  
 “ unial Fines and Unlaws already paid or trans-  
 “ acted; and but prejudice to us, or these com-  
 “ mitted by us, to call all Collectors and other  
 “ Intrmitters with publick Money, to give Ac-  
 “ count of their Intermiſſions, and to make Pay-  
 “ ment of what shall be found due by their  
 “ Intermiſſions. And farther excepting, all Man-  
 “ slaughters, Murders, Assassinations, Witchcrafts,  
 “ Fire, Raifings, Depredations, Robberies, Rapes,  
 “ Spulzies, Thefts, House-breakings, Mutilations,  
 “ Adulteries, Blasphemies, and Delinquences of  
 “ Immorality. All which Crimes, and those  
 “ guilty thereof, are no ways to be comprehended  
 “ in, or have any Benefit by this our Pardon and  
 “ Indemnity as the said Crimes excepted. And  
 “ lastly, to the end all our good Subjects may have  
 “ Notice of our Royal Will and Pleasure, we do  
 “ hereby command our Lion King at Arms, and  
 “ his Brethren, Heralds, Pursivants, and Messen-  
 “ gers at Arms, to make due Publication hereof at  
 “ the Market-Croſs of *Edinburgh*; for all which  
 “ these Presents shall be a sufficient Warrant.”  
 Given at our Court at *St. James's*, March 16th,  
 1703, and of our Reign the second Year.

By her Majesty's Command.

Queensberry.

GOD save the QUEEN.

Mr. Raymond. Look on the Backside.

Mr. Att. Gen. What is that?

Mr. Raymond. A Certificate from the Duke of  
*Queensberry*, Secretary of State of *Scotland*, that it  
 is a true Copy.

Mr. Att. Gen. We admit it.

Mr. Williams. Then, my Lord, it is insisted on  
 that we should prove the Prisoner a Native of *Scot-*  
*land*.

Mr. Att. Gen. If you think it material, you  
 may prove it.

L. C. J. Holt. They did think it material, and  
 therefore made it part of their Case.

Mr. Williams. Call *James Grey*, Esq; (*who ap-*  
*peared, and was sworn*.) Sir, do you know the Pri-  
 soner at the Bar?

J. Grey. Yes.

Mr. Williams. What Countryman is he?

J. Grey. Always reputed of *Scotland*. I have known  
 him this 20 Years, and he was always reputed so.

L. C. J. Holt. Have you known him 20 Years  
 in *England*?

J. Grey. Yes, my Lord, in *England*; not in  
*Scotland*.

Mr. Soll. Gen. Have you had any Correspond-  
 ence with him?

J. Grey. No, Sir, no great Correspondence.  
 In King *James's* Time he was Secretary to the  
 Lord *Melfort*.

Mr. Williams. What Countryman was he reputed  
 then?

J. Grey. A *Scotchman*.

L. C. J. Holt. Did you know his Family?

J. Grey. No, I have been always in *England*;  
 I did not know his Family.

Mr. Williams. We have another Evidence.

L. C. J. Holt. You must bring better Proof than  
 this, or else it will not do.

Mr. Williams. Call Mr. *Trumbal* (*who appeared,*  
*and was sworn*). Mr. *Trumbal*, do you know the  
 Prisoner at the Bar?

*Trumbal*. Yes.

Mr. Williams. How long have you known him?

*Trumbal*. I have known him this twenty Years.

Mr. Williams. What Countryman did you al-  
 ways reckon him?

*Trumbal*. A *Scotchman*.

L. C. J. Holt. How do you know that?

*Trumbal*. He has always been reputed so. He  
 dealt in Wine with one that I knew, and so I came  
 to know him.

Mr. Williams. Did you know him in *Scotland*?

*Trumbal*. No.

Mr. Att. Gen. Have you known him any where  
 but in *England*?

*Trumbal*. No; but he has been reputed a *Scotch-*  
*man*, that dealt in Wine. He had always the Re-  
 pute of an honest Man.

Mr. Williams. Call *Charles Canair* (*who ap-*  
*peared*).

Mr. Att. Gen. You should bring your Witnesses  
 into the Court. What is your Name, Sir?

Mr. Canair. *Charles Canair*.

Mr. Williams. How long have you known the  
 Prisoner?

Mr. Canair. Ever since I was a Child.

Mr. Williams. Where did you know him?

Mr. Canair. In *Scotland*. I remember him from  
 a Child.

L. C. J. Holt. And you knew him to be a Na-  
 tive of *Scotland*?

Mr. Canair. Yes, my Lord, of *Dundee* in *Scotland*.

L. C. J. Holt. Did you know any of his Re-  
 lations?

Mr. Canair. Yes, my Lord; his Father was of  
*Dundee* in *Scotland*.

Mr. Williams. My Lord, we have something  
 farther to prove.

L. C. J. Holt. What is it?

Mr. Williams. That the Prisoner was allowed the  
 Benefit of this Proclamation in *Scotland*; and we  
 beg leave to say, this Fact which is now charged  
 against him is already pardoned.

Mr. Att. Gen. That Pardon has Influence in  
*Scotland*, not in *England*.

Mr. Williams. Then you admit also that the Pri-  
 soner had the Benefit of this Proclamation allowed  
 him in *Scotland*.

Mr. Att. Gen. I know nothing of that.

L. C. J. Holt. Now go on and state your Case.

Mr. Williams. My Lord, Mr. *Attorney General*  
 is not pleased to admit we had the Benefit of the  
 Proclamation allowed us in *Scotland*.

Mr. Att. Gen. They insist on what I know no-  
 thing of; if they think they can have any Benefit by  
 it, they may prove it.

Mr. Raymond. We have done our Endeavour  
 to have the Secretary of State of *Scotland* appear  
 here, but I don't know whether he has done us  
 the Favour. We have the Certificate under his  
 Hand.

L. C. J. Holt. Is it the same Hand?

Mr. Att. Gen. My Lord, he asserts that Certifi-  
 cate, but we know not whether it be true.

L. C. J. Holt,

*L. C. J. Holt.* Then that must be proved.

*Mr. Raymond.* Call *Thomas Bruce, Esq;* (*who appeared, and was sworn*). *Mr. Bruce*, do you know the Prisoner, and whether he had Benefit of the Pardon in *Scotland*?

*Mr. Bruce.* I know very little of him. I know he was at *Edinburgh* last Summer, and was under Confinement there, and under Examination several Times; but after some Days he was at Liberty again. That's all that I know.

*Mr. Raymond.* Was he not at Liberty by leave of the Government?

*Mr. Bruce.* It was so believed.

*Mr. Att. Gen.* Can you tell when he came back to *Scotland*?

*Mr. Bruce.* No, Sir. He was in Custody about *July* last.

*Mr. Att. Gen.* Can you be particular to the Time? Was it in *June* or *July*?

*Mr. Bruce.* I can't be positive; it was in the Time when the Parliament sat. I never was in his Company.

*Mr. Raymond.* Call *Mr. Southberland*.

*Mr. Att. Gen.* I know not why we should trouble the Court with this. What signifies the Pardon?

*L. C. J. Holt.* Let them make what Use they can of it.

*Mr. Att. Gen.* Sir, what is your Name?

*Mr. Southberland.* *Southberland*.

*Mr. Raymond.* Do you know any thing of the Prisoner's having any Benefit allow'd him of the *Scotch Pardon*?

*Mr. Southberland.* I heard he had surrendered to the Government.

*Mr. Raymond.* Was he discharged by the Government?

*Mr. Southberland.* Yes, it was generally reported so.

*Mr. Att. Gen.* What Time was that, Sir?

*Mr. Southberland.* In *June* or *July* last Summer.

*Mr. Att. Gen.* Was he there the 27th of *July*, or before?

*Mr. Southberland.* I cannot be positive.

*Mr. Raymond.* Call *Dr. Hutton* (*who appeared*). Doctor, what do you know of the Prisoner's having the Benefit of the *Scotch Pardon*, and its being allowed him by the Government?

*Dr. Hutton.* I was, in *September*, at *Edinburgh*, and there I saw *Mr. Lindsay* at the *Queen's-Head*, with the *Attorney General*. He had been examined about some Letters (as I heard say) that had been directed to him. And there I heard *Sir John Stuart* tell him, the Council had set him free. And I met him afterwards at Liberty, and it was done upon the Proclamation of Indemnity.

*Mr. Williams.* What Religion is he reputed of?

*Dr. Hutton.* I know not that. But I have known him six and twenty Years, and I heard him tell *Sir James Stuart* (who asked him why he came away from *France*) because he would not be a Papist, and he said, he had rather go to the Gallows than return again.

*Mr. Williams.* What is his Temper? Is he a quiet Man in relation to the Government; or of a turbulent Temper?

*Dr. Hutton.* I have always known him a fair, peaceable, friendly Man.

*Mr. Raymond.* Doctor, I would ask you one Question; whether you have any Law in *Scotland* that prohibits going into *France*?

*Dr. Hutton.* I do not know. I know several Persons that came from *France* to *Scotland*.

*Mr. Att. Gen.* Doctor, you give him a fair Character. Can you tell in whose Service he was in *France*?

*Dr. Hutton.* No, Sir; I cannot.

*Mr. Att. Gen.* What was his Affection towards the Government?

*Dr. Hutton.* I know nothing of that.

*Mr. Soll. Gen.* When did he return into *Scotland*; was it before or after the 27th of *July*?

*Dr. Hutton.* I do not know.

*Mr. Raymond.* He came into *England* in *September* last, after he had his Pardon. We say he came through *Northumberland*, and other Places hither, and in this County he was taken.

*Mr. Lindsay.* I was taken no where, but surrendered myself to *Sir Charles Hedges*.

*Mr. Williams.* The Fact is, that he came from *Scotland* through *Northumberland*, &c. and so into *Middlesex*, and surrendered himself; so that *Northumberland* was the first County of *England* that the Prisoner came into, after his leaving *Scotland*; and so that the Treason, if any, was committed there, and we insist that the Arraignment and Trial ought to be there.

*L. C. J. Holt.* If you insist upon it, that the Treason committed was in *Northumberland*, then you must prove it.

*Mr. Williams.* My Lord, with Submission, tho' the Fact being that *Northumberland* was the first County of *England* that we came into, yet it may be difficult to us to prove it; but with Submission, it may not be absolutely necessary for us to prove, that *Northumberland* was the first County, in regard that your Lordship will take notice that *Middlesex* cannot be the first County, it being impossible to come from *Scotland* into *Middlesex*, without being in other Counties before; and the Indictment ought to have been in the first County of *England* he came into.

*Mr. Att. Gen.* My Lord, we indict him where we find him.

*Mr. Raymond.* We can prove that he came first to *Berwick*, then through *Northumberland*, before he came into *Middlesex*.

*L. C. J. Holt.* If you can, do.

*Mr. Raymond.* *Dr. Hutton*, do you know where he came first into *England*, and which Way he came hither?

*Dr. Hutton.* No, indeed; I have heard that he came through *Northumberland*, &c.

*Mr. Raymond.* Did you lend him your Horse?

*Dr. Hutton.* No, Sir; but a Friend of mine did lend him his Horse.

*Mr. Raymond.* Where does your Friend live?

*Dr. Hutton.* At *Edinburgh*.

*Mr. Raymond.* Did he come hither on that Horse?

*Dr. Hutton.* That I know not. He was left there by a Friend of mine, to be sent into *England* with the first Opportunity, and so he sent him by *Mr. Lindsay*.

*Mr. Raymond.* Did he make use of that Horse all the Way?

*Dr. Hutton.* I know not that.

*Mr. Williams.* My Lord, I am, by your Lordship's Permission, of Council for the Prisoner: And I hope this free and ingenuous Confession, which he has now made at the Bar, being the very same which he before made at his Arraignment; and being the very same Confession which he made before the Secretary of State, and others, before

before whom the Prisoner was examined, will be taken and weighed by the Court as a good Argument of the Sincerity of this unfortunate Gentleman; and that he designs in his Trial to put your Lordship to as little Trouble as possible. My Lord, It has been proved that he is a Native of *Scotland*, and he always has been of the *Protestant* Religion. He has been indeed in *France*, but finding he could not enjoy his Religion there, he was resolved by the first Opportunity to endeavour to gain a Licence from the Government for his Return into his own Country. In the mean time comes out Her Majesty's Gracious Proclamation of Indemnity. That Proclamation was proclaimed in a publick Manner, by all Her Majesty's Heralds, at the Market-Cross at *Edinburgh*, and it has very extensive Words in it, pardoning all Treasons, Felonies, &c. all Crimes and Misdemeanors whatsoever. My Lord, in Confidence of this Her Majesty's Royal Proclamation, we came from *France* to *Scotland*, and there claimed, and were allowed by that Government, the Benefit of the Queen's Mercy. Afterwards having been advised by the most eminent Advocates and Council of *Scotland*, that by this Proclamation we were rendred in every Respect as a free Subject, and might with Safety come from thence to *England*; we accordingly came from thence hither; but all this while we paid all the due Submission and Regard that could be, as well to the Law as to the Government; for we came from *France* unto the *Hague*, and we there attended upon Her Majesty's Envoy, Mr. *Stanhope*, and acquainted him with our Intentions of returning home. Immediately upon our Return into *Scotland*, we voluntarily came before the Chief Commissioner and Magistrates there; who, upon our Claim, were pleased, at length, to allow us the Benefit of Her Majesty's Royal Proclamation and Pardon. And when we were in *England*, on the first Notice of a Warrant out against us, we, of our own Accord, waited on the Secretary of State, Sir *Charles Hedges*, and he happening not to be then at Leisure, we voluntarily attended upon him a second and a third time; and upon our third Attendance we were committed. And now, my Lord, we stand indicted before your Lordship for the greatest of Crimes, *High-Treason*. My Lord, as to the Statute upon which we were indicted, tho' some Part of it, without doubt, was not only very reasonable, but absolutely necessary, I mean that Part of it which was for the Preservation of his late Majesty's Person and Government; but as to that Part of it upon which we are indicted, it seems, with great Submission, a severe Law. That the bare returning into our native Country, when we before were convicted of no Crime, or guilty, at most, but of a bare Contempt, in going out of the Queen's Dominions without Licence, that this should be made High-Treason, this, with Submission, is somewhat severe: So that in respect of the Severity of this Law, besides the common Arguments of its being a Penal Law, your Lordship will be the rather induced to admit of the most favourable and merciful Construction to every Part and Clause of this Act, that it will bear. My Lord, we do humbly insist on the Words of the Proclamation; and we take it, that those Words do amount to a Licence to us to come into *Scotland*: And if so, then we are not guilty within this Act of Parliament, of coming to the Queen's Dominions without Licence. And we likewise further insist, that one that has the Queen's Licence to come into *Scotland*, may, without any further Licence, come into *England*—

beg your Lordship's Leave to read that Part of the Proclamation, which we chiefly insist on. The Proclamation pardons all Treasons, and all corresponding and intercommuning with Rebels, or declared Enemies of the Queen. My Lord, it pardons all other Crimes, of what Nature soever. It pardons any Act, that may infer any Pain or Punishment, on the Lives or Estates of Her Majesty's Subjects. And it is declared to be as available to all Subjects, to pardon them all Crimes, as if the particular Crime were named, and as if Remissions under the Great Seal were pass'd. And then Her Majesty declares, That this shall be taken in the most favourable and comprehensive Sense that may be, for the Security of the Subject. Now, my Lord, taking this Proclamation in the most favourable and extensive Sense, in favour of the Prisoner; which Her Majesty has been pleased expressly to direct it should; with Submission, I take it, it will amount to a Licence from Her Majesty, to return from *France* to *Scotland*: And we humbly take it, that if the Prisoner did by Licence come from *France* to *Scotland*, that he afterwards coming from *Scotland* into *England*, is not within the Act.

My Lord, I would beg Leave to consider what it was that hinder'd the Prisoner from returning from *France* to *Scotland*: Sure it was his going to *France* without Licence. Then when Her Majesty is graciously pleased to pardon this Offence, we take it, that Her Majesty, by removing the Obstacle, does by necessary Implication give Leave to the Prisoner to return to *Scotland* again. Her Majesty is pleased, with Submission, plainly to give him this Leave, by taking off that that hinder'd his coming. That Parliament plainly did take it, and have been pleased to declare it an Offence, to go into *France* without Licence; and have therefore been pleased to punish that Offence with a temporary Banishment: But when that Offence is pardoned, when that Banishment is remitted, then the Prisoner seems at Liberty to return home: And that Liberty being given by the Queen's Proclamation, this, with Submission, amounts to a Licence from the Queen, for the Prisoner's returning home. My Lord, there are many Instances, wherein the King or Queen's Grants or Pardons shall have a double Operation, for the Benefit of the Persons upon whom they are bestowed. But these Cases, as I humbly conceive, not immediately relating to this Point now before your Lordship, I shall not trouble your Lordship with citing them. My Lord, if we, when in *France*, had been guilty of more than what is charged upon us in the Indictment; I mean, had we corresponded, or adher'd to the Queen's declared Enemies; still the express Words of the Proclamation seem plainly to extend to us, when it pardons all corresponding and intercommuning with the Queen's declared Enemies, which the *French* then were, and now are. My Lord, If this Proclamation could in any Part of it bear two Constructions (the one making for the Prisoner, the other against him) the Queen has been pleased to determine in what Sense it shall be taken; in the most beneficial manner for the offending Subject. But, with humble Submission, would this be observing of Her Majesty's Gracious Directions; instead of allowing to the Prisoner the Benefit of this Proclamation, to make his very coming to *Scotland*, to claim the Benefit of it, and humbly to lay hold of Her Majesty's Mercy; to make this very Act to amount to a Crime; to make it the greatest of Crimes, High-Treason? This surely would be the very Reverse of Her Majesty's most



Gracious Intentions: And yet this, with Submission, would be the Consequence, if the Prisoner's coming from *France* into *Scotland* should be construed to be Treason. My Lord, I admit the Words of this Act are, If any return into *England*, or any other of Her Majesty's Dominions, without a Licence under the Privy-Seal, it shall be High-Treason.

Sir *T. Powis*. But this is not a Licence under the Privy-Seal.

Mr. *Att. Gen.* The Great Seal of *Scotland* will not vacate an *English* Act.

Mr. *Williams*. Now we humbly take it, if the Queen is pleased to bestow her Licence by any Act, or in any manner equally notorious with her Privy-Seal, 'tis sufficient, and within the Meaning and Equity of the Statute. And this Proclamation made by all the Heralds at Arms, at the most publick Place in *Edinburgh*, is as notorious, nay, much more notorious and publick, than a Licence under the Privy-Seal only; and therefore within the meaning of this Act. Besides, the very Words of the Proclamation are, That it shall be in every Respect as valid and effectual, as if it were under the Great Seal: And if under the Great Seal, surely it must be at least as strong, as if under the Privy Seal. Besides, the Statute does not say, that the Licence must be under the Privy-Seal of *England*. The Words of the Act are, If any return into *England*, or any other of Her Majesty's Dominions, without Licence under the Privy-Seal, without saying of what Kingdom. Now, with Submission, it not being said what Privy-Seal, or of what Kingdom; it must be intended, according to the Subject-matter, the Seal of that Kingdom or Dominion where the Licence is granted; and that being *Scotland*, the Licence under the Great Seal of *Scotland*, is sufficient: For it seems improper, that the Seal of one Kingdom should be made use of, to license an Act in another Kingdom. Now, if a Licence under the great Seal of *Scotland* be sufficient, this Proclamation declares, that it shall be as valid as if 'twere under the Great Seal: And it can't be deny'd, as I have said, but a Licence under the Great Seal must be equivalent with a Licence under the Privy-Seal. Besides, the Queen's Proclamation does not mention what Great Seal, or of what Kingdom; and so it may be intended, that Great Seal that would be most beneficial to the Prisoner; taking it in its most favourable Sense, as Her Majesty is pleased to direct it should be.

But 'twill be said, That taking this to be a Licence, this is only a Licence to come into *Scotland*; but the Prisoner is indicted for coming into *England* without Licence. But we take it, If we had a Licence to come into any one of the Queen's Dominions, and we first came into that Dominion with this Licence; we can't then be guilty of Treason within this Act. The Words of the Act make it Treason to come into *England*, or any other of the Queen's Dominions without Licence; so 'tis the same thing as if it said, that it should be Treason to come into the Queen's Dominions without Licence. Then if one comes into *Scotland* with Licence, *Scotland* being one of the Queen's Dominions, the Prisoner can't be said to come into the Queen's Dominions without Licence; so that by this Licence the Prisoner is wholly out of the Act. This Act, with Submission, must operate and take its Effect upon the first Step made from *France* into any of the Queen's Dominions; so that if the Prisoner be guilty of High-Treason within the Act, it must be when

he made his first Step from *France* into *Scotland*: But that being made lawful, by the Proclamation amounting (as we say) to a Licence; it can't be afterwards Treason, for the Prisoner to come into *England*. Take it, that the Prisoner had had Her Majesty's Licence to come from *France* into *England*; and accordingly the Prisoner comes into *England*, and afterwards goes into *Scotland*; had this been Treason? Surely not. Take it, that a Man within this Act returns from *France* into *England* without Licence, and is pardoned, and he afterwards goes into *Scotland*; would this have been a new Treason, for which the Man that was before pardoned must lose his Life? We humbly take it, that it would not.

Besides, with Submission, this Proclamation amounts to a Pardon of the Treason, tho' it be before the Prisoner return'd to any of the Queen's Dominions. And if it appears to your Lordship, that the Prisoner is pardon'd, tho' we have not pleaded it, your Lordship will not be pleas'd to suffer the greatest Punishments to be inflict'd on any that your Lordship perceives are entitl'd to Her Majesty's Mercy, or on any that are so much as within Her Majesty's Intentions of being pardon'd. Besides, another Consequence of the Prisoner's being pardon'd, is, That then if he be pardon'd, he is a free Subject, and has Liberty to go any where, and into any of the Queen's Dominions. My Lord, as to this Point, whether the Treason be pardon'd, 'tis necessary, with humble Submission, to consider what makes this Treason. 'Tis the going into *France* without Licence, and returning home without Licence: 'Tis both joined together make the Treason; and the one without the other does not make the Treason. Had not the Prisoner gone into *France* without Licence, his returning without Licence would not have amounted to Treason: So that the going into *France*, is the Foundation of the Treason. And I humbly take it, that this Act of Parliament has made the bare going into *France* without Licence, an Offence; and has punish'd it as such, by Banishment during the Queen's Pleasure: So that the Prisoner, from the Time he went into *France* without Licence, was an Offender, and consequently capable of a Pardon. So, with Submission, 'tis plain, there was some things on which the Pardon might operate, tho' the Pardon was before the Prisoner's landing in *Scotland*; then taking it, that the Prisoner's going into *France* without Licence was an Offence, and the original Foundation of the Treason: This original Offence is, with Submission, pardon'd by the Proclamation, by the Pardon of all Crimes and Misdemeanors, of what Nature soever. And if the original Offence be pardon'd, all the Consequences, all the Dependences upon that Offence, all that ensues upon that Offence are, with Submission, at the same Time pardon'd. This, my Lord, seems to be proved by *Cole's Case*, *Plowd.* 401. where, after one had feloniously wounded another, then comes a Pardon of all Crimes and Misdemeanors; and afterwards the Party wounded dies. The original Misdemeanor being pardon'd, all that ensues upon it is pardon'd; and consequently the Murder is pardon'd, by the Pardon only of all Misdemeanors. Now in our Case 'tis plain, the original Offence is going into *France* without Licence; and that being pardon'd, all that ensues that Offence, all the Dependences upon that Offence, according to the express Words of that Case, are pardon'd also: And therefore, the returning into the Queen's Dominions without Licence, being only

only a Consequent and a Dependent upon the going into *France* without Licence; is pardon'd also. Besides, my Lord, so favourable a Construction does the Law make upon Acts of Mercy, that when the Crown pardons any Crime, the Pardon restores the Man in such a manner, as if the Offence had never been committed. And consequently, after this Pardon, 'tis the same Thing as if the Prisoner had never gone into *France* without Licence: And if the Prisoner had never gone into *France* without Licence, 'tis plain his coming home without Licence would not have been Treason.

In *Hob. 81. Cuddington v. Wilkins*, If a Man commits a Theft, and is pardon'd, it afterwards he is called Thief, an Action lies, tho' he is called so by one that had no Notice of the Pardon; for that after the Pardon, 'tis as if he had never been guilty of Theft. There is likewise another Case put there, which seems much stronger than the Prisoner's Case; which is this: If an Appeal of Felony be brought against a Man, and the Defendant prays Trial by Battle; the Plaintiff counterpleads the Battle, by saying, that the Defendant, when committed to Prison for his Felony, broke the Prison, and so escaped (which is a Presumption of Guilt) and so takes off the Trial by Battle; yet 'tis adjudged, that when the King pardons the Breach of Prison, this restores the Defendant to his Trial by Battle, and 'tis then as if the Defendant had not broken the Prison at all. Yet in this Case it might have been objected, That tho' the King has pardon'd the Breach of Prison, tho' the Prosecution or Punishment for Breach of Prison is pardon'd; yet the collateral Effect of it, which is the Presumption of Guilt upon the Party's Flight, might remain; especially as to the Appellant, whose Suit (according to the general Rule) the King's Pardon can't influence. Yet here 'tis adjudg'd, that even as to the Appellant, the King's Pardon of the Breach of Prison, makes it as if the Party had never been guilty of it. Now this is stronger than the Prisoner's Case: For in the Prisoner's Case, the Queen's Pardon is only made use of, to prevent her own Prosecution, and not the Suit of any Appellant. Therefore in the present Case, the Proclamation pardoning all Misdemeanors, pardons the Offence of going into *France* without Licence: And that being pardon'd, 'tis as if the Prisoner had never gone into *France* without Licence; and without this, the bare Return without Licence will not amount to Treason. So that, with Submission, we take this Proclamation to be a Licence to the Prisoner to return into the Queen's Dominions. Nay, we take it to be a Pardon even of the Treason of which he stands indicted.

Besides, I would humbly beg Leave to offer to your Lordship's Consideration, whether a *Scotchman*, that was not in *England* at the Time of the making of this Act of Parliament, be within the Meaning of this Act. The Act says, If any of his Majesty's Subjects shall go into *France* without Licence, if he return without Licence, 'tis Treason. I don't pretend to call in question *Calvin's* Case, which was (at that Time at least) a very convenient Resolution. I don't deny, but a Natural-born Subject of *Scotland* is, as to many Purposes, a natural-born Subject of *England*. But whether (upon the Construction of so very penal a Law as this is) a *Scotchman* is within the Meaning of this Law, is the only Question. Now, with Submission, when the Act says, If any of his Majesty's Subjects shall go into *France* without Licence, this (according to a reasonable Construction) shall be intended only of

*English* Subjects, strictly speaking, that is, those of *England*; it must be intended only of such of His Majesty's Subjects, who were represented by the Parliament that made this Law, and who are presumed to consent to the making of this Law; 'tis these Subjects only that may reasonably be supposed to have Notice of this Law, and therefore 'tis reasonable that they only should be bound by it; especially in the Case of so severe a Law, where a Man's Life, Estate, and all that is dear to a Man is at Stake. There may be a great deal of Difference betwixt an Act of Parliament that punishes a Fact that was before *Malum in se*, and an Act which makes that an Offence which was before lawful: Every one of any Nation is, at his Peril, to abstain from committing any Act that is *Malum in se*; and if he he commits such an Act in any Country, he seems subject to be punish'd according to the Laws of that Country where the Fact was committed. But going into *France*, or any Place beyond Sea, without Licence, seems only *Malum Prohibitum* by this Statute: And therefore when the Act says, If any of his Majesty's Subjects who went into *France* without Licence, shall return without Licence, shall be deem'd guilty of Treason; it shall be intended only of those of *England*; such Subjects as either by themselves, or their Representatives, were consenting to the making of this Law. Therefore I humbly beg Leave to put the Case; That if one of Her Majesty's Subjects of her remote Plantations (as *Barbadoes*, or *Antego*) that was resident there at the Time of the making this Law, should have since the Year 1688, gone into *France* on any private or particular Account, without Licence; and afterwards should come into *England*; would this Subject (who, in all Probability, knew nothing of the making of this Law) be guilty of High-Treason, for coming into *England*? Surely this would be excessively hard. Then if one resident at *Barbadoes*, or *Antego*, at the Time of the making of this Act, should not be within this Law; much less shall a *Scotchman* be within it, in regard *Scotland* is a separate Kingdom, that can't be bound by our Acts of Parliament; whereas any of the foreign Plantations are plainly liable to be bound by *English* Acts of Parliament.

Besides, there is another Reason from the very Words of the Act, why a *Scotchman* that was not resident in *England*, at the Time of the making this Law, can't be intended within the Meaning of the Act: and that is not only because the Act mentions nothing of *Scotland*; but because the Words of the Act are, If any of his Majesty's Subjects who went into *France* without Licence, shall return into *England*, or any other of His Majesty's Dominions, without Licence, 'tis Treason. Now the Word (Return) must plainly have Relation only to that Country where the Party was resident at the making of the Law, or to the Country that he left at the Time of his going towards *France*. But it does not appear that the Prisoner, who is a *Scotchman*, was in *England* at the making the Act; and he having been proved to be a Native of *Scotland*, must be intended to be then in *Scotland*, unless proved to be elsewhere: And therefore the Prisoner's coming into *England* can never be within the Meaning of the Word *Returning into England*, any more than a Man can be said to return to a Place where he was not before.

There is another Objection (because I will give Mr. *Attorney* only one Trouble) and that is, That this Indictment (or Trial) can't in this Case be in

*Middlesex*, but must be in that County where the Prisoner first came after his leaving *France*; which really was *Northumberland*, as he came from *Scotland*; or at least your Lordship will take notice, that it can't be *Middlesex*. 'Tis a known Rule, that all Indictments and Trials for Treasons and all other Crimes, must be in the County where the Treason was committed: And 'tis clear (taking the Proclamation out of the Case) that the Treason was committed in that County which the Prisoner first came into after leaving *France*. The Treason (taking the Pardon out of the Case) was completed by the first Step made into *England*. Nay, if the Prisoner, immediately after his making his first Step into *England*, had returned, still it had been a complete Treason; and the Party had returned with his Guilt upon him. And, my Lord, I do not take it, that the Party commits a new Treason, by his going into another County. 'Tis true, 'tis said, if I steal Goods in one County, and carry them into another, this is Felony (tho' not Robbery) in every County where I carry them: But even in this Case, the Law (as I take it) is said to be otherwise, in *Fitz. Abr. Tit. Coron. Par. 194.* and that the Trial must be in the County where the Goods were first taken. But taking this to be Law, That the Felon may be tried in any of the Counties, where he carries the Goods he stole; as I must needs own, the Law is now allowed to be so; yet this depends upon a different Reason, no way affecting the principal Case. For the Reason given of this Case, in *Dyer 40.* and *7 Coke 2.* and *Butwer's Case* is, That the Robbery or Felony does not alter the Property of the Goods; and therefore, into whatever County the Felon carries the Goods, 'tis a new Felony. But there 'tis not that special Reason in the principal Case, and therefore the Law is not the same. Supposing the Prisoner had been pardon'd the Treason, in coming into the first County of *Northumberland* without Licence; could he afterwards have been punish'd for Treason, for coming into the next adjacent County? This would be a pretty strange Construction of multiplying Treasons. And if coming into every County would make a fresh Treason, a Man at that Rate may be brought to suffer as a Traitor, tho' with many Pardons about him. No surely, my Lord, 'tis the original Act the Law regards, and the coming into a second County does not make it a second Treason; and therefore we take it that the Indictment or Trial in this Case can't be in *Middlesex*, but must be in *Northumberland*, or such other County, which was the first County of *England* that the Prisoner came into. Upon the whole Matter, we, with great Submission, insist, First, That Her Majesty's Proclamation amounts in Law to a Licence for the Prisoner to come from *France* into *Scotland*; nay, that it amounts to a Pardon to him, even of his Treason that he is now indicted for. But if that be against us, we in the next Place take it that a *Scotchman* not resident in *England* at the time of the making this Act, is not within the Meaning of this Act. But if that also be against us, yet in the next Place we humbly insist, that he cannot be indicted for this Treason in *Middlesex*, but must be indicted in the County where he first enter'd *England*. And 'tis sufficient if any one of these Points are for us; and therefore we humbly hope the Prisoner shall be acquitted.

Mr. *Raymond*. My Lord, if your Lordship please, I'd beg the Liberty to offer a Word or two on the same Side for the Prisoner at the Bar.

I humbly apprehend, your Lordship expects no Apology from us, for appearing as Council in a Cause of this Nature, since 'tis by your Lordship's Permission granted us in Pursuance of an Act of Parliament, that we have this Liberty; and I can't forget what your Lordship has said formerly in this Place on the like Occasion, That it is as lawful for the Gentlemen of the Bar to be Council in such a Case, and that they are as much obliged to do their Duty for their Client in it, as in any other Case, wherein by Law they are allowed to plead.

I shall therefore, the Fact being agreed on by both Sides, state it as a Case, and submit the Observations I shall make upon it to your Lordship's Opinion.

The Fact is no more but this.

Mr. *Lindsay*, being a Native of *Scotland*, came into *England*, and resided some Time here; from thence he went into *France*, where he continued a considerable Time; after he was gone into *France*, and whilst he was there, the Act of Parliament, upon which he now stands indicted, was made. Afterwards the Queen granted a general Pardon and Indemnity to her Subjects in *Scotland* for all Treasons, &c. Depending upon which, Mr. *Lindsay* returned into *Scotland*, and having had the Allowance of the Benefit of it there, he returned into *England*, coming by the way of *Berwick* and *Northumberland* to *London*.

My Lord, I shall humbly insist upon it in behalf of the Prisoner at the Bar:

First, That he is not comprehended within the Words of this Act.

Secondly, That if he should be within the Words, yet that he is not within the Meaning of the Act.

My Lord, I shall by no means presume to arraign the Wisdom or Justice of the Law-makers in making this Act, which doubtless was founded on great Reason, and was very necessary for the Preservation of his late Majesty's Person and Government. But let it be never so wise, never so just, or never so necessary, yet, with great Submission, 'tis a very penal Law; partly, because it has a Retrospect and makes that Fact an Offence, which was none at the Time when it was done (for before this Act, it was lawful for any one to have gone into *France*, between the Eleventh of *December*, 1688, and the Time of the proclaiming War with *France*). But principally because it makes the Offender against it a Traitor, therefore it must be expounded according to those strict Rules of Construction, the Law has appointed for other penal Statutes, and must never be extended by Equity beyond the Letter.

My Lord, as to the Penning of this Act, I must observe, there is not one Word in it of *Scotland*, or the Subjects of *Scotland*, in express Terms.

The Question then will be, what other Words in it can extend to Mr. *Lindsay's* being a Native of *Scotland*? The most comprehensive Words seem to be these at the Beginning of the enacting Part, *If any of her Majesty's Subjects, who have, &c.*

I must beg Leave to insist upon it, that Mr. *Lindsay* can't be call'd one of His late Majesty's Subjects within this Act. I do agree he was the late King's Subject, as King of *Scotland*, but not as King of *England*; but this Act being made in *England* by the *English* Parliament, and using the Word Subjects, must mean such Subjects as that Parliament were able to oblige, which are only the Subjects of *England*, or the Dominions depending on the Crown of *England*; but not the Subjects of

of *Scotland*, which is a distinct Dominion from *England*.

The King of *England* has a double politick Capacity in him, one as King of *England*, the other as King of *Scotland*; the two Nations are absolutely distinct, and so are the Laws by which they are respectively governed: If therefore the King, as King of these two Kingdoms, has two several politick Capacities in him; if the Nations and the Laws are distinct, with Submission, the Subjects of Necessity must be considered so too.

I am very sensible, My Lord, with what Solemnity *Calvin's Case* in 7 *Rep.* is said by my Lord *Coke* to have been adjudged; it shall be therefore, with a great deal of Submission to your Lordship's Opinion, and Deference to the Authority of that Case, if I shall say any Thing that may seem to clash with that Resolution.

I confess that Case has determined, that Allegiance is a Quality of the Mind, and can't be circumscribed by Place; that 'tis due to the Person of the King; and because his natural Person can't be divided, the Allegiance owing to him is inseparable and indivisible, and therefore that there is an Union of Allegiance of both Kingdoms; and that a Man can't be consider'd as a Liegeman or Subject, which is all one to the King, as King of *Scotland*, and not as King of *England*, and so *Vice Versa*.

I'll beg Leave to consider my Lord *Coke's* Foundation, upon which this Resolution is built, and submit it entirely to your Lordship whether that is able to support it.

According to my Lord *Coke* himself in *Calvin's Case*, Legiance is a true and faithful Obedience of the Subject due to the Sovereign, for which the Sovereign is obliged to protect his Subjects. *Protectio trahit Subjectionem, Subiectio Protectionem.* 7 *Co.* 5.

I suppose it will not be pretended that this Obedience due from the Subject to the Sovereign is an absolute blind Obedience to every arbitrary Command of the Sovereign; but is only such an Obedience as the Law of the Kingdom, or Principality, or Dominion, has respectively prescribed for the Subject to pay to his Sovereign; and the same holds as to the Sovereign's Part in Point of Protection. If therefore this Obedience or Legiance (which is the same) is altogether prescribed and governed by the Law of the Place where 'tis due, it must necessarily follow, that where the Laws are different, the Legiance or Rule of Obedience and Subjection must be different also, and consequently the Legiance due to the King as King of *England*, and the Legiance due to him as King of *Scotland*, (since the Laws of both Nations are distinct) must be separate and distinguishable: Were it not so, the same Act, if so in one, must in both Kingdoms be the Performance of the Subjects Legiance; and the same Act, if so in either, must in both Kingdoms be the Breach of it. But that that is otherwise, is easily to be proved; as for Instance, according to my Lord *Coke* in *Calvin's Case*, 7 *Co.* 7, 6. The King of *England* may command any Subject of *England* to attend him in his Wars beyond Sea; but suppose by the Law of *Scotland* a Subject of *Scotland* is not oblig'd to go with the King out of the Kingdom, the King commands a Native of *Scotland* to wait on him out of *Scotland* beyond Sea, and he refuses; now by the Law of *England* he has broke his Legiance to the King, and yet in *Scotland* he is as good a Liege Subject (notwithstanding this Refusal) as any Subject the King has

there.—In this very Case of Mr. *Lindsay*, by his Return into *Scotland* from *France* (if your Lordship takes the Word Dominions in the Act in as large a Sense as I suppose the Queen's Council would have the Word Subjects took, that is, to all the Places in Subjection to the King, tho' not dependent on the Crown of *England*) he was become a Traitor to the Queen as Queen of *England*, which is the highest Breach of Allegiance that can be; and yet at the same Time (laying the Pardon out of the Case, and supposing there was no Law in *Scotland* to prohibit his coming thither) he was a very good Subject of the Queen's in *Scotland*, and not guilty of any Breach of Allegiance due to her there. Then certainly these two Allegiances are not the same, but distinguishable; one owing to the King as King of *Scotland*, the other owing to the King as King of *England*; and if the Allegiances may be considered separately, so may the Subject (who owes those Allegiances, and by owing of which he becomes a Subject) be separately considered as such in respect of them; and consequently, that Mr. *Lindsay* being a Native of *Scotland*, must be regarded as a Subject of the King as King of *Scotland*, and not a Subject of the King as King of *England*, and so not within the Words of the Act, for the Reasons offered to your Lordship before.

The second Thing I begg'd your Lordship's Leave to insist upon was, That taking it, that Mr. *Lindsay*, tho' a Native of *Scotland*, should be comprehended within the Words, *any of his Majesty's Subjects*, yet that this Act did not design to extend to any Native of *Scotland*, and consequently not to him. With great Submission to your Lordship, there are many Cases in the Books where Statutes have received a Construction contrary to the Words, to comply with their Intent. The Statute of *Gloucester*, *Cap.* 1. enacts, that the Disseisee shall recover Damage, in a Writ of Entry, founded upon the Disseisin, against him who is found Tenant; upon which *Litt. Sect.* 685. puts this Case, That if the Disseisor makes a Feoffment of the Land to *B. C.* and *D.* and Livery of Seisin is made to *B.* and *C.*; but *D.* was absent, and never would agree to this Feoffment, nor take the Profits; *B.* and *C.* die, the Disseisee brings a Writ of Disseisin in the *Per* against *D.* who pleads this Matter; tho' he is a Tenant of the Freehold of this Land, yet no Damages shall be recovered against him. So in this Case, tho' the Words of the Act in their utmost Extent would comprize the Prisoner at the Bar; yet if the Parliament did not design they should, a Construction shall be made accordingly.

That the Parliament did not intend to concern themselves with *Scotland*, or the Natives thereof, appears, with Submission, by the Preamble (which is, as my Lord *Coke* terms it, *Co. Litt.* 79. a Key to find out the meaning of the Law-makers).

The Words of the Preamble are, That upon the Conclusion of the Peace between his Majesty and the *French* King, it was become necessary for the carrying on a Trade between *England* and *France*, That the Subjects of each Kingdom should have, &c. — I suppose it will not be pretended that *Scotland* can be comprehended under the Word, of *England*; nor *Scotchman* under the Word, the Subjects of each Kingdom, that is, of *England* and *France*. — For if a *Scotchman* should be took to

to be a Subject of the King of *England*, yet I humbly conceive he was never took to be a Subject of the Kingdom of *England*; the word Kingdom is the same as Realm, and is usually applied to the Land of *England*, and not to the Dominions dependent on the Crown of *England*; as on the 35 *Hen.* 8. C. 2; a Treason committed in *Ireland* was adjudged to be a Treason committed out of the Realm of *England*, and triable as a foreign Treason, *Orurke's Case, Ander. 262. Pl. 269.* But if Kingdom or Realm should be taken to have the same Signification as Dominion, that Case could not be Law, because *Ireland* was never held to be out of the Dominion of the Crown of *England*; so that with great Submission to your Lordship, nothing in the Preamble affects the Prisoner at the Bar.

The next Thing to be consider'd, is, what the Parliament meant by the Words, *If any of His Majesty's Subjects, &c.* And I humbly hope your Lordship will think it reasonable to let that Expression be explained by the Word Subjects used in the Preamble, and so interpret them his Majesty's Subjects of the Kingdom of *England*, which this Prisoner is not; and the rather, because to construe them to extend to *Scotchmen*, will be an Interpretation that will make the *English* Parliament make an Offence a Treason, which will not be in the Power of the *English* Government to punish, unless by Accident: For if a *Scotchman* returning out of *France* into *Scotland*, contrary to this Act, should be a Traitor, yet he could not be punished here, unless he accidentally came hither afterwards, because the *English* Government has no coercive Means to fetch him from *Scotland* hither to be punished. — But 'tis otherwise in respect of the Dominions depending on the Crown of *England*, as *Ireland, &c.* for a Man may be transmitted from *England* to *Ireland*, or *Vice Versa*, to be tried; as Colonel *Lundy* was 2 *Ventr.* 314. but *England* can't compel the Government of *Scotland* to send a Man hither from thence to be tried. Then I humbly conceive that it can't be imagined, that the Parliament design'd to make an Offence a Treason, which can't be punish'd but by Accident here, since 'tis below the Dignity of a Government to have Offenders against their Laws, in Crimes of so high a Nature, out of their Power to punish — But of an *English* Subject it would be otherwise, tho' he was in *Scotland*, or any foreign Prince's Dominion, because they might proceed against such a Person to Outlawry, and upon Attainder confiscate his Estate.

Another Thing I must beg leave to offer to your Lordship, as a Proof that this Parliament did not intend in this Act to include *Scotland*, or the Natives of *Scotland*, is, that the Paragraph which makes the taking of a Charter or Grant from the late King *James* to be Treason, is so far from relating to *Scotland*, or the *Scotch*, that it does not make it penal for any *Englishman* to take a Grant of Honour or Estate in *Scotland* from the late King *James*; the Words of the Act being, to be had or enjoy'd in the Kingdom of *England* or *Ireland*: So that the Parliament seem'd industriously not to concern themselves with any thing relating to *Scotland*; and yet doubtless they might have made it Treason for any *Englishman* to have took such a Grant; and there had been as great Reason so to have done, if they had thought fit to have meddled with any thing relating to *Scotland*, since the taking of such a Grant in *Scotland* by an *Englishman* from the late King *James*, had been as great a Derogation to

the Liegance owing to the King, as if it had been of any thing in *England*; the Acceptance of such a Grant amounting to an Acknowledgment of another Power besides the King's — So that for these Reasons I humbly insist upon it, that the Parliament did not intend to include any *Scotchman* within this Act.

But, my Lord, taking it that Mr. *Lindsay*, tho' a Native of *Scotland*, should be within both the Words and Meaning of this Act; yet I must submit it to your Lordship's Judgment, whether this Act could bind him, he being beyond Sea, *viz.* in *France*, at the Time when it was made. I do agree, that if any of the *Scots* have Lands, &c. in *England*, they shall be liable to pay all Duties imposed by Act of Parliament on those Lands. I do also agree, that every *Scotchman* resident here, is bound by all the Laws of the Land; and so are all Foreigners whatsoever (be they *Danes* or *Swedes*, or of whatsoever other Nation they be) who live here under the King's Protection: But as soon as they are gone out of the Kingdom, their Allegiance, which was but local, ceases, and they are no longer obliged by the Laws of *England*. It must be agreed, that no *English* Act of Parliament can bind *Scotland*, nor, as I humbly apprehend, the *Scots*, whilst out of *England*; if so, then how could this Prisoner be bound by this Act, being a *Scotchman*, and out of this Kingdom, at the Time when the Act was made? With great Submission, his coming into *England* alone could not subject him to this Law; for there seems to be a great Difference between this Act, and other general Acts or Laws of this Place: For, as I said before, if a *Scotchman* comes into *England*, and inhabits here, he is liable to all the Laws then in Force, and shall be punished for the Breach of any of them; because he was before protected by those Laws, and therefore must be obedient to them. But in this Case, the Subjection to the Law, and the Offence, began at the same Instant; for before his Landing in *England*, this Law had no Power over him, and the very Act of Landing made the Offence in this Indictment; 'twill be therefore something severe to construe that Act, which only makes the Prisoner liable to the Law, to be a Breach of it. As to this Matter, there will be no Difference between a *Scotchman* or a *Dane*: Both, when here, are bound by the Laws; neither, when absent. Suppose it should be enacted, That if a *Dane* should land in *England* without Licence from the King, he should be a Traitor; and a *Dane* notwithstanding such Act should come into *England* without such Licence, would he be a Traitor? With humble Submission, Not. Such Act might amount to a Prohibition of his coming, and make him be used as an Alien Enemy, 7 *Co.* 6 *B.* as *Perkin Warbeck* was in *Henry* the VIIth's Time; but could not make him a Traitor, because he owed no Allegiance to the King, nor Subjection to the Law, at the Time when the Act was made. As to the Prisoner's having been in *England*, and having resided here before; that, I humbly think, will make no Difference, because his Subjection to the *English* Law ceased, as soon as he stept off from the *English* Shore.

What I shall beg Leave further to insist upon for the Prisoner (supposing your Lordship should be of Opinion against him on the former Points) is, That this Evidence don't maintain the Indictment. The Indictment is for returning without Licence from *France* into *England*: The Evidence is, That he returned out of *France* into *Scotland*, and from thence

thence into *England*. The Act of Parliament is, *That if any of His Majesty's Subjects, &c. return into this Kingdom of England, or other His Majesty's Dominions*: The Meaning of which, we for the Prisoner humbly take to be, That the first coming of any such Person, as is within the Act, into any of his Majesty's Dominions, shall be the Treason; and that the Act did not intend to make every several Coming into every distinct Dominion a new Treason; as if such Person should come out of *France* first into *Scotland*, then into *Ireland*, thence into *Jersey*, and so into *England*, the Act, with Submission, did not design to make this Person liable to be indicted for four Treasons; but that into what Dominion he first came, for that he was a Traitor and punishable: And that Construction sufficiently prevents the Mischief and Danger the Act design'd to arm against. For if a Man should come without Licence into any one Dominion, and is look'd on as a dangerous Person, the taking away his Life will prevent any future Mischiefs from him: If he has a Licence to come into one, 'tis to be believed, with a great deal of Reason, he may be trusted in any other of his Majesty's Dominions, or else his Majesty would never have granted him a Licence to return into any of his Dominions, where he would be equally capable of putting in Execution any dangerous Practices against the Government. If that should be the Meaning of the Act, then, with Submission, this Indictment ought to have been for coming into *Scotland*, which was the Place he first came into, for there was the Treason, and not for coming into *England*. Besides, if the coming into *Scotland* was the first and only Treason punishable by this Act, then we must offer the general Pardon of *Scotland* in the Prisoner's Excuse: Not, my Lord, that I can pretend, that a Pardon in *Scotland* can pardon a Treason in *England*; but we must beg Leave to insist upon it, as amounting to a Licence to return into *Scotland*. I do expect that it will be objected, that the Licence which this Act appoints, must be under the Privy-Seal of *England*, which this *Scotch* Pardon can't be pretended to be. I confess, my Lord, the Words are, without Licence from his Majesty under his Privy-Seal. But 'tis not said Privy-Seal of *England*. And tho' generally speaking, when an *English* Act mentions the Great Seal or Privy-Seal, it must be took to be the Great-Seal or Privy-Seal of *England*; yet in this *English* Act, if your Lordship will construe the Words, *His Majesty's Subjects*, not only to be his Subjects as King of *England*, but as King of *Scotland*, or any other Nation; if your Lordship will construe the Word, *Dominions*, to be not only the Dominions dependent on the Crown of *England*, but also all other Dominions of which his Majesty was King, as *Scotland*; by Parity, the Words, Privy-Seal, ought to be extended to all the Privy Seals the King has, as King of *England*, or King of *Scotland*. And if so, then since the Queen has in Her Proclamation, declared that Her Pardon shall be took as beneficially as if it had been under the Great-Seal; but the Great-Seal includes the Privy-Seal, and is of greater Efficacy: We humbly hope, that it will be as beneficial to the Prisoner, as if it had been under the Privy-Seal; nay, rather more, because as to *Scotland* it pardons the Offence; for tho' the Return is after the Pardon, yet it pardons the going into *France*, which is the Foundation of the Crime, and without which the returning into *Scotland*, or any of His Majesty's Dominions,

was no Offence. This is the Use the Prisoner would make of this Pardon. I can't press it as a Pardon of an *English* Crime; tho' with great Submission to your Lordship, it seems something strange, that Mr. *Lindsay*, should by virtue of this Pardon be a very good Subject of the Queen's in *Scotland*, and have all the same Liberties other of his Countrymen have there, and yet that he should be a Traitor against the Queen here in *England*; that he should be within the Queen's Protection there, and out of her Protection here; and yet at the same Time that his Allegiance to her can't be severed, nor he considered as a Subject to Her, as Queen of *Scotland*, and not as Queen of *England*.

But admitting the Pardon will not avail the Prisoner in any respect, and that your Lordship should be of Opinion that his coming to *England* is a Treason, notwithstanding he returned from *France* into *Scotland* first; then I must insist upon what Mr. *Williams* has before mentioned, that this Indictment is ill, and that he ought to have been indicted in the County which he first came into, which was impossible to be *Middlesex*; and I must ground it on the general Rule, that all Crimes are local, and inquirable by the Grand Jury of the County where they are committed. Even in Batteries, which are transitory in Actions; yet, with Submission, Indictments are local, and must be enquired of by the Grand Jury of the County where they are committed. My Lord, I shall trespass no longer upon your Lordship's Patience, only just beg leave to say, that upon the whole Matter, for the Prisoner at the Bar, I humbly insist upon it, That he being a Native of *Scotland*, is not within the Words of this Act: For if he should be within the Words, yet he is not within the meaning of the Act. But if both those Points are against me, That, as this Case is, he is not obliged by it: If I should fail in all these, then I must have recourse to the Construction of the Act, that it intended only to make the first Entry into any of the Queen's Dominions Treason, and consequently that this Treason was upon his Return to *Scotland*, and ought in the Indictment to have been laid as such: For which Reason I humbly conceive that the Indictment is not only ill, but the Pardon will amount to a Licence. But if your Lordship should be of Opinion he is indictable for coming into *England*, that then the Indictment ought to have been laid in that County where he first came into. If any of which Points hold, with Submission, the Prisoner can't be found guilty on this Indictment; but your Lordship will be pleased to direct the Gentlemen of the Jury to acquit him, which I humbly pray in his Behalf.

Sir *Thomas Powis*. My Lord, I have observed these Gentlemen in the Method they have gone, and will follow them in the same Manner to give them an Answer. What we have to say, will be nothing but with respect to the Law, as it now stands upon the Act of Parliament: Whether the Case deserves Mercy or no, is not the Question here, that will be consider'd in another Place. Our Part is to maintain the Law as it stands, with reference to this Indictment; it must be owned that a great deal of that which has been said might have carried weight with it, if it had been pleaded in *Scotland*, where the Proclamation was made; but to make use of it here in *England*, as having any Force in this Case, is not agreeable to Law or Reason.

son. First, no Man can say, a Pardon, if it had been under the Great Seal of *Scotland*, could pardon a Crime committed here in *England*; but it is not so, for it is not under any Seal at all. But supposing it were to be taken in the Extent they would have it, yet it would not be a sufficient Pardon in this Case. For these two Things must be consider'd. First, It is a Pardon only of Crimes committed in that Kingdom. Secondly, It cannot be a Pardon of a Crime committed since that Pardon granted; for we must mind the Date of that Pardon, and the Crime he is tried for. The *Scotch* Pardon is dated in *March*, 170 $\frac{1}{2}$ . that was *March* was Twelvemonth. No Man can say a Proclamation in that Kingdom can pardon a Crime that was committed afterwards. Now this Crime was committed in *December* last, for then it was he returned into *England*; therefore that Pardon can never extend to this Case. So that these two Things if considered, will be sufficient to answer all that has been insisted on, by way of Pardon. First, It is a Pardon of another Kingdom for Offences committed against the Crown of *Scotland*; whereas this Indictment is for an Offence committed against the Crown of *England*. And secondly, It was granted at a Time precedent to the Time of this Offence committed: But next, they say the Pardon in *Scotland* will amount to a Licence from the Queen to go into *Scotland*, and that then by Consequence he was free to come into *England*; with Submission, we think they cannot make such an Inference, for the Queen's Pardon cannot extend to such a double Purpose. Suppose the Queen had expressly pardoned his going into *France* and returning into *Scotland*, that would not have amounted to a Licence to come into *England*. So that we deny their Inference, that the Pardon in *Scotland* amounts to a Licence to come into *England*. But in the second Place, If the Queen had expressly given him a Licence to go into *Scotland* (tho' I do not admit that to be the Case) yet I deny that that would have been a Licence to come into *England*. If the Queen under the Privy Seal of *Scotland*, should have admitted him to come into *Scotland*, yet that would not have been a Licence for him to come into *England*; for it would have been a special Licence to go to one Place, which can never be reckoned, in such a Case as this is, a Licence to go to another Place in another Kingdom. For the King or Queen might perhaps think fit to license one to come into *Scotland*, and yet not think it convenient to license him to come so near their Royal Person, as he would be here in *England*. So that there is no such Licence in that Pardon, as is insisted on; and if there had been, yet it would not have had that Operation to license him to come to *England*. The next Thing they speak most fully to (and which is very considerable, if they make it out) is, that the Words of this Act of Parliament, upon which the Indictment is founded, or at least the Meaning of them, cannot be extended to a Native of *Scotland*. As for the Words of the Act we need do no more than read them, to make it appear to be otherwise. It is observed by them very truly, that *Scotland* is no part of the Kingdom of *England*; but they must admit it is a part of the Dominions of the Queen of *England*, tho' not part of the Kingdom of *England*. They would do little Service to the Subjects of *Scotland*, if they should endeavour to overthrow Cal-

*vin's* Case, which was so solemnly determined near an hundred Years ago, which enables them of *Scotland* to come into *England*, and enjoy the same Privileges here, as the Subjects of *England* do. Certainly, as they are let into all these Benefits by the Resolution of that Case, so they are at the same Time the Subjects of the King or Queen of *England*. That the Words therefore of the Act are against them, nothing can be plainer; *If any of His Majesty's Subjects who since the eleventh of December, 1688. have gone into France.* — This leaves them no room for Dispute; it says not, if any of the Subjects of the Kingdom of *England*, but if any of His Majesty's Subjects; so that whoever was a Subject of the late King is within the Act. The Words are without any Restriction whatever, *If any of his Majesty's Subjects*; and they will not deny but that a *Scotchman* was a Subject of His late Majesty. But then they say, if the Words should extend to it, the Meaning of the Act cannot. With Submission, we think the Case before you is within the Words and Meaning of the Act, and within the Mischief which the Act provides against. For at the Time this Act was made, it being taken notice of, that upon the Peace concluded there would be a Door opened for a Communication between *England* and *France*, and that many Persons who had resorted thither, who had been actually in Arms there, and other disaffected Persons, might take Advantage, and be encouraged from thence to form and carry on treasonable Designs and Practices against his Majesty's Person and Government; Therefore, to obviate that Mischief, this Act was made in such general Words, That if any of His Majesty's Subjects who had gone voluntarily into *France*, since the Time mentioned in the Act, without Licence, let them be born where they would, whether they were of the one Kingdom or the other, the Mischief of their returning without Licence was equal. And by consequence, it was the Meaning of the Act to exclude one as well as the other; for the Design of the Act was to prevent the Danger that might arise by such Persons coming over. But as to this present Case, if what the Witnesses have said be true, it would be very mischievous indeed, if a Person that had been resident here for near twenty Years, as the Prisoner was, by his own Witnesses, and afterwards went into *France* without a Licence, if he may be allowed to return back again without a Licence, because not originally a Native of *England*. By the same Rule all those Persons that have done the like both of *Scotland* and *Ireland* would be at Liberty to return also, because not Natives of *England*; which was not surely the Meaning of the Act of Parliament, nor ought the Construction of the Words to be so taken. It's true, we can't here by an Act bind them in *Scotland*, but we are not now putting in Execution this Act in *Scotland*, but putting it in Execution here in *England* on a *Scotchman* that had been long an Inhabitant here before. My Lord, the next Thing that was insisted on, is, that if he be such a Subject as may be construed within this Act, and if the Pardon should not have the Effect they contend for, yet they say this Indictment is laid in the wrong Place, it ought to have been laid in the County where he first arrived. There need little to be said to this, because the Prosecution is made where

where the Party was apprehended. The Objection they make, is that which would render it impracticable to prosecute any for this Offence. For how is it possible to know where a Man first privately arrived? That which is enough to charge him, is, that he was first found in such a Place in *England*; for 'tis not said in the Act, that they shall not return to this or that County, but not to *England*. And then wherever he is found in *England*, there the Indictment may be laid against him. And the Case of the Felony comes home to this Point; the Man that steals Goods in one County, may be indicted in any other County where he carries them. So he that returns into *England* contrary to the Act, wherever he is apprehended he carries the Crime with him. And it does not appear, but that this is the first Place where he was found. They say it is impossible to come from *Scotland* into *Middlesex*, without first coming into some other County; but it is agreed that this is the Place where he was first apprehended. Therefore, upon the whole Matter, the Fact being confessed, we insist that he is within the Words and the Meaning of the Act, and within the mischievous Consequences which are intended to be prevented by it.

Mr. *Att. Gen.* My Lord, I would not speak any thing to aggravate Matters against the Prisoner; but there have been some things said by his Council, which I think fit to be taken notice of,—They have given him a Character for his Faithfulness to the Queen, and called some Witnesses to it: And Mr. *Williams* was pleased to say, his owning the Facts charged against him in the Indictment (whereby he saved the Court and the Queen's Council a great deal of Trouble) was an Argument of his Sincerity.—I only say, I believe he had a better Opportunity by other Methods to have shewn it. My Lord, Every one knows from whence he came (*viz.* from *France*) and how long he stay'd there, and in whose Service. And it would have been a better Argument of his Sincerity, if he had given an Account of his Knowledge of what pass'd in *France* while he was there; and probably would have been of more Advantage to him, than saving the Trouble of proving what (he knew) we were ready and able to prove.

What has been said as to the Act in general, is something surprizing to me; to hear any *Englishman* complain of the Hardship of this Law, on which the Prisoner is indicted, which was made for the Preservation of the King's Person and the Government, and by the Wisdom of the Nation thought necessary. But as to the Matters of Law the Prisoner's Council have insisted on, they are reducible to two Heads.

First, That the Queen's Proclamation in *Scotland*, pardoning Her Subjects of *Scotland* of all Treasons, &c. amounts to a Licence to return to *Scotland*, by pardoning the Offence in going to *France*; and every Subject of *Scotland* may lawfully come thence into *England*.

Secondly, That the Prisoner ought to have been indicted in the first County, into which he first returned; which is impossible to be *Middlesex*.

As to the first Matter, it has been said, That a Native of *Scotland* is not bound, nor can be punish'd by a Law made in *England*. And the Council, tho' they have not denied the Authority of *Calvin's* Case, yet they do seem to dislike the Resolution of it. Now he is (according to *Calvin's* Case) a Subject of *England*. That Case was more bene-

ficial to the Subjects of *Scotland* than to the Subjects of *England*; and it has been always allowed to be Law ever since. But, my Lord, we are not to consider this Gentleman in this Case as a *Scotchman* absolutely, but as a *Scotchman* here in *England*. How far an Act made in *England* would affect a *Scotchman* that should return into *Scotland*, I need not meddle with. But the Question here is, Whether an Act of Parliament made in *England*, will not bind every Person that is resident here in *England*? Now the Prisoner was resident here in *England* with his Family, and went hence to *France*: And by the Law, every *Scotchman* residing in *England*, is an *Englishman*; and hath Right to enjoy the Privileges of an *Englishman*. This is the Resolution of *Calvin's* Case. I will give but once Instance of this. The Act of Navigation made 12 *Car. II.* requires, in many Cases of Goods imported, that the Matter, and three fourth Parts of the Mariners, shall be *English*. The Act of 14 *Car. II. Chap. 11.* of Frauds, declares, That any of her Majesty's Subjects of *England, Ireland,* and the Plantations, shall be accounted *English*, and no others.

Now the Natives of *Scotland* inhabiting in *England* or *Ireland*, have always been allowed to be *English* or *Irish* within the Act of Frauds; and have enjoy'd the Privilege ever since of being Masters of Ships: And the same hath been allowed them on all Trials in the Court of *Exchequer*, that is, according to *Calvin's* Case; That to all Intents and Purposes, a *Scotchman* being in *England*, enjoys the Privileges of an *Englishman*, he is a Subject of the Crown of *England*.

But give me Leave, my Lord, to consider how the Prisoner comes to be affected by this Act: Not as being her Majesty's Subject, living in *Scotland*; but he is bound by this Act, as he is a Subject residing here in *England*. For as to what they say, that his Offence is going into *France*; that is not the Matter he is charged with: That is the Description of the Person that falls under the Disability of the Act: [A Man under these Circumstances.] But his returning from *France* into *England* (being a Person describ'd by the Act) is the Offence.

My Lord, his returning is the Offence: Not his returning to *Scotland*, but returning to *England*, or any other her Majesty's Dominions, bound by the Acts of Parliament made in *England*. The Act is, *If any of his Majesty's Subjects return*: And every *Scotchman* that resides here, is a Subject of the Queen. Every Law that is made in *England*, will bind every *Scotchman* that resides here; and this will bind him from returning into *England* without Licence; which is all that is in this Case.

It hath been objected, The Act cannot bind the *Scots* here, because they have no Representative in Parliament. But that is not so: They may be Freemen of Corporations, and are capable of being Freeholders; and as such, may be represented in Parliament. The Penning of the Act shews, the Parliament intended to include all Subjects, that might in the utmost Latitude be called Subjects. The Words are [If any of his Majesty's Subjects, that have gone into *France*, shall return into *England*]. So that the Act says, They that were his Majesty's Subjects, and went into *France*, and did return, shall be guilty. Therefore, what hath been said of the Laws of *England* binding *Scotland*, is quite out of this Case.

The Council for the Prisoner have argued, That the Proclamation of Indemnity in *Scotland*, is a Licence to return into *Scotland*. I would fain know



where they find that. If there were a Pardon under the Great Seal of *England* for all Offences committed, I would be glad to know whether that would be accounted a Licence to return into *Scotland*? No, certainly. They have said, That the Matter that hinder'd the returning to *Scotland*, was the Offence of going to *France* without a Licence; which Offence is remitted by the Pardon. That is plainly a Mistake: For the Act had not Regard to any Offence of going to *France*; referring to the 11th of *December*, 1688, when, and long after, it was not any Offence to go thither without a Licence: Every Man, till the War was declar'd, might have gone thither without Licence. And yet by this Act, those that went between that Time and the War declared, as well as those that went during the War, are prohibited to return without Licence. So that the Pardon which they rely on, cannot avail the Prisoner: For the Act did not regard Crimes committed; but, as the Preamble is, it was made to prevent an Inconvenience which might follow by disaffected Persons returning; who might form and carry on traitorous Conspiracies, against the late King and the Government. And the Parliament look'd on Persons to be disaffected, that left their Country, and went and stay'd in *France* after the late King went thither; and therefore judg'd it not reasonable to have such trusted here, without the Government should license their Return.

The Persons mentioned in the Act are characterized: So that as to the Matter of the Pardon (if it were an *English* Pardon) it would not bring them from under the Act. Besides, any Licence or Pardon in *Scotland*, cannot indemnify them from an Act made in *England*.—The Law and the Seals of each Kingdom are distinct: And an express Licence under the Seal of *Scotland* to return to *England*, nay an Act of Parliament for that Purpose there, would not avail: For no Act of *Scotland* can take off a Disability laid on by any Act made in *England*. For this Act is a banishing them from *England*, unless the Queen gives a Licence to return.

My Lord, It is an extraordinary Thing which they argue from the Preamble of the Act, that mentions the carrying on the Trade between *England* and *France*; and *Scotland* being not named, the Act shall not extend to the *Scotchmen*. I do not see what can be gather'd from that.—The *Scotchmen* residing here, are considered as *English*: and being here, are bound by the *English* Laws; else the *Scots* would be in a better Condition here than the *English*. But, my Lord, that which we insist on, is, That the *Scots* residing here, are to all Intents *Englishmen*; That they are subject to the Laws of *England*, and bound by them. The going first to *Scotland* will not avail the Prisoner: For the Offence is, returning to the Place from whence he went, that is, *England*. Whether his returning to *Scotland* be an Offence within this Act or not, is not material; nor whether an Act of Parliament made in *England*, can banish a *Scotchman* from *Scotland*: But it is, That an Act of Parliament in *England* may prohibit any *Scotchman*, or any other Person, from returning out of *France* into *England*.

My Lord, The next Matter, which they mightily insist on, is, as to the Place of Trial: But if that Objection should prevail, it would make the Act ridiculous and useless. For then it would lie on the Queen's Council to prove, Where a Person (who privately return'd, and got into the Kingdom) first landed. But the Act says (If they

shall return into *England*). And wherever he is found, thither he is returned. There was an extraordinary thing said indeed: That if we can make it Treason wherever he is found, then he may be tried in every County he comes into; although he be pardoned, or tried, for returning into one County. Certainly that will not be so. For the returning is but one Treason: And tho' he may go into several Places, yet when he is tried in one Place, and convicted, and pardon'd for that, it discharges him wholly. For the returning is but one intire Offence, tho' having been in many Place. The Queen may proceed against him in any one of them. It is like the common Case of an Escape. An Escape is an Escape in every County, wherever the Party goes afterwards: And the Party escaped, or the Sheriff may be proceeded against in any County whither the Party escaped goes, as well as in that whither he first escaped. And without this be so, the Act can never be put in Execution.

My Lord, I think this is the Substance of what they have said; that an Act made in *England*, will not bind a Native of *Scotland*. We think an Act made in *England*, will bind such a one residing in *England*. Now the Prisoner was residing in *England* for twenty Years; and he is both within the direct Words, and within the Intent and Meaning of the Act. There are a great many of them that are in *France*: And I believe the Parliament never intended to leave the *Scots* free to return into *England*, any more than the *English*.

Mr. *Lindsay*. My Lord, I desire to know, whether the Queen's Licence does not set us free, as well in *England* as in *Scotland*? And whether one that has a Licence to come into *Scotland*, may not come into *England* too?

Mr. *Att. Gen.* One may be brought to a Trial here, tho' he had a Licence in *Scotland*.

Mr. *Lindsay*. My Lord, Her Majesty's Pardon extends further than a Licence: It restores to all the Privileges I had before.

L. C. J. *Holt*. If I take you right, you mean This Pardon in *Scotland* secured to you all the Advantages you had at the Time of your Birth, or at any Time before your Departure out of *England*; so that you are not to be impeach'd, or convicted of any Crime you have committed against the Laws of *Scotland*; but you are thereby upon the same Foot, and have the same Rights and Privileges as any other *Scotchman* hath, that hath never offended: And every innocent *Scotchman* hath a Right and Liberty to come into *England* when he will. Which is very true, that the Pardon discharges all Disabilities and Incapacities, that you have incur'd by any Offence committed against the Laws of *Scotland*, but not any committed against the Laws of *England*. That is, supposing the Pardon had been subsequent to your Return into *Scotland*, and that your Return hither had been High-Treason by this Act.

Mr. *Lindsay*. My Lord, I think this Pardon reinstates me in all the Privileges I enjoy'd before.

L. C. J. *Holt*. I tell you no: It only restores you to the Privileges that you had as a *Scotchman*; and which you would have lost, if convicted of those Offences by the Law of *Scotland*; but exempts you not from any Punishment, to which you were then obnoxious by the Law of *England*.

Mr. *Att. Gen.* My Lord, I would say but this only; That speaking of the Pardon, as a Pardon, it cannot pardon a Crime before it is committed. If the Pardon granted in *Scotland*, would pardon a  
Crime

Crime committed in *England*; yet it would not pardon a Crime committed afterwards.

*L. C. J. Holt.* But observe what he says. Says he, I am by this Pardon made a Free *Scotchman*: (And it is to be admitted, that the Pardon of *Scotland* has that Effect). And if, says he, this Pardon has made me as Free a *Scotchman* as I was before; *Ergo*, I may come into *England*, as well as any other *Scotchman* that was under no Disability.

*Mr. Att. Gen.* My Lord, he is bound by the Laws of *England*, as he resided here: It has been the constant Practice. He does not pretend that he had King *William's*, or the present Queen's Licence to come into *England*; only that he had the Queen's Licence to come into *Scotland*.

*L. C. J. Holt.* You hear what he says.

*Mr. Soll. Gen.* My Lord, the several Facts alledged in the Indictment, are admitted to be true; except that the Prisoner was a Subject to his late Majesty; and, that his Return into *England* since the 14th of *January*, 1697, was without Licence.

'Tis objected, he was not a Subject of his late Majesty within the Meaning of the Act, because he was a *Scotchman*.

Whoever is born under the Legiance of the King of *England*, is a Subject of the King; and 'tis admitted *Mr. Lindsay* was so born.

It has been likewise objected, His Return was not without Licence.

'Tis not pretended he had such a Licence as the Act of Parliament specifies, and the Indictment mentions; a Licence under the Privy Seal, to return into *England*.

But 'tis insisted on, That the General Pardon in *Scotland* does, by Construction of Law, amount to such a Licence.

It can't surely, with any Colour of Reason, be urg'd, That such a Pardon should be construed any farther than a Licence to return into *Scotland*; and such a Licence would not excuse the Prisoner.

My Lord, this Pardon in *Scotland* can have no Relation to the Offence in Question. A Pardon in that Kingdom can't extend to any Crime, which by the Laws of *Scotland* can't be there punish'd. But had that Pardon, which pass'd in *Scotland*, been under the Great Seal of *England*, it could have been of no Service to the Prisoner. As a Pardon it could not; because 'tis precedent to the Offence, and it can't by any Implication amount to a Licence.

The Reason offer'd, why it should be so construed, is, That the Offence, whereof the Prisoner stands indicted, is of a complicated Nature: That it consists of two Parts; going out of *England* into *France*; and, returning out of *France* into *England*. That the first Part of this Offence (his going to *France*) being pardoned, he can't be prosecuted for his Return.

The Supposition whereupon this Argument is founded, is a Mistake: For after the 11th of *December*, 1688, any Man might (before the War was proclaim'd) have, without any Offence, gone into *France*: And therefore, his going thither after the 11th of *December*, 1688, is no Part of the Crime; but a Description of the Person, whose Return without Licence was enacted to be High-Treason.

*Mr. Conyers.* My Lord, the Prisoner insists on the Benefit of Her Majesty's Proclamation of Pardon in *Scotland*; which (as has been already taken notice of) bears Date in *March*, 170<sup>2</sup>, and cannot extend to pardon a Treason since that Time. The Treason for which he stands charged, was not till *December* last; then he came into *England* without

Licence of the Queen: He voluntarily went into *France* without Licence, since the 11th of *December*, 1688. He came back into *England* without Licence, in *December* last; and for that he stands charged with Treason, by Virtue of the Act of Parliament in the ninth Year of the late King. But the Inference he makes from this Pardon, by the Queen's Proclamation in *Scotland*, is, That he is thereby restored to all the Privileges of a *Scotch* Subject, and consequently may freely come into the Kingdom of *England*, as any other of her Majesty's native Subjects of that Kingdom may do. Now the Pardon in *Scotland* can only extend to exempt him from Punishment for any Crimes committed in that Kingdom; and he can have no Benefit of it for a Crime committed against the Laws and Statutes of *England*, which is a distinct Kingdom, and govern'd by distinct Laws. And such Inference as he makes from this Pardon, is both against the very Words and Meaning of the Act of Parliament, upon which he stands indicted. The Words are very express and plain: *Any of Her Majesty's Subjects, who have at any Time since the 11th of December, 1688, voluntarily gone into France without Licence (as the Prisoner confesses he did) and after the 14th Day of January, 1697, shall return into England, or any other Her Majesty's Dominions, without Licence ——— shall be judged guilty of High-Treason.* He was residing in *England* after the 11th of *December*, 1688. He went from *England* into *France*; and is returned into *England* without Licence, since the 14th of *January*, 1697, and so is within the express Words of this Act. And the Intent of the Act will appear by the Preamble. The Mischiefs and Inconveniences apprehended at the making of this Act, were, That the Freedom of going and coming out of *England* into *France*, and from *France* to *England*, by the respective Subjects of each Kingdom after the Peace, might be an Encouragement to such of the King's Subjects, who had been engaged in traitorous Designs and Conspiracies against his Majesty, and who might be encouraged to form and carry on treasonable Designs and Practices against the King and the Government, to come out of *France* into *England*. The Persons from whom those Dangers were apprehended, were such Persons as are described in this Act; and therefore, for the Safety and Preservation of His Majesty's Person and Government, the Intent of this Law was to prohibit their returning into *England*, without such Licence from His Majesty under His Privy-Seal.

*L. C. J. Holt.* Have you any more to say? Or have you any thing to reply?

*Mr. Williams.* My Lord, we would save your Lordship's Time as much as might be; but we humbly insist, that our Objections are not answer'd: And it being upon a new Law, and in Case of Life, we pray that the Matter may be found Specially.

*L. C. J. Holt.* If we see any Reason to doubt it, it shall be found Specially. But what you have said, overthrows *Calvin's* Case; for you urge, That you are a Subject of *Scotland*, and so not within this Act of Parliament. But you ought to consider, That as you are a Subject of *Scotland*, so also you are a Subject of the Crown of *England* by being a Native of *Scotland* since the Accession of *Scotland* to *England*, which is by the Law of *England*. And if the Case had been, that you had only departed from *Scotland* into *France*, and from thence returned into *Scotland*, and stay'd there without ever coming into *England*, the Case would have been much different:

different: For it may be, the Law of *England* cannot oblige a *Scotchman*, for any Act by him done in his own Country (though there is no Occasion to give any Opinion of that); but an Act of Parliament in *England*, may subject any *Scotchman* to any Penalty, for any Act that he should do in *England*. Suppose a *Scotchman* going out of *Scotland* into *France*, since the 11th of *December*, 1688, that shall return into *England* since the 14th of *January*, 1697, he seems to be within the Words and Meaning of the Act. But there is no need of determining that Point now: The Prisoner being a *Scotchman* born, and having been in *England* for a long Time, and departing from *England* into *France* within that Time, and returning into *England* afterward, is to all the Purposes within the Letter and Design of the Act: For being a Resident in *England* at that Time, you are to all Purposes a Subject of the Crown of *England*, as much as any Native of *England*; and your departing into *France*, and remaining there for so long Time, and returning without Licence, is the same Danger that the Act of Parliament intended to prevent.

Mr. *Williams*. My Lord, I would not presume to say any thing in Derogation of *Calvin's* Case: But I say, that tho' a *Scotchman* may be as a Natural-born Subject of *England*, yet he may not be within the Meaning of this so penal a Law.

L. C. J. *Holt*. Certainly within the Meaning, if within the Words and Reason. But there is another Point that you, his Council, have urged in his Behalf; which is, That this Pardon is a Licence to him to return into *Scotland*. Which in Truth is not; for it is to another Purpose, *viz.* To pardon and discharge all Treasons and Crimes committed in *Scotland*; but not give a Licence to return into that Realm: But suppose it to be a Licence to go into *Scotland*, that will not be a Licence to return into *England*. The Treason is, to return into the Realm of *England*, or any other His Majesty's Dominions. Another Matter that you have insisted upon, is, That supposing this to be a good Pardon under the Great Seal of *Scotland*, it hath pardon'd the Offence of going into *France*. The Return into *England* can't be High-Treason; because the Treason consists of two Facts, say you, which are, The departing into *France*, and, The returning into the Queen's Dominions. Like unto the Case, when one gives another a mortal Wound, of which he languishes, and before he dies, the Stroke is pardon'd; and then the Party dies: Afterwards it will not be Murder; because that Act, which should make it so, is discharged by the Pardon. To this a plain Answer has been before given by the Queen's Council; That going into *France* since the 11th of *December*, 1688, is no Offence originally; but only the Return of such Person is made High-Treason, and from that Return doth the High-Treason commence. Therefore such a Pardon, under the Great Seal of *England*, could not have discharged him from being guilty of High-Treason, if he had returned afterwards.

But, says he for himself (as I apprehend him) That this Pardon hath made him a Free *Scotchman*, to all Purposes, as if he had never offended. And tho' the Pardon can't have any Operation to discharge him of any Crime committed against the Law of *England*; yet it hath this Effect, by putting him in the same State of other *Scotchmen*, to enable him to come into *England*. It is true, this Pardon puts him in the same Condition, in which other *Scotchmen* are by the Law of *Scotland*; but it puts

him not in the same Condition that other *Scotchmen* are by the Law of *England*. By the Law of *England*, *Scotchmen* may at any Time come into *England*: But the Law prohibits those who are Subjects, and went into *France* without Licence, to return into *England*.

They who were born in *Scotland*, may inherit Lands in *England*: But if an Alien to *England* and *Scotland* be naturaliz'd by Act of Parliament in *Scotland*; though he is to all Purposes a Natural-born Subject of *Scotland* by the Law of that Realm; yet not therefore Inheritable to Lands in *England*, because he is not a Natural-born Subject by the Law of *England*.

There is another Question hath been stir'd; which is, That he should have been indicted in the first *English* County into which he came: For it appears, upon the Evidence, that he came from *Scotland*. Now *Middlesex* can't be the first County; but it must be *Northumberland*: For upon his coming there, the Treason is complete; and his proceeding further into other Counties, can't make it more Treasons than it was before. As to the Case of Felony, stealing Goods in one County, and carrying them into another; it is Felony in every County they are carried into. A Prisoner escapes from a Goal in one County, and then goes into several Counties; it is an Escape in every County into which he comes; which is a Case very opposite to this in Question. Suppose a Man committed for Felony has escaped out of *Newgate* into *Northumberland*; may he not be indicted in *Northumberland*? He came voluntarily into this County of *Middlesex*; and certainly may be indicted, and tried here. Indeed, if he had been taken in one County, and carried into another County, that would be another Case; because he came there by Coersion.

Mr. *Williams*. Now, my Lord, in this Case, the Prisoner comes into this County of *Middlesex* to surrender himself; and coming into *Middlesex* with an Intention to surrender himself, when a Warrant is out against him, will not be Treason in *Middlesex*, tho' his first coming into *England* were admitted to be Treason.

L. C. J. *Holt*. That does not appear: He says otherwise himself. He says, he heard there was a Warrant out against him; and then he surrender'd himself.

L. C. J. *Trevor*. I do not think, if he had come into this County to surrender himself, it would have alter'd the Case. If he had surrender'd himself in the first County he came into, he would have been within the Law.

Mr. *Williams*. My Lord, with humble Submission, if he comes into *England*, he, by that, commits Treason. But if, after his coming into *England*, and before he comes into *Middlesex*, he hears that in *Middlesex* there is a Warrant out against him; and, purely to surrender himself upon this Warrant, he comes into *Middlesex*, and surrenders himself in *Middlesex*; with humble Submission, this Act of Surrendering himself, which the Prisoner does in Obedience, and in Justice to the Process of Law, won't amount to make him guilty of High-Treason in *Middlesex*.

L. C. J. *Holt*. This is not the Case. However, we are all of Opinion, that alters not the Case: (For I have consulted my Lord and Brothers). Have you any more to say for the Prisoner? Or has he any thing more to say for himself?

Mr. *Lindsay*. My Lord, I have told you what was the Motive that brought me into *England*; That

That I was to come to my Wife and Children, believing that I might have done it without Trespassing against the Law, because I saw others did so before me. Now if it be taken as a Fault in me, and not in others; that will be very hard, my Lord. If I have offended, it is out of Ignorance.

*L. C. J. Holt.* Ignorance of the Law is no Excuse: But that may fall under another Consideration, which doth not belong to us. Have you any more to say?

*Mr. Lindsay.* If I have by my Ignorance offended in this Point, and if you think my Indemnity in *Scotland* will not avail me, I humbly beg your Lordship will intercede for me to Her Majesty.

*L. C. J. Holt.* Gentlemen of the Jury, this Prisoner, *David Lindsay*, is indicted for High-Treason upon the Statute that was made in the Ninth of King *William*. The Offence set forth in the Indictment is to this Effect, That he being a Subject of the late King, did, since the 11th of *December*, 1688, go out of this Realm into *France*, and that he has returned into *England*, without Licence under the Privy-Seal, since the 14th of *January*, 1697; which returning, by that Act is made High-Treason. This Act was made upon the concluding the Peace of *Reswick*, because then (as the Act recites in the Preamble) the Seas would be open for Commerce between *England* and *France*, and that would give an Opportunity to those Persons to return to *England*, whom the Wisdom of the Nation thought dangerous to the Government, that is, those that had been in the Service of the *French* King, and others, that by departing the Realm since the 11th of *December*, 1688. Therefore, to prevent all Danger to the King and his Government, this Act was made, to make such a Return to *England* by such Persons to be so penal as to amount to High-Treason.

Now, the Question is, whether this Prisoner be guilty. It does appear that he is a Native of *Scotland*, and also that he was here in *England* for many Years (I think one of his own Witnesses says about twenty) and did depart since the 11th of *December*, 1688, and he returned into *Scotland* since *March* was Twelve-month, and came into *England* afterwards about *December* last, which is also admitted. So that it appears he is in the Words of the Act, and had no Licence under the Privy-Seal.

But that which he insists upon by his Council, is, that he was a *Scotchman* by Birth, and had an Invitation to return into *Scotland*, and had the Queen's Pardon, whereby he was pardon'd all manner of Offences. It's true, he admits he was at *St. Germans*, but returned into *Scotland* in order to take the Benefit of that Pardon. He was at first secured by the Government there, but he had the Benefit of the Pardon allow'd him, and was discharged. And then he says, he did desire to come into *England*, and would not continue longer in *France*, because he would not be a Papist. That when he was in *Scotland*, he desired to come into *England* too, which he thought he might upon the Account of his Pardon in *Scotland*; and he advised with Council, whether he might safely come into *England*, and they told him he might, as he says.

The Question is, whether any of these Things will be to his Advantage. First, It is a Law of *England*, that he is indicted upon; no Pardon under the Great Seal of *Scotland* can discharge any

Crime committed against the Law of *England*, neither can a Pardon under the Great Seal of *England* discharge any Crime against the Law of *Scotland*. But suppose he had had a Pardon under the Great Seal of *England* before his Return; that would not have pardon'd him in this Case: For his Offence is not in going into *France*, and coming into *England* in Time of Peace; but that having so gone, he returns without Licence, that is the Fact that is made so penal. Now a Pardon given before a Man commits any Offence, is ineffectual; the Queen cannot pardon a Crime before it is committed.

But, says he, I am by this Pardon made to all Purposes a free *Scotchman*, I am restored to all my Capacities that I had lost; therefore, if I have all the Capacities that I had as a *Scotchman* before, I may come into *England*. Now that is a Mistake. It's true, he is restored to all the Capacities of a *Scotchman*, which is to be had by the Laws of *Scotland*; but a Pardon in *Scotland* cannot give him those Privileges he had by the Law of *England*, and therefore cannot discharge him from an Offence committed against the Law of *England*. Nay, if he had been in *Scotland*, having escaped after he had been here, that would not have been effectual to discharge him from his Offence against the Law of *England*. Gentlemen, the Matter is before you, he is a Subject of the Queen of *England*, he has departed from *England* since the 11th of *December*, 1688, and has returned hither without Licence under the Privy-Seal. And if you do believe all this, then you are to find him guilty; but if you do not believe it, you are to acquit him.

*Then the Jury withdrew, and in about half an Hour returned into Court.*

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

*Jury.* Yes.

*Cl. of Arr.* Who shall speak for you?

*Jury.* Our Foreman.

*Cl. of Arr.* *David Lindsay*, hold up thy Hand (which he did). How say you? Is he guilty of the High-Treason, whereof he stands indicted, or not guilty?

*Foreman.* Guilty.

*Cl. of Arr.* What Goods or Chattels had he at the Time of this High-Treason committed?

*Foreman.* None that we know of.

*Then the Court adjourned till Five of the Clock.*

*About Five of the Clock the Court met, and the Prisoner being brought, the Court proceeded.*

*Mr. Att. Gen.* My Lord, *Mr. Lindsay* the Prisoner hath been convicted of High-Treason, and I pray the Judgment of the Court.

*Cl. of Arr.* *David Lindsay*, thou has been arraigned for High-Treason, and thereof convicted, what hast thou to say why Judgment should not pass against thee?

*Mr. Lindsay.* My Lord, I refer myself to the Queen's Mercy.

*L. C. J. Holt.* Have you any thing to plead for yourself, or by your Council?

*Mr. Williams.* My Lord I did design to have insisted upon a Point in relation to this Statute, upon

upon which the Indictment against the Prisoner is grounded; but understanding it has been already under the Consideration of your Lordship, and the rest of my Lords the Judges, and that it has received your Lordship's Determination, I shall chuse to wave it; but this, with Submission, I do insist upon; That it is not shewn in this Indictment that the Prisoner was a Subject of King *William* at the Time of his going into *France*, or at the making this Act. Now, as I humbly conceive, the very Words of the Act require, that the Party should be a Subject at that Time. The Words are thus, *If any of His Majesty's Subjects, who have after the 11th of December gone into France, if they return without Licence, they shall be guilty of High-Treason.* Now by the Words of the Act, it seems requisite that he should be a Subject at the Time of his going into *France*; or at least at the Time of the making of the Act. So that, with Submission, the Indictment does not agree with the Act of Parliament, unless it be shewn that the Prisoner was a Subject at the Time of his going to *France*; and no Indictment in any Case, much less an Indictment for High-Treason shall be aided by Intendment.—And in this Case, my Lord, there is the less Room for an Intendment, that the Prisoner was then a Subject, because it is not shewn that the Prisoner was a natural born Subject, or that his Treason was *contra naturalis allegiantie debitum*. And it not being shewn that he was a natural Subject, it must be supposed he became a Subject by Naturalization, or by Denization, which might be since his going into *France*.—My Lord, I must own, 'tis said in the Indictment that he was a Subject of King *William*, but 'tis not said when he was a Subject; so that it may be as well supposed he became so after he went into *France*, as before; and the rather in regard he is not shewn to be a natural-born Subject. And we take it, that by the Penning of this Law, which says, *If any of his Majesty's Subjects, who have gone into France, &c.*—it must be meant of a Subject at that Time, or at the Time of his going into *France*; and it not being shewn that he was a Subject at that Time, we humbly take it that the Indictment is insufficient.

Mr. *Raymond*. My Lord, we say, with great Submission, that this Indictment is not good, because it does not shew that Mr. *Lindfay* was a Subject of the late King at the time of the making the Act, or any time before. If this Person had become a Subject of the King after the making of the Act, as he might by Derivation, and had returned into *England*, having been in *France* in the Time mentioned in the Act, he would not be within the Act. Therefore it was necessary to shew at what Time he was a Subject. It is not laid in the Indictment, that he was a natural-born Subject, nor do I pretend that it is necessary in an Indictment for Treason, because one that owes Local Allegiance may be guilty of Treason. But they ought to have averr'd either that he was a natural-born Subject, and that he shall be intended so always; or else, that he was a Subject at the Time of the making of the Act, otherwise we won't be within the Act; because the Words of the Act seem to tie it up to Subjects at the Time of the making the Act, by the Words which follow, *viz. Who have gone into France, &c.*

Sir *T. Powis*. I have look'd both into the Indictment and the Act. One Part of the Objection is, that he is not a natural Subject. That is

not to be insisted on, for there is no such thing in the Act; for the Act says, *If any of his Majesty's Subjects*; and there is no need of laying any more in the Indictment than the Act requires; and it was not intended to be confined to such. The other Part of the Objection is, That it is not alledged that the Prisoner at the Bar was the Subject of King *William* at the time when the Act was made. Now there is no need of alledging these Words in the Indictment; for the Act runs thus, *Therefore be it enacted, that if any of his Majesty's Subjects, who have at any Time, since the 11th of December, 1688, voluntarily gone into France, without Licence from His Majesty King William, or from Queen Mary, shall return: And the Indictment does lay it, that this Prisoner was a Subject of the late King William, and that he is now a Subject to the present Queen; and that he, after the 11th of December, 1688, did go into France.* Now sure here is alledged in this Indictment that the Act refers to; that is, *That if any Subject, who went into France after the 11th of December, 1688, shall return into England.* And the Indictment says, he was a Subject of King *William*, and that he did go into *France* after that Time, and did return into *England* after the Time prohibited by the Act. Here is nothing required in the Act, but what is laid in the Indictment. And it is a very strange Objection to say that we should averr that he was a Subject when this Act was made; this ought to have been shewed on the other Side, if it be otherwise. Here is that in the Indictment which is conformable to the Act, and there is no more necessary, than to describe the Person according to the Act.

Mr. *Att. Gen.* My Lord, we have taken that Method in the Indictment that is proper, that is, to pursue the Act of Parliament; we have laid him as the Act describes. Now they say, that it being not shewn that he was a Subject at the Time of his going into *France*, he is not within the Act. But when a Man is laid in the Indictment to be a Subject, it is a strange Objection to fancy we must mention the Time of his beginning to be a Subject. We have shewed he was a Subject before the making of the Act, and we have shewed he was a Subject after; and he is presumed to have always been a Subject, unless special Matter is shewn when he was not a Subject, as that he was an Alien, and at a particular Time naturalized or made a Denizon; which without Proof will not be presumed; and this Objection should have before arisen from Evidence. It is laid likewise to be contrary to the Duty of his Allegiance, being a Subject of the late King *William*, and of the present Queen.

Mr. *Williams*. My Lord, this Exception against the Indictment seems, with great Submission, not to be answered; I go upon the Words of the Act:

*If any of his Majesty's Subjects, who have since the 11th of December, 1688, gone into France.* My Objection is, That it is not shewn, that at the Time of going into *France*, nor when the Act was made, that the Prisoner was a Subject; and it not being so shewn, to intend the Prisoner then a Subject, is helping the Indictment by Intendment, which cannot be. And I say there is the less Room for this Intendment here, because this Prisoner is not shewn to be a natural Subject.

Mr. *Raymond*. My Lord, every Word of this Indictment would have been true, if this Gentleman had been an Alien, and become a Subject after the Act was made, and before the late King died.

died. And yet in such a Case he would not have been within the Act: For if he had been a Stranger, and after the Act had been denizon'd, and then had returned into *England*, having before been in *France*, that would not have been within the Act, because the Act says, *If any of the King's Subjects, who have gone into France, shall return: Which must be meant, that were so before the Act was made: And yet that is all this Indictment says.*

*L. C. J. Holt.* That is a foreign Supposition. Can any Man suppose, that such a Man that has been in *France*, that he should be naturaliz'd or indenizon'd after such an Act was made? And suppose it were so, that he was an Alien, and happen to be naturaliz'd by general Words; the Act does not say, If he shall be a Subject at his Departure; but if he were in *France* since such Time, and return after this Act.

He was a Subject to King *William*, and to Queen *Anne*; and that he went away since the 11th of *December*, 1688, and returned into *England* without Licence.

This is an Indictment formed suitable to the Act of Parliament; it pursues the Words of the Act of Parliament. The Act describes the Person, and sets out what shall be the Offence; that is, one that is a Subject of the King, and has gone away into *France* since the 11th of *December*, 1688, and shall return without Licence.

*Mr. Williams.* It appears not he was a Subject when he went away.

*L. C. J. Holt.* *If any of his Majesty's Subjects, that have gone away since the 11th of December.* It does not say, Any that shall go away; but that have gone away after the 11th of *December*.

*Mr. Justice Powel.* A Subject is supposed to be a natural Subject, unless he be naturalized afterwards: But now he being said to be a Subject according to the Act, supposes him to be a Subject then.

*Mr. Raymond.* My Lord, we think, with Submission, this is not an Indictment according to other Indictments.

*Mr. Justice Powel.* It's enough that he is said to be a Subject.

*Mr. Raymond.* But, my Lord, must there not be a Distinction between a Subject that owes natural Subjection, and commits Treason, and one that only owes local Legiance?

*Mr. Justice Powel.* You might have shewn that, when you were upon the Evidence.

*Mr. Williams.* My Lord, we humbly think it must be shewn that he was a Subject, at least at the Time of the making of the Act.

*Mr. Justice Powel.* We must take him to be a natural Subject, unless the contrary appear.

*L. C. J. Trevor.* We suppose that he was a Subject at the Time of his going out of *England*; and that the Indictment sufficiently sets forth. If you could have shewn that he became a Subject afterwards, that might have help'd you; but else it signifies nothing.

*L. C. J. Holt.* Have you any more to say?

*Mr. Williams.* If we have slipt any Thing on Behalf of the Prisoner, which might have been of Service to him, we hope he shall not suffer for any Omission of his Council; and therefore humbly pray, that your Lordship will favour him, and will be pleased to hear him for himself.

*Mr. Lindsay.* My Lord, What I have done has been out of Ignorance, and being supported by what other People did. And therefore, my Lord,

having come into *England* by my self, I did not come with any Design of Harm, or to do any Thing contrary to the Law. As I am a *Scotchman*, it is not to be presumed I can understand the Laws of *England*: And therefore, if I have done any Thing amiss out of Ignorance, I hope your Lordship will make a favourable Construction of it; and represent my Case to the Queen. And I hope, as Her Majesty has given me the Effects of her Mercy in *Scotland*, I shall not feel the Effects of her Displeasure in *England*.

*L. C. J. Holt.* *Mr. Lindsay,* You have been indicted, and upon the Evidence of your own Confession of the Fact alledged against you, and after a great Debate in Matter of Law (which by you, and your Council, was urged on your Behalf) are convicted of High-Treason. That which now remains, is, To pronounce Judgment of Death upon you, which you are to suffer in that Manner which the Law hath appointed. Your Crime is, returning from *France* without the Queen's Licence; having before gone thither without any Licence from the late King or Queen. That Law which hath made such your Return to be an Offence of so high Nature, cannot (by any considering *English* Protestant) be thought to be severe: For they who, in the Time mention'd in the Act, chose rather to run into *France*, than to stay in *England*; could have no other Inducement, than an Affection to an Interest opposite to the Protestant Religion, and the ancient Constitution of this Kingdom. For they were received, protected, and encouraged by that Prince, who is a dangerous and profess'd Enemy both to our Religion and Government. The Wisdom of the Nation thought it absolutely necessary to keep them out; unless they should either clear their Innocence, or give Satisfaction by their Repentance, that they were fit to be trusted here. For he that should adventure to return, without doing either, must be presumed to come in upon the same Principles, and with the same Purposes, with which he went out: Which must be a constant Danger, even to the Foundation of our Government, which is established upon the Protestant Religion, and the Laws of the Kingdom. As to these Circumstances which you have mentioned to be peculiar to your Case, they fall not under Consideration; since they are not sufficient to justify you in acting contrary to the Law. Of what Consideration they may be to obtain the Queen's Mercy, falls not under our Cognizance; for that is a peculiar Attribute, inseparable from Her Majesty's Royal Person, by whom it can only be dispensed. Our Business is to put the Law in Execution. And you must be convinced in your own Conscience, that you have been convicted on a full Evidence, proving the Fact, which hath proceeded from your own Mouth. We have all heard, and debated that Matter of Law which you urged by your Council in your own Behalf; and are all of Opinion, that doth not avail you; but you are an Offender against an Act of Parliament: And nothing remains now, but to pronounce the Sentence of the Law upon you; which is,

*That you shall be conveyed from hence to Newgate, the Prison from whence you came, and from thence to be drawn upon a Hurdle to Tyburn; where you are to be hanged by the Neck, and while you are alive to be taken down, your privy Members are to be cut off, and your Bowels to be taken out of your Body, and burnt in your View; your Head is to be cut off, your Body is to be divided into four Parts, and your Head and your*  
Quarters

*Quarters are to be disposed as her Majesty shall appoint. And the Lord have Mercy upon your Soul.*

Mr. *Lindsay*. My Lord, I beg that my Wife and Children may come to me; and that I may have a Minister of the Church of *England* allow'd me.

L. C. J. *Holt*. You shall have whom you will, according to what is usual in such Cases.

Mr. *Lindsay*. I desire my Wife and Children may come to me alone, without the Keeper.

L. C. J. *Holt*. That is not to be permitted, that may occasion Danger.

Mr. *Lindsay*. I desire they may be lock'd up with me.

L. C. J. *Holt*. Mr. *Lindsay*, It is a Charge on the Keeper, that he admit them; but so as may not occasion any Danger.

Mr. *Lindsay*. It is a Trouble to the Keeper to wait on me so long (two or three Hours together) which was the Reason I desired it. And if a Minister come to me, I desire we may be private.

L. C. J. *Holt*. He will use you with all the Charity that may be; but he must do what is prudent. Nothing that is reasonable, or fit, shall be deny'd you.

Mr. *Lindsay*. My Lord, I should be sorry, if I desired any thing that is unreasonable. My Lord, I suppose it is my Time now to say any Thing. I shall say only thus much; that is, I well understood what Circumstances I was in: I believe no *Scotchman* has been call'd in Question upon that Act; and I believed in my Conscience I was not guilty.

L. C. J. *Holt*. You are guilty of the Fact charg'd upon you; and it was a very reasonable Law.

Mr. *Lindsay*. My Lord, I own, the Reason was good for making the Act; but that the Reason that I am guilty of the breaking it, I cannot own that.

L. C. J. *Holt*. You are guilty of the Thing you are charg'd with. All that you can do now, is, To appeal to the Mercy of the Queen: She is the best Judge of it.


Mr. *Lindsay*. My Lord, I rest upon your Lordship's representing my Case to the Queen.

*Her Majesty was afterwards pleased to grant him a Reprieve.*



CLXXX. *The Trial of JOHN TUTCHIN at the Guild-Hall of London, for a Libel, entitled, The Observator, Nov. 4. 1704. 3 Ann.*

*The Queen against John Tutchin.*

London ff.  HE Information sets forth, That the Defendant being a seditious Person, and a daily Inventor and Publisher of false News, and horrible and false Lies and seditious Libels, and a perpetual Disturber of the Peace of this Kingdom; and wickedly and maliciously devising the Government, and Administration of Justice under our Lady the Queen, to traduce, scandalize and vilify; and our said Lady the Queen, her Ministers and Officers, to bring into Suspicion, and the ill Opinion of her Subjects: The 30th Day of May, in the First Year of her Majesty's Reign, at London, &c. did falsely, seditiously and scandalously, write, compose and publish, and cause to be written, composed and published, a certain false, malicious, seditious and scandalous Libel, entitled, The Observator. In which Libel, (of and concerning this Kingdom, and the Officers and Ministers of the Queen) are contained (inter alia) as follows.

N<sup>o</sup> 11. Saturday, the 30th of May, 1702.

“ At the same Time we [the Subjects of this Kingdom meaning] “ consider the French King's Success in “ his Bribery and Corruption, we ought to lament the “ sad State of our own Country [the Kingdom of England meaning] “ which affords so many Instances “ of Treachery. If we may judge by our national “ Miscarriages, perhaps no Nation in Europe has “ felt the Influences of French Gold more than Eng- “ land: And worthy it is our greatest Lamentation, “ that our dear Country [meaning this Kingdom] “ should be thus weaken'd by Men of mercenary Princi- “ ples; when Countries inferior to us in Strength “ and Riches, are secured from Attempts of this Na-

“ ture only by the Fidelity of their People. What “ is the Reason that French Gold has not affected “ Holland as well as England; but that their Mini- “ stry is such as is entirely in the Interest of their Coun- “ try, and altogether incorruptible? They prefer “ Men that are knowing in their Posts, and are “ active in Business: When, in England, we find out “ Offices for Men, not Men for Offices. And a “ Title of Honour gives a Man a Title to a great “ Employment he is altogether ignorant of. By this, “ and by preferring of Men by Interest and Favour, “ has the Excise, the Customs, and other Branches of “ the Revenue intolerably sunk: And by this Means “ has the Navy of England, our chief Support, been “ hitherto perfectly bewitch'd. And can Lewis spend “ his Money better, than in getting Men into Of- “ fices in England, who are either false, or ignorant “ in the Business, or are his Friends?

N<sup>o</sup> 23. Saturday, the 11th of July, 1702.

That the Defendant afterwards, the 11th of July following, another false, malicious, seditious, and pernicious Libel, entitled, The Observator, falsely, maliciously, and seditiously, did write, compose, and publish, and caused to be written and published: In which Libel (of and concerning the Government of this Kingdom, and the Power of the People of this Kingdom) are contained (inter alia) as follows.

“ And this is a Prerogative of singular Advan- “ tage to the People of England; in that their Re- “ presentatives are the Judges of the Male-Admi- “ nistration of their Governors; that they can call “ them in Question for the same, and can appoint “ such to wear the Crown (meaning the Crown of this Kingdom) “ who are fittest for Government: “ Which

“ Which they have often done, and indeed which  
 “ is the Privilege of all free People, who are au-  
 “ thorized by the Laws of God and Nature, to  
 “ chuse their own Governor’s.”

N<sup>o</sup> 19. Saturday the 12th of June, 1703.

That the Defendant afterwards, the 12th of June, in the second Year of the Queen, did write and publish, and caused to be written and published, another false, scandalous, and seditious Libel, Entituled, The Observator. In which said Libel (of and concerning the Royal Navy of this Kingdom, and the Government of the said Navy) are contained (inter alia) as follows: “ Take one Time with another, the  
 “ Mismanagements of the Navy (meaning the Royal Navy of this Kingdom) “ have been a greater Tax  
 “ on the Merchants, than the Duties raised by Par-  
 “ liament: We never had a better Navy, but the  
 “ Wisdom of the Managers thereof is like a ot-  
 “ tomless-Pit, past finding out.”

N<sup>o</sup> 20. Wednesday the 16th of June, 1703.

That the Defendant afterwards, the 16th Day of the said June, did write and publish, and caused to be written and published, another false, scandalous, and seditious Libel, Entituled, The Observator. In which was contained (inter alia, of the said Royal Navy, and the Officers of the said Navy) as follows: “ What avails it a Man of Learning and Parts, to  
 “ qualify himself for the Service of his Country  
 “ on the Ocean? If he has Knowledge enough to  
 “ advise Neptune himself, if he has no Interest, he  
 “ shall have no Preferment. How much does it  
 “ look to our Nation’s Disadvantage, to have Men  
 “ in eminent Stations in the Navy, who have not  
 “ so much as an Idea, a Notion, a Thought of  
 “ Naval Affairs? To have Men to superintend the  
 “ Building of our floating Castles, who know not  
 “ the Nature of any Part of the Management? To  
 “ have Men employ’d in the Victualling, who qua-  
 “ lify themselves for that Post by learning to write  
 “ their Names, which is indeed a Post for a Philo-  
 “ sopher bred to the Sea?”

N<sup>o</sup> 27. Saturday the 10th of July, 1703.

That the Defendant afterwards, the 10th of July following, did write and publish, and cause to be written and published, another false, scandalous, and defamatory Libel, Entituled, The Observator; in which are contained (inter alia, of one Daniel de Foe, who was indicted the 24th of February, in the first Year of the Queen, before the Justices of Oyer and Terminer at the Old-Bailey, London: And in July following, was convicted upon his own Confession, for composing and publishing a seditious Libel, Entituled, The shortest Way with the Dissenters, or Proposals for the Establishment of the Church, and of the Judgment against him to pay a Fine of 200 Marks, and to stand three Times in the Pillory, and to find Security for his good Behaviour for seven Years) as follows: “ Countryman. Truly Master Observator,  
 “ I have no very good News for you: Mr. Daniel  
 “ De Foe has pleaded Guilty to the Indictment  
 “ against him, for writing and publishing the  
 “ shortest Way with the Dissenters; and he is sen-  
 “ tenc’d to stand three Times in the Pillory, to pay  
 “ a Fine of 200 Marks, and to find Security for  
 “ his good Behaviour for seven Years. *Observ.* The  
 “ Court could do no otherwise than convict him,  
 Vol. V.

“ upon his pleading Guilty; *habemus confitentem*  
 “ *reum*, is very often the Voice of Courts of Judi-  
 “ cature, ’tis the Ease of Judges and Juries: If  
 “ Daniel De Foe was in Expectation of Coleman’s  
 “ Black-Box, he has found a Pillory instead of it.  
 “ I don’t trouble my Head about the Custom of  
 “ giving the Pillory to Authors, which is the Pu-  
 “ nishment of Bakers. You talk’d just now of  
 “ turning Author, have a Care of your Candle; you  
 “ see which is the shortest Way with Authors;  
 “ you must all enter your selves into the Regiment  
 “ of Colonel Foe: The Law of England directs, that  
 “ no Man shall be fined *ultra tenementum*; and I  
 “ make no Question, but the Justice of the Court  
 “ has fined Mr. Foe answerable to his Estate: His  
 “ Security for his good Behaviour for seven Years,  
 “ without doubt, was rationally considered, as to  
 “ the Legality thereof. For my Part, I am only  
 “ acquainted with old Laws of England, the an-  
 “ cient Birthrights and Immunities of Englishmen:  
 “ This I take to be the Foundation of new Laws.”

N<sup>o</sup> 17. Saturday the 20th of May, 1704.

That the Defendant afterwards, the 20th of May last, did write and publish, and cause to be written and publish’d, another false, scandalous, and seditious Libel, Entituled, The Observator. In which are contain’d (of and concerning the Defendant, and a Prosecution to be had against him for divers seditious Libels by him, before that Time, compos’d and publish’d) as follows: “ Countrym. Master Observator,  
 “ there’s another Plot against you (meaning the De-  
 “ fendant). “ *Observ.* Prithce Man, there’s a Plot  
 “ against the Queen, and the whole Nation; is it  
 “ any Wonder then, that there are Plots against me?  
 “ The High-Flyers are now plotting against every  
 “ honest Man in England. I’ll tell you more of it,  
 “ the next Time we meet. *Countrym.* I fancy some  
 “ sort of People plot against you, because you en-  
 “ deavour to countermine their Plots against the  
 “ Queen and Nation. *Observ.* You are right  
 “ enough; but that shan’t hinder me from detect-  
 “ ing their Designs, and from opening the People’s  
 “ Eyes: But prithce, what Plot is this? *Countrym.*  
 “ Why, Sir, it is a Plot preparatory to your Trial;  
 “ and if they can’t affect this Plot, I suppose you’ll  
 “ never be tried. They insinuate into the Citizens  
 “ of London, that you have lately written very  
 “ scandalously, maliciously, and treasonably, and  
 “ I don’t know how many other Lies, against them  
 “ the said Citizens; and by this Means they are  
 “ minded to set your Jurors against you. *Obj.* This  
 “ is likely enough; they’ll leave no Stone unturn’d,  
 “ to suppress the Truth. I understand, I should  
 “ have been prosecuted by Bill the last Sessions, but  
 “ that the High-Flyers did not like the Jury; nay,  
 “ they say they don’t like the two Sheriffs, be-  
 “ cause they won’t pack Juries to find innocent Men  
 “ guilty.” To the Disturbance of the Peace of this  
 “ Kingdom, to the great Scandal of the Queen and her  
 “ Government, and against the Peace of the Queen,  
 “ her Crown and Dignity, &c.

Proclamation was made for all Persons to attend.  
 Then the Jury was called.

John Cooper,  
 Thomas Briscoe,  
 Alexander Pollington.

Edward Pinfold being called, desired to be excused.



Mr. *Pinfold*. My Lord, I desire I may be excused. I do not know Mr. *Tutchin*, for I never saw him in my Life; but I have read his *Observations*, and have several Times publickly disallowed them; and therefore some may think I am prejudiced against him.

\* Mr. *Att. Gen.* The Question is only, whether he was the Author of these Papers? For that is the Matter to be tried.

Mr. *Pinfold*. I do not know that.

Mr. *Mountague*. But, my Lord, there may be something more in it, for he publickly disallowed his Papers.

L. C. J. *Holt*. You must not be excused unless the Queen's Council will.

Mr. *Mountague*. My Lord, we challenge him on behalf of the Defendant.

Mr. *Att. Gen.* Shew your Cause.

Mr. *Mountague*. My Lord, our Cause is, that he himself looks upon himself as not indifferent.

L. C. J. *Holt*. He says, he has read some of his Papers, and has publickly condemned them, that he did not approve of the Matter contained in them, but he does not say he is the Author.

Mr. *Whitaker*. But he said he did not doubt but he was the Author of them.

Mr. *Serj. Darke*. He is the fitter Man for a Jury.

Sir T. *Powis*. He does not say he has disapproved all the Papers he has read, and it may be those were not the Papers now in Question.

Mr. *Mountague*. My Lord, the Matter we are contending for, is, that one that is not altogether an indifferent Person should not be on the Jury.

Mr. *Att. Gen.* The Question is not whether the Papers are criminal, but whether the Defendant is the Author of the Papers; and if this Gentleman knows him to be Author of them, he is proper to be on the Jury: For the Jury are by Law to be of the Neighbourhood of the Place where the Fact is alledged to be done, because they are presumed to know what is done there? And if this be a Cause of Challenge, you may Challenge all People, and so there could be no Trial.

L. C. J. *Holt*. He can't be challenged, unless he had given his Verdict before.

\* Mr. *Soll. Gen.* My Lord, we can have no Jury in this way they are going. A Juryman is not to be asked what his Opinion of the Cause is; what he will voluntarily say, he may; and if upon what he says voluntarily he is liable to Exception he may be set aside.

L. C. J. *Holt*. It is not a Challenge.

Mr. *Mountague*. Surely, my Lord, he is not so indifferent as he ought to be. He says he has already declared his Opinion publickly concerning Mr. *Tutchin's* Papers.

Mr. *Pinfold*. My Lord, I know not well what he is indicted for, but it may be they are those Papers that I have given my Opinion of.

Mr. *Att. Gen.* I believe no Man that has read them, but has given his Opinion of them one way or other; but that is not a sufficient Cause of Challenge.

Mr. *Whitaker*. Mr. *Attorney*, I hope you will not contend for one Juryman.

Mr. *Att. Gen.* He says, he knows not what Papers he was indicted for, he says only that he has read some of his Papers, and has declared his Dislike of them.

L. C. J. *Holt*. Draw up your Challenge in Form, and it shall be consider'd.

Mr. *Att. Gen.* If these Gentlemen think there is nothing in it, what need they put us to this Trouble.

Mr. *Mountague*. Indeed I believe there is something more than ordinary in it, for I object only to what he himself has said.

L. C. J. *Holt*. I will have it done that it may remain a Decision *in perpetuam rei memoriam*. But if you that are for the Defendant will wave it you may.

Mr. *Mountague*. My Lord, we must insist on it; they have Jurymen enough.

Mr. *Soll. Gen.* We can't tell whether we have or no, for you may challenge them all, as well as this Man.

Mr. *Mountague*. No, I will challenge no body besides; and I challenged him, only because he mentioned himself as not an indifferent Person.

Mr. *Soll. Gen.* Is it a principal Challenge, or to the Favour?

L. C. J. *Holt*. A principal Challenge, if any.

Mr. *Soll. Gen.* He can't challenge to the Favour in Case of the Crown.

L. C. J. *Holt*. He makes it as a principal Challenge; which must be determined, and you shall have my Judgment when drawn up; it must be a principal Challenge or nothing; for there can be no Challenge to Favour in the Case of the Crown.

Mr. *Att. Gen.* My Lord, we are not willing to put you to this Trouble, we will leave it to Mr. *Pinfold* himself.

L. C. J. *Holt*. Then ask Mr. *Pinfold*.

Mr. *Att. Gen.* Mr. *Pinfold*, Do you know who is the Author of these Papers?

Mr. *Pinfold*. I know nothing of it but what is commonly reported. I know not Mr. *Tutchin* if I see him; I have read his Writings.

Mr. *Att. Gen.* My Lord, we leave it to the Juryman himself.

Mr. *Pinfold*. My Lord, I desire to be excused.

Mr. *Att. Gen.* Then we excuse you.

Then the Persons following were sworn on the Jury.

|                              |  |                       |
|------------------------------|--|-----------------------|
| <i>John Cooper,</i>          |  | <i>Mark Proctor,</i>  |
| <i>Thomas Briscoe,</i>       |  | <i>William Grub,</i>  |
| <i>Alexander Pollington,</i> |  | <i>James Lund,</i>    |
| <i>James Dod,</i>            |  | <i>John Baker,</i>    |
| <i>Isaac Beinct,</i>         |  | <i>Thomas Allen,</i>  |
| <i>Robert Potberby,</i>      |  | <i>Jasper Waters.</i> |

Then Proclamation for Information being made, the Court proceeded.

Mr. *Serj. Weld*. This is an Information against *John Tutchin*: The Information sets forth, That he being a seditious Person, and a daily Inventor and Publisher of Lies, and maliciously designing to asperse the Government, and the Administration of it, has composed and published several malicious and scandalous Libels; some of them are relating to the Government, some to the Parliament, some to the Courts of Justice, other of them to the Ministry. I shall not now take up your Time in opening the Words at large, because they are very long, and for that you will have them read to you, when the Witnesses come to prove them. He hath pleaded, Not Guilty.

Mr. *Att. Gen.* You must recite the Words of the Charge.

Mr. *Serj. Weld*. The Charge is very long. The Information sets forth, That he did write, and compose

pose, and publish a false and scandalous Libel, call'd *The Observer*, of and concerning the Government. This is laid to be on *Saturday* the 30th of *May*, 1702. And the Words therein charged against him, are these: "At the same Time, we the Subjects of *England* considering the Success of the *French* King, in his Bribery and Corruption, we ought to lament the sad State of our own Country, which affords so many Instances of Treachery. If we may judge by our national Miscarriages, perhaps no Nation in *Europe* has felt the Influences of *French* Gold, more than *England*; and worthy it is our greatest Lamentation, that our dear Country should be thus weaken'd by Men of mercenary Principles, when Countries inferior to us in Strength and Riches are secured from Attempts of this Nature, only by the Fidelity of their People. What is the Reason that *French* Gold has not affected *Holland*, as well as *England*; but that their Ministry is such, as is intirely in the Interest of their Country, and altogether incorruptible: They prefer Men that are knowing in their Posts, and are active in Business. When in *England* we find Offices for Men, not Men for Offices; and a Title of Honour gives a Man a Title to a great Employment he is altogether ignorant of. By this, and by preferring of Men by Interest and Favour, has the Excise, the Customs, and other Branches of the Revenue, intolerably sunk; and by this Means has the Navy of *England*, our chief Support, been hitherto perfectly bewitch'd: And can *Levois* spend his Money better, than in getting Men into Offices in *England*, who are either false or ignorant in the Business, or are his Friends?" And the Information further sets forth, That on *Saturday* the 11th of *July*, 1702, he publish'd another Libel, call'd *The Observer*; in which are these Words: "And this is a Prerogative of singular Advantage to the People of *England*, in that their Representatives are the Judges of the Administration of their Governors; that they can call them in Question for the same, and can appoint such to wear the Crown, who are fittest for Government: Which they have often done, and indeed which is the Privilege of all free People, who are authorized by the Laws of God and Nature to chuse their own Governors." It further sets forth, That *June* 12, 1703, he publish'd another Libel, call'd *The Observer*; in which are these Words: "Take one Time with another, the Mismanagements of the Navy have been a greater Tax on the Merchants, than the Duties raised by Parliament. We never had a better Navy; but the Wisdom of the Managers thereof is like a Bottomless-Pit, past finding out." The Information further chargeth, That on the 16th of *June*, 1703, he publish'd another Libel, call'd *The Observer*; in which were these Words: "What avails it a Man of Learning and Parts, to qualify himself for the Service of his Country on the Ocean? If he has Knowledge enough to advise *Neptune* himself, if he has no Interest, he shall have no Preferment. How much does it look to our Nation's Disadvantage, to have Men in eminent Stations in the Navy, who have not so much as an Idea, a Notion, a Thought of Naval Affairs? To have Men to superintend the Building of our floating Castles, who know not the Nature of any one Part of the Management? To have Men employ'd in the Victualling, to qualify themselves for that Post by learning to write their

"Names, which is indeed a Post for a Philosopher bred to the Sea?" It's farther set forth in the Information, That on the 10th of *July*, 1703, he publish'd another Libel, wherein, among other things, are these Words relating to *Daniel De Foe*. "Countrym. Truly, Master *Observer*, I have no very good News for you. Mr. *Daniel De Foe* has pleaded guilty to the Indictment against him, for writing and publishing *The shortest Way with the Dissenters*; and he is sentenced to stand three times in the Pillory, to pay a Fine of 200 Marks, and to find Security for his good Behaviour of seven Years. *Observ.* The Court could do no otherwise than convict him, upon his pleading Guilty; *habemus confiteam remum* is very often the Voice of Courts of Justice; 'tis the Ease of the Judges and Juries: If *Daniel De Foe* was in expectation of *Coleman's* black Box, he has found a Pillory instead of it. I don't trouble my Head about the Custom of giving the Pillory to Authors, which is the Punishment of Bakers. You talk'd just now of turning Author, have a care of your Candle; you see which is the shortest way with Authors: You must all enter yourselves into the Regiment of Colonel *De Foe*. The Law of *England* directs, That no man shall be fined *ultra tenementum*; and I make no Question, but the Justice of the Court has fined Mr. *Foe* answerable to his Estate: His Security for his good Behaviour for seven Years, without doubt, was rationally considered, as to the Legality thereof. For my Part, I am only acquainted with old Laws of *England*, the ancient Birthrights and Immunities of *Englishmen*: This I take to be the Foundation of new Laws." And that on *Saturday*, *May* 20, 1704, he publish'd another Libel, call'd *The Observer*; wherein, among other things, are these Words: "Countryman. Master *Observer*, There's another Plot against you. *Obf.* Pruthee Man, there's a Plot against the Queen and the whole Nation; is it any Wonder that there are Plots against me? The High-Flyers are now plotting against every honest Man in *England*. I'll tell you more of it the next time we meet. Countrym. I fancy some Sort of People plot against you, because you endeavour to countermine their Plots against the Queen and Nation. *Observat.* You are right enough; but that shan't hinder me from detecting their Designs, and from opening the People's Eyes: But, prithee, what Plot is this? Countrym. Why, Sir, it is a Plot preparatory to your Trial; and if they can't effect this Plot. I suppose you'll never be tried. They insinuate into the Citizens of *London*, that you have lately written very scandalously, maliciously and treasonably, and I don't know how many other Lies against them, the said Citizens; and by this means, they are minded to set your Jurors against you. *Observ.* This is likely enough: They'll leave no Stone unturn'd, to suppress the Truth. I understand, I should have been prosecuted by Bill the last Sessions, but that the High-Flyers did not like the Jury. Nay, they say they don't like the two Sheriffs, because they won't pack Juries, to find innocent Men guilty." The Defendant has pleaded, Not Guilty: But if we prove the Charge, I doubt not but you will find him Guilty.

Sir *T. Powis*. My Lord, I am of Council with Her Majesty. This Information is brought on the Behalf of the Queen, against Mr. *Tutchin*. I shall not long entertain you about it, because the Matter

is short. The Charge is, That he has publish'd several Libels, scandalous and seditious, reflecting on the Government, and the Administration of it, in many Instances given at large. I think the Papers are six in Number; and by and by you will have them more particularly before you. I presume, there ought to be made a Difference between a just Liberty and Licentiousness. This Information is brought, that Men may be warned. The Plea he has made is, That he is not Guilty. The Matter we are to prove is, That he was the Person that did write and compose these Papers, and did publish them, or cause them to be done. My Lord, we shall call our Witnesses: And notwithstanding what you have heard of late from the Defendant, relating to this Trial, I do not doubt but there will be all Justice done. I am sure, on our Side, nothing else is intended. And I doubt not, but if we prove that he did publish these Papers the Jury will find him Guilty.

Mr. *Att. Gen.* My Lord, the Information is laid against Mr. *Tutchin*, for a few of his *Observers* of the many he has writ; sometimes two, sometimes three in a Week. It is a great while that he has done it; and it has been the great Indulgence of the Government, that he has not been prosecuted before. He has been taken notice of by the *House of Commons*, and been before the Secretary of State; where he has been admonish'd to take care of what he should write: But he would not take Warning. And now he is to be try'd for some of his Papers; wherein it will appear, that he has taken the greatest Liberty, I believe, that ever Man took. Libels used to come out by Stealth, and in the dark; but these have been publish'd openly, with all the Defiance imaginable. You may see how mild the Prosecution hath been, by what he has done since the Beginning of it: He has been writing in such a Manner, to prepare for the Trial, as I think was never done before. A Prosecution of this Nature is of the greatest Consequence: And it may be, I may be blam'd being in the Office wherein I am, that there have not been more such made. Here is the highest Reflection on the Government imaginable. There can be no Reflection on them that are in Office under her Majesty, but it must cast some Reflection on the Queen who employs them. I believe there is hardly one in any considerable Post under the Government, but has been criminated by him: Nothing escapes him. He censures all Mankind; writes magisterially, and defies all Authority, and casts the vilest Reflections on the Government: As if we, who are in the Queen's Service, made it our Business to corrupt Juries. And makes Reflections both on Sheriffs and Juries. These are of the greatest Consequence in the World to the Government, and to every Body. For if such mercenary Writers may have the Liberty to reflect on whom they please, no Man's Reputation can be safe.

Gentlemen of the Jury, The Matter you are to enquire into is, whether the Defendant be the Author, or Publisher of these Libels: That is the Matter you are to try. What the Punishment must be, if you find him Guilty, is in the Judgment of the Court. We will produce our Witnesses; and doubt not but you will do the Queen Justice.

Mr. *Soll. Gen.* Call *John How*. (*He appear'd, and was sworn*). Shew him those *Observers*. (*Which was done; and he look'd them over*). Have you look'd over them?

Mr. *How*, Yes.

Mr. *Soll. Gen.* Then pray acquaint my Lord and the Jury, whether you know who composed and brought them to the Press?

Mr. *How*. I do suppose them to be Mr. *Tutchin's*: I dealt with no other Man for them.

Mr. *Att. Gen.* Acquaint my Lord and the Jury, how they came to be printed.

Mr. *How*. About the latter End of *March*, 1702, I treated with Mr. *Tutchin* about writing an *Observer*, to be publish'd Weekly: The first of which was publish'd in *April*, 1702. And all that have been printed since, I had from him, to this Year.

Mr. *Att. Gen.* You look'd on these Papers here: Were these printed by the Direction of Mr. *Tutchin*?

Mr. *How*. To the best of my Knowledge they were. They were always brought from him to me.

Mr. *Att. Gen.* Was there any Agreement made between you about the writing of it?

Mr. *How*. Yes, it was agreed at first to write once a Week; and I was to give him half a Guinea for it. I have printed in all about 266.

Mr. *Att. Gen.* Have you had frequent Discourse with him about them since? You said, you printed in all about 266: Have you paid him for all?

Mr. *How*. Yes.

Mr. *Soll. Gen.* Have you had any Discourse with him, wherein he has owned them all to be his?

Mr. *How*. He has owned them from time to time, till within this Week.

Mr. *Soll. Gen.* Has he owned himself to be the Author of them?

Mr. *How*. He always own'd himself to be the Author.

Mr. *Soll. Gen.* Have you had any Discourse with him, lest you should come into Danger for it?

Mr. *How*. Yes, I have had Discourse with him about the Danger: And he has said to me, I own, myself to be the Author: And do not fear; if any Danger happen, you are a Rogue to yourself and Family, if you do not discover me.

Sir *T. Powis*. Look on these Papers, and see if he deliver'd these very *Observers* to you: Were these the very same?

Mr. *How*. Yes.

Sir *T. Powis*. And was he paid for them by you?

Mr. *How*. Yes.

Mr. *Mountague*. I desire to see them.

Mr. *Att. Gen.* Deliver them to Mr. *Mountague*.

Mr. *Mountague*. Take that *Observer*, and look on it: 'Tis that which they are about to read. [*Then Mr. How look'd on it*]. How long ago is it that you had that Paper in your Custody?

Mr. *How*. I suppose this was delivered out of my Shop, to be sent to Mr. *Borret*.

Mr. *Mountague*. Do you know you sent that Paper?

Mr. *How*. Yes, I deliver'd it, and put my Mark upon it.

Mr. *Mountague*. How long ago?

Mr. *How*. I do not justly remember it.

Mr. *Mountague*. If you do not remember that, do you remember the printing of it?

Mr. *How*. It was done at my House.

Mr. *Mountague*. When a Copy is brought to you to be printed, do you print that Copy always exactly?

Mr. *How*. As near as I can, I do.

Mr. *Mountague*. The Question I would ask you, is; Do you, when you have a Copy, strictly keep to

to the Letter of the Copy? Or do you, as you think convenient, alter it?

Mr. *How*. I have alter'd it oftentimes, to make it safe.

Mr. *Mountague*. Then you do take it on you to alter?

Mr. *How*. To strike out a Line, never to alter his Sense.

Mr. *Mountague*. Do you not insert any Thing?

Mr. *How*. Yes, frequently a Word.

Mr. *Mountague*. Do you not take upon you to insert several Words, and leave out several?

Mr. *How*. Yes.

Mr. *Mountague*. You do. Then I ask you, Are you sure that that Paper is printed without Alteration?

Mr. *How*. I do not remember any thing of that.

Mr. *Mountague*. I ask you, Whether that Paper were not alter'd from what was sent you?

Mr. *How*. I cannot swear it.

Mr. *Att. Gen.* Can you say that Paper was alter'd?

Mr. *How*. Not that I know of.

Mr. *Whitaker*. Look on the Title; whose putting down is that?

Mr. *How*. He agreed to the Title.

Mr. *Mountague*. Does the Paper come to you, entitled the *Observer*, or not?

Mr. *How*. I cannot tell whether he ever put it in.

Mr. *Mountague*. Who put it in then?

Mr. *How*. It was agreed between us to call it *The Observer*.

Mr. *Mountague*. Does he write the *Observer*, or did you?

Mr. *How*. There is no occasion for the Title, that I know of.

Mr. *Mountague*. But who writ the Title to it?

L. C. J. *Holt*. They ask you this Question: Who was it that put this Title to this Paper?

Mr. *How*. I do not know but I might write it in the Paper at first, and so it was inserted afterwards.

L. C. J. *Holt*. Who was it first writ that Title?

Mr. *How*. I do not know who did write that, He or I. I did first propose the Title to him.

L. C. J. *Holt*. Was that Title writ by him or you?

Mr. *How*. I do not know, my Lord.

L. C. J. *Holt*. Was there an Agreement made between you, that this Paper should be writ once a Week with that Title?

Mr. *How*. Yes, my Lord.

L. C. J. *Holt*. Did he agree to that Title? And was he privy to it?

Mr. *How*. Yes, my Lord, it was agreed upon between us; and he agreed to write such a Paper, with such a Title.

Mr. *Whitaker*. Where did you come to this Agreement?

Mr. *How*. I cannot tell.

Mr. *Whitaker*. Was it in *London*, or *Middlesex*, or *Surrey*?

Mr. *How*. I cannot tell.

Mr. *Whitaker*. Where were they printed?

Mr. *How*. I printed some of them in *Fanchurch-street*, about Eighteen; the rest in *Grace-church-street*.

Mr. *Harris*. Was that Paper alter'd by you, or not?

Mr. *How*. I cannot remember whether I alter'd that, or no.

L. C. J. *Holt*. You say you alter'd sometimes: Did you acquaint him with the Alterations you made?

Mr. *How*. Sometimes they have been sent to me; I knew not where to find him; and then I

have alter'd them my self, rather than be disappointed. At other Times, I have been in his Company; and then I complain'd, and he has alter'd them. And sometimes he said, You have the Pen; do you alter them.

Mr. *Soll. Gen.* Can you say, You alter'd a Syllable in these Papers?

Mr. *How*. I cannot say so.

Mr. *Soll. Gen.* Since the first publishing of them, have you not publish'd them in Volumes?

Mr. *How*. Yes.

Mr. *Soll. Gen.* And who gave Order for it?

Mr. *How*. Mr. *Tutchin*.

Mr. *Att. Gen.* What Direction had you about this Volume? [*A Volume bound up being in Court*].

Mr. *How*. That Volume was order'd by Mr. *Tutchin*. He order'd me to bind up three Volumes: One of which he order'd to be deliver'd to Mr. *Borret*; which I did not deliver, by reason of a Prosecution at the *Old-Bailey*.

Mr. *Att. Gen.* Did he order any other Man's Works to be bound up, or his own?

Mr. *How*. He order'd me to bind his own, with the *Preface*.

Mr. *Att. Gen.* Where is that *Preface*?

Mr. *How*. Before the Book: And he owned that, and put his Hand to it.

Mr. *Att. Gen.* Had you paid for these?

Mr. *How*. Yes; He order'd me to bind up these together, and to deliver one of them to Mr. *Borret*.

Sir T. *Powis*. Did you pay him for the *Preface*?

Mr. *How*. Yes, and for the *Index*.

L. C. J. *Holt*. Who made the *Index*?

Mr. *How*. He did.

L. C. J. *Holt*. Did he write his Name to the *Preface*, after it was brought to you?

Mr. *How*. It was deliver'd to me with his Hand to it; and he owned it.

Mr. *Soll. Gen.* Then he owned all the *Observers* to be his, by setting his Name to the Volume?

Mr. *Mountague*. Where was this Book deliver'd to you to be bound up?

Mr. *How*. I do not know, whether in *London*, or *Middlesex*, or *Surrey*.

Mr. *Mountague*. Recollect where it was that you had this Discourse about a Book.

Mr. *How*. I do not remember the exact Time.

Mr. *Mountague*. But you remember the Discourse: And can't you say where it was?

Mr. *How*. No, indeed.

Mr. *Mountague*. The *Preface* they talk of, was it brought in Writing?

Mr. *How*. It was brought, or sent in Writing; and I printed it from a Manuscript Copy.

Mr. *Mountague*. How do you know he sent it?

L. C. J. *Holt*. What did you give him for that *Preface* and *Index*?

Mr. *How*. I think it was ten Shillings.

Mr. *Mountague*. My Lord, with Submission, they cannot read this Paper: For if it be read, it must be read as the Paper of Mr. *Tutchin*. Now, as to this Paper that they produce, we do insit upon it, that is Mr. *How*'s Paper, and not Mr. *Tutchin*'s. For he tells you, That whatever Papers he had, or whatever Directions were given him from Mr. *Tutchin*, were in Writing. Now if Mr. *Tutchin* is to be charg'd with a Libel in Writing, they must produce that very Writing, or a true Copy thereof. And another Man's taking a Copy of my Writing, cannot be said to make it my Writing; especially when it is not prov'd to be a true Copy. So that this Paper, which is printed by

Mr. *How*,

Mr. *How*, cannot be charged on Mr. *Tutchin*. If one single Penman had taken a Copy of it, if he could not be sure it was an exact Copy, it could not be read; much less such a Paper, which goes thro' so many Hands as this has done. And Mr. *How* says, He did often alter it, according to the best of his Understanding; and therefore that makes it his Paper. For, by a very small Alteration, a Thing may be made a Libel, that was not so before. And besides, it appears by Mr. *How*'s own Evidence, that Mr. *How* makes an Advantage by the Printing and Publishing of it: And perhaps he makes Alterations, to make it sell the better. That makes it nothing like to Mr. *Tutchin*'s Paper; and therefore they ought to produce that very Paper that was brought from Mr. *Tutchin*: And this Paper ought not to be read against him.

Mr. *Harris*. My Lord, he does not swear it is a true Copy; and therefore we cannot allow it to be read.

Mr. *Whitaker*. He has added the very Title: It is called an *Observer*; and he has put that Title to it. And he gives you no Account when, or where there was any Agreement made with Mr. *Tutchin* about it.

L. C. J. *Holt*. Where was the Agreement made for printing the Papers?

Mr. *How*. I am not positive where it was; whether in *London* or *Middlesex*. I did think it was in *Fenchurch-street*; but he says it was in the *Strand*.

Mr. *Mountague*. Can you be positive it was in *Fenchurch-street*?

Mr. *How*. I cannot be positive.

Mr. *Att. Gen.* Where were they printed?

Mr. *How*. In *Fenchurch-street*.

Mr. *Att. Gen.* Where did you bind the Book, and put the *Preface*?

Mr. *How*. That Book was sent out of my House to be bound; and when it was done, it was sent from my House again.

Mr. *Conyers*. Did he come to *Fenchurch-street*, to direct the Printing at any time?

Mr. *How*. Yes, several Times.

Mr. *Weld*. Did he agree with you to have them printed and publish'd?

Mr. *How*. Yes.

L. C. J. *Holt*. Have you the original Papers of these *Observers*?

Mr. *How*. I have very few of them now.

L. C. J. *Holt*. How came you to part with them?

Mr. *How*. I thought there would be no Use made of them, and so I did not keep them: But I have most of the third Volume by me.

Sir T. *Potter*. My Lord, in answer to this Objection, I must say, If this shall prevail in that Strictness, I take it for granted, that instead of restraining Libels, it will be the best and most effectual Way to publish them. For the Author then hath nothing to do, but when a Copy is printed, to destroy the same; and then no Evidence can be against him: Because the Printer will be called on, to know if that which is printed agree with the written Copy to a Letter. If that be so, it will be impossible to come at the Author. It is not an Answer, to say, you may go to the Printer: For tho' he is punishable; yet it is more reasonable to come at the Author. We have given a fair Evidence, that this is the same that was brought to this Man: And they do not make it appear, that he did add to, or diminish any of these Papers. The Printer says, The Defendant has avowed and justifi-

fied all that he did for him since the Beginning. That by his Order he collected all those *Observers* we insist on, in this Volume; which he has owned, and publish'd sufficiently: For here is his *Index* and *Preface*. And that he did publish this Volume there is no room to question. We have given as good Evidence of this as the Matter will bear.

Mr. *Att. Gen.* My Lord, we have given as good Evidence as can be expected, of a Matter of this Nature. We are prosecuting the Author, and have brought the Printer to give his Evidence; which is all we are able to get: For it is not in our Power to prove, where the Defendant did actually write them. The Printer had no Reason to take care of the original Papers, because when they were printed, they were of no Use. He tells you, the whole Volume was printed, and owned by Mr. *Tutchin* continually, and by him directed to be made up into a Book, and he paid Mr. *Tutchin* for writing them from Time to Time. If this be not a sufficient Evidence of his publishing of them, it would be impossible to give any Evidence; for the Author would always take away his Copy, and then he is safe. These were printed and published in *London*; and wherever the Agreement was made, we may charge the Defendant, where the Papers were printed, pursuant to an Agreement made between him and Mr. *How*; which makes the Composing and Printing his Act.

Mr. *Serj. Darnel*. My Lord, if this be not Evidence, that this Man is the Maker or Publisher of these Papers, his Agreement to have it done, his owning after it is done, and his own Confession, and his being paid for it; if this be not Evidence, nothing is.

L. C. J. *Holt*. His Agreement to publish that Book, is sufficient to prove that he owned it.

Mr. *Conyers*. My Lord, there is one Thing very considerable; the Discourse he had with this Man. Says he, *If you are question'd about it, I am the Author, I gave you the Copy, and directed the printing of it; and you are unjust to your self and your Family, if you do not discover me.* My Lord, they make this Objection: We did contract with Mr. *How* to make an *Observer*, but he made Alterations in it, as he thought fit; and sometimes he shew'd them to him, and sometimes not. Now it's clear, Mr. *Tutchin* did give him that Liberty; and he cannot say, that there was any one of these Papers that was altered.

Mr. *Soll. Gen.* And, my Lord, after there were an Hundred compos'd, he directs Mr. *How* to bind them up in a Volume, and puts a *Preface* and *Index* to them, and sets his Name to it. Now that is certainly a Publication and owning of them.

Mr. *Weld*. So far as in that Book goes, there is Evidence that he is the Author and Publisher; and they have objected nothing to it: So that the only Question is concerning the other *Observers*. Now he says he had leave from the *Observer* to make those Alterations.

L. C. J. *Holt*. No, he does not say so. Heark! you, Sir, Did you ever add any Thing?

Mr. *How*. Not that I know of, but a Word sometimes to make it Sense.

Mr. *Weld*. Did he ever allow you to do it?

Mr. *How*. He has often said, that Printer was a Blockhead that did not.

Mr. *Mountague*. My Lord, my Objection was singly, as to the reading the Papers, not of the Book. The Thing they offer'd as Evidence, was the Papers; and we say they ought to produce the Originals, which they have not done.

L. C. J. *Holt*. They offer the Book in Proof.

Mr. *Mount-*

Mr. Mountague. Then, my Lord, I must beg Leave to oppose that likewise. For this Book is proved to be his, no otherwise, than by the Printer's swearing, that Mr. Tutchin order'd him to bind up three Volumes of his *Observers*; and the Printer himself has put together these Papers, and Mr. Tutchin has writ a Preface before them; but whether the Papers thus put together were ever examined, *non constat*: or whether the Bookbinder has made no Alterations, *non constat*. And it does not appear, that Mr. Tutchin look'd over any of the Papers that are here bound up. So that the most the Queen's Council can make of this Evidence, is this: Here is a Book Mr. Tutchin took to be his Book upon the outward View of it, or at least upon the Credit of his Printer; and therefore every thing in it must be read against him, as his. Surely, my Lord, that ought not to be allowed of. When Dr. Drake was here tried for being the Author of a scandalous Book, it was sworn against him, That upon shewing him one of the Books he was charged with, he owned himself to be the Author of it. But a Question being ask'd, Whether the Book that was offer'd to be read in Evidence against him, was that very Book that had been shewn him, when he owned himself to be the Author? It was answered, No: But it was a Book of the same Impression, and therefore ought as much to be read against him, as the Book he owned. But, as I take it, that Evidence was disallowed.

Mr. Att. Gen. Mr. Mountague, you state it wrong, for that Book was read.

L. C. J. Holt. That Book was read, tho' it was not proved as that very Book that was deliver'd. It was the Bookseller that said the Book was printed by Dr. Drake; but he would not say it was that very Book that was given in Evidence. He took a Book with such a Title: But was this the Book? But he could say, the other Book was never taken away. Now this Book is owned by Mr. Tutchin, by making the *Preface* and *Index* to it.

Mr. Mountague. It was a Book of the same Impression with that which Dr. Drake had own'd himself to be the Author of, that was offer'd in Evidence.

L. C. J. Holt. He took the Book from the Shop that was read, the other Book was in the Shop.

Mr. Att. Gen. The Bookseller said he knew who writ the Book, but not who writ the Preface.

Mr. Mountague. But, my Lord, be the Case one way or the other: The Thing we insist on is, That they cannot read the first Papers produced, because Mr. Tutchin has not owned that Paper in particular for his, that is inserted in the Book.

L. C. J. Holt. If the first Paper was printed by his Order, according to the Bargain made between them, it is reasonable it should be read. *I do not know*, says he, *that I made any Alteration here; sometimes I did alter, and sometimes strike out, and made the Expression lower; but I know not that I made any Alteration here; and when I did, I oftentimes acquainted him with it; but that I made any Alteration here, I know not: I printed it by the Copy, and the Copy is lost.* Now Mr. Tutchin would have him make up a Volume; and, says he, This Volume I bound up by his Order.

Mr. Mountague. My Lord, here is a Paper offer'd, which they cannot prove to be a true Copy; and will you let them read it, because they produce another Paper like it, bound up in a Volume; which, by the way, is proved no otherwise to be his, than by his bespeaking a Set of *Observers* to be bound up for him?

L. C. J. Holt. It is the same.

Mr. Mountague. My Lord, I think, with Submission, they may not read any of the Papers, if they have not examined the first Copy sent to the Printer.

L. C. J. Holt. A Man sends a Copy to print, which is a Libel, and the Print is produced that is said to be according to the Copy: There is another Print produced, that agrees with the first, which he hath owned.

Mr. Mountague. My Lord, I did hope that the Queen's Council would have given an Answer to that Part of my Objection, That these printed Papers are no more than Copies.

L. C. J. Holt. It is more than a Copy. Every Copy of a Libel is a Libel; and every Printer of a Libel is guilty of a Libel.

Mr. Mountague. My Lord, it's true, every Copy of a Libel is a Libel; but whose Libel is it?

Mr. Harris. My Lord, it is not proved that he ever perused that Copy.

Mr. Mountague. Pray, Mr. How, was it his Direction to put these very Sheets together, or to make up a Volume of *Observers*? I do ask you, whether your Direction was to make up a Book of *Observers*, or to bind up these very Sheets?

Mr. How. He gave me Direction to make up a Set of *Observers*.

Mr. Mountague. Then you say, it was only to bind up a Set of *Observers*; and so on your own Head you bound up these *Observers*. But can you say, he has look'd over all the Papers in that Book, and owned them?

Mr. Serj. Weld. My Lord, here is a Man says, he order'd him to deliver them to my Lord Nottingham.

Mr. Mountague. How long is it since he gave you these Directions?

Mr. How. I believe it was about a Week after the Volume was published.

Mr. Mountague. How long since is it, that the Volume was published?

Mr. How. It was about April, 1703.

Mr. Mountague. How long after did you deliver them?

Mr. How. I deliver'd them within a Week after.

Mr. Att. Gen. There are but two of the *Observers* we charge the Defendant with in that Book; and therefore we humbly insist on reading of the printed Papers, on the Evidence we have given, which we take to be sufficient to read them without the Book; these Papers being printed after this Agreement was made between them, and bound up by his Directions, he is answerable for them.

Mr. Mountague. My Lord, I do, with Submission, say it ought not to be read, tho' it be in that Book; for no Man has proved that Paper that is in it to be his. But if they lay any Weight on the owning the Book, the publishing the Book is a new Crime, for which he may be punished afterwards, and he is not charged with it in this Information.

Mr. Att. Gen. If a Man be indicted for being the Author of a Book; being indicted once, he is indicted once for the whole Book.

Mr. Whitaker. My Lord, we are indicted for a single Paper; and that Book is not the Matter of the Indictment.

Queen's Council. My Lord, we have done now. We desire the Papers may be read.

L. C. J. Holt. Read them both.

Then the first *Observer* was read.  
*Observer*, May 30, 1702. "At the same time we consider the French King's Success in his  
 " Bribery

“ Bribery and Corruption, we ought to lament the  
 “ sad State of our own Country, which affords so  
 “ many Instances of Treachery. If we may judge  
 “ by our national Miscarriages, perhaps no Nation  
 “ in *Europe* has felt the Influences of *French Gold*  
 “ more than *England*; and worthy it is our greatest  
 “ Lamentation, that our Dear Country should be  
 “ weaken’d by Men of mercenary Principles, when  
 “ Countries inferior to us in Strength and Riches  
 “ are secured from Attempts of this Nature, only  
 “ by the Fidelity of their People. What is the Rea-  
 “ son that *French Gold* has not affected *Holland*, as  
 “ well as *England*? but that their Ministry is such,  
 “ as is entirely in the Interest of their Country, and  
 “ altogether incorruptible: They prefer Men that  
 “ are knowing in their Posts, and are active in Bu-  
 “ siness. When in *England* we find Offices for Men,  
 “ not Men for Offices; and a Title of Honour  
 “ gives a Man a Title to a great Employment he  
 “ is altogether ignorant of. By this, and by prefer-  
 “ ing of Men by Interest and Favour, has the Ex-  
 “ cite, the Customs, and other Branches of the Re-  
 “ venue, intolerably sunk; and by this Means has  
 “ the Navy of *England*, our chief Support, been hi-  
 “ therto perfectly bewitch’d: And can *Lewis* spend  
 “ his Money better, than in getting Men into Of-  
 “ fices in *England*, who are either false or ignorant  
 “ in the Business, or are his Friends?”

Mr. *Soll. Gen.* The next is N<sup>o</sup> 23. *Saturday*,  
*July 11. 1702.*

“ And this is a Prerogative of singular Advan-  
 “ tage to the People of *England*, in that their Re-  
 “ presentatives are the Judges of the Male-Admini-  
 “ stration of their Governors, that they can call  
 “ them in Question for the same, and can approve  
 “ such to wear the Crown who are fittest for Go-  
 “ vernment; which they have often done, and in-  
 “ deed which is the Privilege of all free People,  
 “ who are authorized by the Laws of God and Na-  
 “ ture to choose their own Governors.”

Mr. *Att. Gen.* Now we will shew these Papers  
 to Mr. *How*, for these are all that are in the Book.  
*(They were shewn him).* Mr. *How*, pray tell us who  
 was the Author of these Papers?

Mr. *How.* Mr. *Tutchin*.

L. C. J. *Holt.* How do you know that?

Mr. *How.* I had them of him.

Mr. *Att. Gen.* Did you pay him for them?

Mr. *How.* I paid him for these very Papers.

Mr. *Montague.* What, these Papers that are now  
 produced? You never shew’d them to him, did you?

Mr. *How.* No; but I shew’d him the same  
 Number.

Mr. *Montague.* Have you read them to him?

Mr. *How.* He has owned them all; he has own-  
 ed them an Hundred and an Hundred times, all of  
 them.

Mr. *Montague.* Have you the Copy of these  
 Papers by you?

Mr. *How.* No.

Mr. *Montague.* Did you search for them?

Mr. *How.* No, I have not.

Mr. *Harris.* My Lord, if we had seen these Pa-  
 pers, then we might have seen what Alterations were  
 made in them.

Mr. *How.* I believe he had them back again.

Mr. *Montague.* I believe he has not been ask’d  
 to search for them.

Mr. *Att. Gen.* Did not Mr. *Borret* send to you  
 about the Original Papers?

Mr. *How.* Yes.

Mr. *Att. Gen.* Did you look on what you had?

Mr. *How.* Those that I had were look’d out.

Mr. *Att. Gen.* What became of them?

Mr. *How.* I know not, but he might have them  
 back again.

Mr. *Att. Gen.* Those that you did find, what  
 did you do with them?

Mr. *How.* Those that I have now, are but Two  
 or Three.

Mr. *Att. Gen.* Did you carry all the Original Pa-  
 pers you had to Mr. *Borret*?

Mr. *How.* Yes, all that I know of.

Mr. *Montague.* Have you no Copies? Did you  
 not say you were not desired to look for these *Obser-*  
*vators*?

Mr. *How.* I said, I did not know whether I was  
 ordered to search for these particular *Observers*.

Mr. *Montague.* Did Mr. *Borret* desire you to  
 look after these Original *Observers*?

Mr. *How.* I am not positive.

L. C. J. *Holt.* Did you deliver all those that you  
 had to Mr. *Borret*?

Mr. *How.* Yes, my Lord, all that I had at that  
 Time; but I have had some since.

Mr. *Att. Gen.* He told you before, That till  
 there was like to be a Prosecution, he did not keep  
 them, but since he did; and now he look’d for what  
 he had, and deliver’d them to Mr. *Borret*.

L. C. J. *Holt.* Then Mr. *Borret* must be sworn.  
*And he was sworn accordingly.*

Sir T. *Powis.* Mr. *Borret*, acquaint my Lord,  
 and the Jury, whether you desired Mr. *How* to look  
 out the Copies of the *Observers*.

Mr. *Borret.* I sent to desire Mr. *How* to look  
 out all the written Copies of the *Observers*, which  
 he had received from Mr. *Tutchin*; and he after-  
 wards brought me a considerable Number of them,  
 and said they were all he could find: And I have  
 very carefully look’d them all over, but cannot find  
 any one amongst them that relates to any of those  
*Observers* mentioned in the Information, except  
 one, which is in *May* last, the which I have here in  
 Court.

Mr. *Montague.* Did you send to Mr. *How*, to  
 ask for the Original of these Papers here named?

Mr. *Borret.* I did.

Mr. *Montague.* Will you produce the Papers  
 you have? My Lord, they have taken those Original  
 Papers; and if they were produced, you would see  
 how they are mangled.

Mr. *Att. Gen.* If they were nothing to the Mat-  
 ter, what did they signify? Only this is a popular  
 Thing, and they must say a great deal.

Mr. *Conyers.* Read the *Observer* of the 12th of  
*June*, 1703, which contains these Words. *(Which*  
*the Clerk read, as follows).*

“ Take one Time with another, the Mismanage-  
 “ ments of the Navy have been a greater Tax on  
 “ the Merchants, than the Duties raised by Parlia-  
 “ ment. We never had a better Navy; but the  
 “ Wisdom of the Managers thereof is like a Bot-  
 “ tomless-Pit, past finding out.”

Mr. *Conyers.* Now go on to N<sup>o</sup> 20, the 16th of  
*June*, 1703. *(Which the Clerk read, as follows).*

“ What avails it a Man of Learning and Parts,  
 “ to qualify himself for the Service of his Country  
 “ on the Ocean? If he has Knowledge enough to  
 “ advise *Neptune* himself, if he has no Interest, he  
 “ shall have no Preferment. How much does it  
 “ look to our Nation’s Disadvantage, to have Men  
 “ in eminent Stations in the Navy, who have not  
 “ so much as an Idea, a Notion, a Thought of Na-  
 “ val

“ val Affairs? To have Men to superintend the  
 “ Building of our Floating Castles, who know not  
 “ the Nature of any Part of the Management? To  
 “ have Men employ’d in the Victualling, who qua-  
 “ lify themselves for that Post by learning to write  
 “ their Names, which is indeed a Post for a Philo-  
 “ sopher bred to the Sea?”

Then Mr. Tanner was sworn, as to an original  
 Record, which he produced about Daniel De  
 Foe’s Trial, to be compared with the Passage to  
 be next read,

Mr. Conyers. Now read the *Observer*, N<sup>o</sup> 27.  
 Saturday the 10th of July, 1703. (Which was  
 read, as follows).

“ *Countrym.* Truly, Master *Observer*, I have  
 “ no very good News for you. Mr. Daniel De Foe  
 “ has pleaded Guilty to the Indictment against him,  
 “ for writing and publishing the *shortest Way with*  
 “ *the Dissenters*; and he is sentenc’d to stand three  
 “ Times in the Pillory, to pay a Fine of 200 Marks,  
 “ and to find Security for his good Behaviour for se-  
 “ ven Years. *Obser.* The Court could do no other-  
 “ wise than convict upon, upon his pleading Guilty;  
 “ *habemus consistentem reum* is very often the Voice  
 “ of Courts of Judicature: ’Tis the Ease of Judges  
 “ and Juries. If Daniel De Foe was in Expectation  
 “ of Coleman’s Black-Box, he has found a Pillory  
 “ instead of it. I don’t trouble my Head about the  
 “ Custom of giving the Pillory to Authors, which  
 “ is the Punishment of Bakers. You talked just now  
 “ of turning Author, have a Care of your Candle;  
 “ you see which is the shortest Way with Authors:  
 “ You must all enter your selves in the Regiment of  
 “ Colonel Foe. The Law of England directs, That  
 “ no Man shall be fined *ultra tenementum*; and I  
 “ make no Question, but the Justice of the Court  
 “ has fined Mr. Foe answerable to his Estate: His  
 “ Security for his good Behaviour for seven Years,  
 “ without doubt, was rationally consider’d, as to  
 “ the Legality thereof. For my Part, I am only  
 “ acquainted with old Laws of England, the an-  
 “ cient Birthrights and Immunities of *Englishmen*:  
 “ This I take to be the Foundation of new Laws.”

Sir T. Powis. The last is of the 20th of May last;  
 Mr. Borret, is the Original of that here?

Mr. Borret. Yes.

Sir T. Powis. Who had you this of?

Mr. Borret. I had it from Mr. How.

Sir T. Powis. Shew it to Mr. How. (Which was  
 done).

L. C. J. Holt. Whose Hand is that?

Mr. How. To the best of my Knowledge, it is  
 Mr. Tutchin’s.

L. C. J. Holt. Who had you it from?

Mr. How. From Mr. Tutchin, or his Order.

L. C. J. Holt. Did you pay him for it?

Mr. How. Yes, my Lord.

Mr. Att. Gen. Then that likewise was printed  
 under the Title of the *Observer*?

Mr. How. Yes, Sir.

Then the Paragraph was read.

“ *Countrym.* Master *Observer*, there’s another  
 “ Plot against you. *Obser.* Prithee Man, there’s  
 “ a Plot against the Queen, and the whole Nation;  
 “ is it any wonder then that there are Plots against  
 “ me? The High-Flyers are now plotting against  
 “ every honest Man in England. I’ll tell you more  
 “ of it the next Time we meet. *Countrym.* I fancy  
 “ some Sort of People plot against you, because  
 “ you endeavour to countermine their Plots against  
 “ the Queen and Nation. *Obser.* You are right

“ enough; but that shan’t hinder me from detect-  
 “ ing their Designs, and from opening the People’s  
 “ Eyes. But, prithee, what Plot is this? *Countrym.*  
 “ Why, Sir, it is a Plot preparatory to your Trial;  
 “ and if they can’t effect this Plot, I suppose you’ll  
 “ never be try’d. They insinuate into the Citizens  
 “ of London, that you have lately written very  
 “ scandalously, maliciously, and treasonably, and  
 “ I don’t know how many other Lies, against ’em  
 “ the said Citizens; and by this Means they are  
 “ minded to set your Jurors against you. *Obser.* This  
 “ is likely enough; they’ll leave no Stone unturn’d,  
 “ to suppress the Truth. I understand, I should  
 “ have been prosecuted by Bill the last Sessions, but  
 “ that the High-Flyers did not like the Jury; nay,  
 “ they say they don’t like the two Sheriffs, be-  
 “ cause they won’t pack Juries to find innocent Men  
 “ Guilty.”

Mr. Mountague. Now, my Lord, we take it,  
 there is a Variation between this Paper, and the In-  
 formation. In the Copy, it is only C.; in the Infor-  
 mation, it is *Countryman*. Now when they describe  
 any Paper, it must be as it is writ; and they cannot  
 say *Countryman*, when it is but C.

L. C. J. Holt. He writes a Dialogue between  
 the *Countryman* and the *Observer*; but now he  
 makes C. for *Countryman*.

Mr. Mountague. My Lord, if they go upon the  
 Libel, they must give it as it is under his own  
 Hand.

Sir T. Powis. That Letter is to be understood  
*Countryman*.

L. C. J. Holt. When he used to write C. were  
 you not to write *Countryman* at large?

Mr. How. At first we were; afterwards as it  
 might be intelligible.

Mr. Mountague. Still we think they have not  
 done enough: They have not proved this Thing  
 sufficiently, by the Witnesses they have called. For,  
 my Lord, we take it, that they must positively  
 shew it was writ within the City. In the Trial of  
 the Bishops, it was proved to be all under their  
 Hands: Yet it was required then, that they might  
 make it appear, that that Paper was writ in the  
 County of *Middlesex*.

Mr. Att. Gen. Mr. How, where do you live now?

Mr. How. In *Grace-church-street*.

Mr. Att. Gen. Let that Agreement be made  
 where it will, the Publishing was in London; and  
 we may lay the Information here.

L. C. J. Holt. Where did you receive these Pa-  
 pers?

Mr. How. Most commonly they were sent to my  
 House, in *Talbot-court, Grace-church-street*.

Mr. Whitaker. Have you not fetch’d some of  
 them from *Lambeth*?

Mr. How. Yes, some of them.

L. C. J. Holt. Suppose a Man draws up a Libel  
 in *Middlesex*, and there agrees with a Printer who  
 lives in London to print it: He takes it away, and  
 prints it in London, and there publishes it. Now the  
 Question is, Whether he that drew it, is not guilty  
 of Composing and Publishing of it in London? Every  
 Copy is a Libel of it self.

Mr. Mountague. Every Copy is a Libel; and  
 the taking a Copy of a Libel, may be a Publicati-  
 on: But that is not the Thing laid to his Charge;  
 it is *Scriptit & Composuit*. Now the Writing is in  
 the County of *Surrey*; there he writes, and there he  
 composes.

L. C. J. Holt. He is charged with Writing,  
 Composing, and Publishing a Libel in London. Tho’



he be not guilty of Writing there, yet he may be guilty of Composing it there.

Mr. *Mountague*. Now, my Lord, as to the Publishing, the Printing is not the Defendant's Publishing: That affects another Man. Therefore we think they should give some Evidence of his writing these Papers in *London*.

Sir *T. Powis*. My Lord, As to that, the Word *Composuit* is proper to relate to the Printing of it: (For the Printers have such a Term as Composing). And that is fully proved to be in *London*. And for Writing (whether that be a material Thing between us) I take it, that he that does write a Libel, and sends it to *London*; and there, by his Authority and Directions, it is composed again in another Paper, and printed; that Paper is still his Writing, wherever it goes. However, the other Words come up to the Case fully; because if that which he writes is so published, it may be said to be writ by him, wherever it is so published.

Mr. *Att. Gen.* We have proved his owning himself to be the Author, and his causing it to be printed in *London*.

*L. C. J. Holt*. That is not an Evidence of his writing it.

Mr. *Att. Gen.* My Lord, It is a Proof of his causing it to be printed.

*L. C. J. Holt*. If he be guilty of a Fact in one County, you cannot charge it in another. But if he caus'd it to be printed in *London*, no question it will be a Publication here.

Mr. *Att. Gen.* The Composing and Printing is a Publication; and that we have proved to be done in *London*, pursuant to his Agreement. And we also charged him with writing the same; and as a Proof of that, we have proved his owning himself to be the Author. If that be not an Evidence of his writing it, we can hardly ever prove that part of the Charge of writing: For he that writes a Libel, will do it alone; and proving the Copies to be received in *London*, is an Evidence they were writ there first, if the Defendant did not prove the contrary.

Mr. *Whitaker*. Mr. *Hew* swears, he had the Copy from *Lambeth*.

Mr. *Att. Gen.* Where was it composed?

Mr. *Hew*. At my House.

Mr. *Att. Gen.* Was he there at your House?

Mr. *Hew*. Yes; and I had them from him there.

*L. C. J. Holt*. Did he write any of them there?

Mr. *Hew*. Not that I know of.

Mr. *Att. Gen.* Is Mr. *Tutchin* in the Court?

Mr. *Mountague*. I believe not.

*L. C. J. Holt*. Why is he not here?

Mr. *Mountague*. May it please your Lordship, and you Gentlemen of the Jury, to spare me a few Words in Behalf of the Defendant. I can hardly say I am of Council with Mr. *Tutchin*, because I have never seen him, but upon recording his Appearance in open Court; and he has not thought fit to send us any Instructions till this Morning, when we were just going down to *Westminster*. But I do suppose, this Remissness in his Temper, does proceed from his Innocency of the Accusation against him: And he has a Mind to let the World see, how easy it is to make his Defence; since he has pitch'd upon me for his Advocate, and given me so little Time to prepare my self for it. But as short Notice as I have had of this Information against him, thus much I will beg Leave to say to it in general; That it does by no Means

come up to what the Gentlemen on the other Side call it, *A Charge of Writing and Publishing a false and scandalous Libel*. My Lord *Coke* has given us a Definition, or rather a Description of a Libel: Says he, "*Famosus Libellus, seu infamatoria Scriptura*, is made either against a private Man, or a Magistrate. If it be against a private Man, it does deserve to be punished; because it is likely to incite all the Family or Kindred of such Person, to revenge the Injury; which tends to the Breach of the publick Peace. If it be against a publick Person, as a Magistrate, it is a greater Offence: Because it concerns not only the Breach of the Peace, but it is a Scandal to the Government. And it matters not whether such private Man, or Magistrate, be dead or alive at the making of such Libel; because the Friends and Relations of such Persons, are incited thereby to disturb the Peace of the Kingdom. By all which Sayings of my Lord *Coke*, I do humbly suppose, That there can be no Libel, where no Person certain is reflected upon, or scandalized. A Libel that points at no Body in particular, is like a Shot at Random, that seldom does any Mischief. And therefore I do take it, with great Submission, That in this Case, Mr. *Attorney* should have shew'd us what Person (either publick or private) these *Observers* have aspersed. My Lord *Coke*, in another Place, does liken libelling to Poison, which secretly destroys a Man's Reputation, as the other does his Life. But certainly it would be thought a strange Sort of Indictment, to charge a Man with being guilty of Murder; and not mention some one in particular, that has lost his Life through the Defendant's Means or Procurement. Now pray, my Lord, how much does this Information differ from such an Indictment? Here it is said, That the Defendant *Tutchin* has wrote and published a false and scandalous Libel, of and concerning this Kingdom of *England*, and the Officers and Ministers of the Queen. But a national Reflection, that equally concerns every individual Person in the Kingdom with the Reflector himself, cannot excite and stir up the People to quarrel one with the other. And to tell me, the Ministers and Officers of the Queen are particularly concern'd, does but give me Occasion to ask, what Officers and Ministers Mr. *Attorney* is taking care of? For I do not find any Minister of State, or other great Officer, so much as mention'd throughout this Record. A Bailiff, or Constable, is one of the Queen's Officers; and yet very few will think, a Man ought to be punish'd for Scandal, that shall say of such Officers and Ministers, they commit frequent Misdemeanors, and are of mercenary Principles. Would it not have been easy for Mr. *Attorney* to have assigned the Particulars, if he knows of any body that has been defamed by these *Observers*? But since the Information sets forth no Particulars, I hope the Jury will take it for granted, that nothing in these Papers can be affixed to any Man's Door: But whatever has been writ, is spent in the Air; and I hope this Accusation will vanish there likewise.

In the next Place, my Lord, I would beg Leave to take Notice of the particular Papers, which have been severally read in Evidence. And the first that has been produced, is one of the printed *Observers*, agreed on all Hands to have been publish'd so long ago as the 30th of *May*, which was in the first Year of her present Majesty's Reign. And as to this, the Charge is, That the Defendant has written,

written, compos'd and publish'd it. But how many of these three Particulars have been made out, must be next observed. And as to the writing of it, Mr. *How* has sworn, That there was an Agreement made betwixt him and the Defendant, (but where, he cannot say) that Mr. *Tutchin* should write a Paper, sometimes once, sometimes twice a Week, of the publick Transactions; and such a Paper has been writ by Mr. *Tutchin*; but where this Paper was wrote by Mr. *Tutchin*, or deliver'd, Mr. *How* cannot swear. However, so far he goes, that from these Papers of Mr. *Tutchin* he has print'd at his House in *London*, these Papers are now produced. But on this Evidence, I must, with your Lordship's Favour, observe, That there are two different Sorts of Libels spoken of: The one is in Writing, suppos'd to be written by Mr. *Tutchin*, but God knows where: The other in Print, own'd by Mr. *How* to be printed and publish'd from the written Paper; which does not appear, and of which no true Copy has been proved. Now we hope, therefore, my Lord, that the Gentlemen of the Jury will rightly distinguish betwixt this first and second Libel, and make a Difference betwixt the Act of Mr. *How*, and that of Mr. *Tutchin*. The print'd Papers here produced, are stil'd the *Observator*; so was not the written ones, if Mr. *How* be to be believed. The print'd *Observators* are sold about, for the sole Benefit of Mr. *How*; and Mr. *Tutchin* receives only a small *Premium*, for the writing once or twice in a Week. Mr. *Tutchin* only earns his weekly Subsistence, by making Observations in the Country; and it does not appear, that he concerns himself further about the printing or publishing of them. If he gets his Money, Mr. *How* may do with his Papers as he thinks fit. So that I must humbly insist upon it, That what Mr. *How* has done within this City of *London*, can never reach Mr. *Tutchin* into *Surry* or *Essex*. It has been said indeed, and I shall not contradict it, That the bare transcribing of a Libel, will make a Man guilty of libelling: But for this Reason I do say, That Mr. *How* only has been guilty of making and publishing these print'd *Observators* in *London*; and Mr. *Tutchin*, if he be guilty, must be convicted of the making and publishing that, which can be sworn to be his written Observations; especially since it has plainly appear'd, that the Papers written by Mr. *Tutchin*, have been frequently alter'd by Mr. *How*, before they were printed off.

And if we consider the Passages that have been produced, the Gentlemen of the Jury will perceive, a very little Alteration will make these Papers quite different from what they are. However, as they be, I hope there is no great Matter in any of them. The first *Observator* says: "At the same time, if we consider the *French* King's Success, in his Bribery and Corruption, we ought to lament the sad State of our own Country, which affords so many Instances of Treachery, &c." Now, pray who is *We* in this Case? Says Mr. *Attorney*, in his *Innuendo*, The People of *England*. But I hope an *Innuendo* shall not make a Man guilty of a Crime, which otherwise can't be affix'd upon him. But supposing this same Paper were in truth written with Relation to *England*; will any one say, that (no Times whatsoever) this Country has afforded not any Instances of Treachery? And what Part of this Information does so much as fix the time to which the *Observator* alludes? If all that is here set forth were written of a former Ministry, I do suppose there would not be so much Blame laid on the Au-

thor, as if he comes nearer the present Times: So the Time to which these Papers do refer, must certainly be material, and fit to be consider'd of, before any one can rightly judge of this Case. And for want of its being ascertain'd and determin'd whether these Reflections may extend, I hope the Jury will not very much regard them.

The next Charge does set forth a wicked Assertion to have been made, *de & concernen' Potestat. Populi Anglicani*. But we must be in your Lordship's Judgment, whether the Paper that is produced, does make out that Assertion to be just as it's laid. I take it, with Submission, that there is a manifest Variance betwixt the Charge and the Libel. The Charge makes him speak of the Power of the People at large; when the Paper comes to be read that speaks of our Representatives in Parliament. And surely there is a Difference, to say, The People at large can do so and so: and to say, Our Representatives in Parliament can do it. For Instance; The making of Laws is not in the People dispers'd over *England*; but in their Representatives in Parliament, in Concurrence with the House of Lords, when the Royal Assent does likewise concur with them; therefore I think this Charge can't affect us, upon account of this Variance. The next Article then to be taken notice of, is that concerning the Navy.—

Mr. *Soll. Gen.* But Mr. *Mountague* says nothing of the Prerogative the People have, that the Representatives are the Judges of the Male-Administration of their Governors; that they can call them in Question for the same, and can appoint such to wear the Crown, who are fittest for Government; which they have often done. He passes by all this scandalous Matter.

Mr. *Mountague*. I did so, Mr. *Sollicitor*, and I did it on purpose, because I look'd upon it as a Matter not proper for you and me to talk of as Advocates in this Place. And I am apt to think my Discretion in passing it by will be more easily justified, than theirs that shall bring such Points as these upon the Stage to be talk'd on before this Assembly. I must declare for my own Part, that I think the Rights of Princes and the Power of the People too high Topicks for me to meddle with; let others do as they think best. I shall pass over to the next Article concerning the Navy. "Take one time with another, the Mismanagements of the Navy have been a greater Tax on the Merchants, than the Duties rais'd by Parliament." Now how does this relate only to the Navy-Royal; it is no where said, the Mismanagement of the King's Navy, or the Queen's Navy. And the Word Navy does, in my poor Understanding, signify no more than a Number of Ships got together; and therefore I do humbly conceive, there may be a Navy of Merchant Ships, as well as a Navy of Men of War, 'tis altogether uncertain what Navy the Author does allude to.

L. C. J. *Holt*. Surely the Navy must be the Navy Royal.

Mr. *Mountague*. If it must, my Lord, yet nobody can say that we never had any Mismanagements in the Royal Navy, and whenever that has happened, the Merchants of *England*, in all Probability, have suffer'd for it.

Mr. *Att. Gen.* My Lord, I think all this Discourse is such as is not to be allowed.

Mr. *Soll. Gen.* When a Man complains of the Mismanagement of the Government, and then comes after this, and says that the People have a Power inherent in them to call their Governors

to an Account: What is this? Does it want an Exposition, thus to possess the People with an Opinion of the Power they have to call the King or Queen to an Account? What does such Things tend to, but to raise in the People an Indignation against the Government?

Mr. *Mountague*. My Lord, the thing I was insisting upon was, that whatever is here set forth, is not brought within any Compass of Time, and there is no particular Reflection upon any Person whatsoever. Though Mention is made of divers Mismanagements and of several Miscarriages; yet all these things may be said of other Times long since. And therefore, since this Exception goes to all the rest of the Charges in the Information, I shall pass by the other Particulars. And since I have taken up a great deal of your Lordship's Time already, I shall leave the rest to these Gentlemen that are to speak after me.

Mr. *Serj. Darnel*. Will you say they are true?

Mr. *Whitaker*. My Lord, here is an Accusation that we did write, and compose, and publish these Papers; now it appears that the first Author was often out of *London*, and that the Copy was often fetch'd from *Lambeth*, and other Places; and the Witness did apply the Title of *Observator* to every one of these Papers. Now that which they call Libellous is not in the Writing which we did write; and if we did not write it in *London*, I hope you will not find us guilty of writing and publishing a Libel.

Mr. *Mountague*. My Lord, we have not done any thing as to the Printing at all; we had nothing to do with it.

*L. C. J. Holt*. Were not you concern'd in printing it? I can't imagine how Mr. *How* came to pay for it else. Mr. *How*, what were you to give for every *Observator*?

Mr. *How*. For about Sixty-six of the last, I paid Twenty Shillings a Time.

*L. C. J. Holt*. What did you give for them before?

Mr. *How*. Half a Guinea a Time.

*L. C. J. Holt*. Was it the same thing to him whether you printed it or not?

Mr. *How*. Yes; but I would not have given it him, if it had not been to be publish'd.

Mr. *Whitaker*. My Lord, we are in your Judgment as to this Matter, whether they can find us guilty of a Libel in *London*?

Mr. *Soll. Gen.* It was in *London*.

*L. C. J. Holt*. Where was the Agreement made?

Mr. *How*. I did think at first that it was in the City, and I do think so; but he says it was in *Surry*. The Papers were deliver'd sometimes at my own House, and sometimes in the Country.

Mr. *Att. Gen.* Were they deliver'd to you to be printed?

Mr. *How*. Yes.

Mr. *Att. Gen.* You said you and he have mended the Papers; has that been done at your House in *London*, or in the Country?

Mr. *How*. I do not know which.

Mr. *Mountague*. Let me ask you one Question: Can you swear to any particular Paper, that he deliver'd that Paper in *London*?

Mr. *How*. I do not know where they were deliver'd.

Mr. *Weld*. It need not be insisted on to find him guilty of all; if they find him guilty of the Publication, that will be enough; and that they cannot deny but he is guilty of that. When it is deliver'd

to be printed, it is as much a Publication as the composing of it.

Mr. *Mountague*. But it does not appear that it was deliver'd in *London*.

Mr. *Weld*. But he owned it in *London*.

Sir *T. Powis*. He did cause these Papers to be printed in *London*.

*L. C. J. Holt*. He deliver'd them to be printed in *London*: *How* agrees to give him half a Guinea a Paper at first, and Twenty Shillings afterwards; and surely then he designed to have them printed.

Mr. *Mountague*. He cares not what he does with the Papers, he was only to have so much Money for them:

Mr. *Att. Gen.* My Lord, here they are setting up a Doctrine that will make Libelling safe, so that no Man shall ever be punish'd for it. We have charged him with writing, composing, and publishing a Libel: We have proved the Agreement made with the Printer, be it in *London*, or out of *London*, is not very material. Now if there be an Agreement made out of *London*, for printing and publishing a Libel, wherever that Libel is printed and publish'd, he is guilty; for whatever is done by his Agreement, he is guilty of it. As to the next thing, I am much concerned to hear them say, that which I never before heard urged in any Court, that a Libel is not a Libel unless they assign some particular Person; but I look upon it as the highest kind of Libels to reflect on publick Officers in general; on the Administration of Justice in general. I believe every one knows a Libel is a Libel, tho' particular Persons are not named: If it reflect on Officers in general, as Ministers of State, or Judges or the like. Mr. *Mountague* would have it, that Reflections on the Ministers of the Crown is not a Reflection on the Queen; and he would have it, that we should have averr'd who these Ministers are that were meant in the Libels. As to the first, certainly they that reflect on the publick Administration of Justice by the Queen's Officers, do reflect on Her Majesty, who places and continues them in their Offices. And to the second Reflection, being in general on the Ministry, we ought not, nor could aver, who in particular he meant in these Libels; the whole Administration under the Queen is reflected on, in placing in Officers in general; in the Management of the Navy, and placing in the Officers thereof; and in the Administration of Justice in the Courts of Justice; and what can be more scandalous? There needs no Averment to explain these, in themselves they appear to be Libels; and I hope such Discourses as have been made on this Occasion for the Defendant, will not meet with any Countenance; but I am surprized to hear it justified here by a Council, That the People have Power to call their Governors to Account.

Mr. *Mountague*. I did not say so.

Mr. *Att. Gen.* Certainly what you did say, viz. That you shewed more Discretion in passing it by, than we did in questioning the Defendant for it, and that we wanted Discretion in bringing this Matter on the Stage; could have no other Meaning, but that the Matter was justifiable, but you would not in Prudence do it; which, I must say, is the greatest Liberty I have known taken by a Council.

*L. C. J. Holt*. I did not hear him say so.

Mr. *Mountague*. I did not say so; I said it was more discreet to pass it by than take notice of it.

Mr. *Att. Gen.* I will always prosecute any Man that shall assert such Doctrine. My Lord, I think my

my self obliged in Duty, being in the Station I am, always to take Notice of such Discourses as these, which no Council ought to presume to make.

L. C. J. Holt. Gentlemen of the Jury. This is an Information that is preferred by the Queen's Attorney-General against Mr. Tutchin, for writing, and composing, and publishing, or causing to be writ, composed, or published, several Libels against the Queen and her Government; and all these that are set forth as Libels, are entitled, *The Observer*, and they are in Number six. The first is said to be made and published May 30, 1702, and in which Mr. Tutchin is charged with having this libellous, scandalous Paragraph against the Government, and the Administration of it. The Words are these, "If we consider the French King's Success, in his Bribery and Corruption, we ought to lament the sad State of our own Country, which affords so many Instances of Treachery. If we may judge by our national Miscarriages, perhaps no Nation in Europe has felt the Influences of French Gold, more than England; and worthy it is our greatest Lamentation, that our dear Country should be thus weaken'd by Men of mercenary Principles, when Countries inferior to ours in Strength and Riches are secured from Attempts of this Nature, only by the Fidelity of their People. What is the Reason, that French Gold has not affected Holland, as well as England? But that their Ministry is such as is entirely in the Interest of their Country, and altogether incorruptible: They prefer Men that are knowing in their Posts, and are active in Business. When in England we find out Offices for Men, and not Men for Offices; and a Title of Honour gives a Man a Title to a great Employment he is altogether ignorant of. By this, and by preferring of Men by Interest and Favour, has the Excise, the Customs, and other Branches of the Revenue intolerably sunk; and by this Means has the Navy of England, our chief Support, been hitherto perfectly bewitched: And can Lewis spend his Money better than in getting Men into Offices in England, who are either false or ignorant in the Business, or are his Friends?" This now is charged on him as a defaming the Government, in employing corrupted Officers, or ignorant Officers, when they are not fit for their Places. There is another that has been produced, which is the Second, that hath these Words: "And this is a Prerogative of singular Advantage to the People of England, in that their Representatives are the Judges of the Male-Administration of their Governors; that they can call them in Question for the same, and can appoint such to wear the Crown, who are fittest for Government: Which they have often done, and indeed which is the Privilege of all free People, who are authorized by the Laws of God and Nature, to chuse their own Governors." This is to possess the People, that they may at their Will and Pleasure when they take a Fancy thereto, disseise the Queen, and set up what Governor they please. These two, and the rest which I shall mention by and by, are given in Evidence. And it seems at first Mr. Tutchin came to Mr. How, the Printer, and there is a Contract made between them two, to print a weekly Paper, and it was to be entitled, *The Observer*, and he was to have half a Guinea a Time. Mr. Tutchin was to write, and the other was to print; his Printing-House was here in London: Accordingly he enters into this Contract, and from Time to Time has received Copies, and prints them, and has paid Mr. Tutchin

for them, and has printed all his *Observers*, even to this very Day: Afterwards there came two out in a Week. Now it is most plain, that a Contract was made between Mr. Tutchin and Mr. How, for Mr. Tutchin to write and frame, and Mr. How to print. And no body can imagine that Mr. How, the Printer, would give him Money, unless that written Copy were to be printed: But now, say they, was there no Alteration made; but were they printed exactly pursuant to the Copy of Mr. Tutchin? Yes, but these two were not; not but that sometimes I made some Alterations; for says he, when I thought his Expressions were too passionate and severe, I apprehended Danger, and made some literal Alterations. But after this, these two were read, and Mr. Tutchin owned them, and divers others, and ordered him to bind them in a Volume, and he does so, and Mr. Tutchin makes a *Preface*, and binds it to this Volume. It appears that his own Hand is to it, to the *Preface*, and was paid Money for them, and Mr. Tutchin owned this Number; so that there is a full Proof that these were composed by Mr. Tutchin, in order to be printed, and they were printed afterwards, and he has received Money for them.

Now there are four more which are charged in the Information, of the same Nature. One is thus: "Take one Time with another, the Mismanagements of the Navy has been a greater Tax on the Merchants, than the Duties raised by Parliament: We never had a better Navy; but the Wisdom of the Managers thereof is like a Bottomless-Pit, past finding out." A fourth Paper hath these Expressions. "What avails it a Man of Learning and Parts, to qualify himself for the Service of his Country on the Ocean? If he has Knowledge enough to advise Neptune himself, if he has no Interest, he shall have no Preferment. How much does it look to our Nation's Disadvantage, to have Men in eminent Stations in the Navy, who have not so much as an Idea, a Notion, a Thought of naval Affairs? To have Men to superintend the Building of our floating Castles, who know not the Nature of any one Part of the Management? To have Men employ'd in the Victualling, who qualify themselves for that Post by learning to write their Names, which is indeed a Post for a Philosopher bred to the Sea?" This also charges the Government for employing unfit Ministers in the Navy. There is a fifth, and that hath these Words. "Countryman. Truly Master *Observer*, I have no very good News for you: Mr. Daniel De Foe has pleaded Guilty to the Indictment against him, for writing and publishing *The Shortest Way with the Dissenters*; and he is sentenc'd to stand three Times in the Pillory, to pay a Fine of 200 Marks, and to find Security for his good Behaviour for seven Years. *Observer*. The Court could do no otherwise than convict him, upon his pleading Guilty; *ba-bemus confitentem reum*, is very often the Voice of Courts of Judicature, 'tis the Eale of Judges and Juries: If Daniel de Foe was in Expectation of Coleman's Black-Box, he has found a Pillory instead of it. I don't trouble my Head about the Custom of giving the Pillory to Authors, which is the Punishment of Bakers. You talk'd just now of turning Author, have a Care of your Candle; you see which is the shortest Way with Authors; you must all enter your selves in the Regiment of Colonel Foe. The Law of England directs, that no Man shall be fined *ultra tenementum*; and I

"make

“ make no question, but the Justice of the Court  
 “ has fined Mr. *Foe* answerable to his Estate. His  
 “ Security for his good Behaviour for seven Years,  
 “ without doubt, was rationally considered, as to  
 “ the Legality thereof. For my Part, I am only  
 “ acquainted with old Laws of *England*, the ancient  
 “ Birthrights and Immunities of *Englishmen*: This  
 “ I take to be the Foundation of new Laws.” And  
 then here is the last which hath these Words. “ *Coun-*  
 “ *tryman*. Master *Observer*, there’s another Plot  
 “ against you. *Observ.* Prithee Man, there’s a Plot  
 “ against the Queen, and the whole Nation; is it  
 “ any wonder then, that there are Plots against me?  
 “ The High-Flyers are now plotting against every  
 “ honest Man in *England*. I’ll tell you more of it,  
 “ the next Time we meet. *Countrym.* I fancy some  
 “ sort of People plot against you, because you en-  
 “ deavour to countermine their Plots against the  
 “ Queen and Nation. *Observ.* You are right  
 “ enough; but that shan’t hinder me from detecting  
 “ their Designs, and from opening the People’s Eyes:  
 “ But prithee, what Plot is this? *Countrym.* Why,  
 “ Sir, it is a Plot preparatory to your Trial; and if  
 “ they can’t effect this Plot, I suppose you’ll never  
 “ be tried. They insinuate into the Citizens of  
 “ *London*, that you have lately written very scan-  
 “ dalously, maliciously, and treasonably, and I  
 “ don’t know how many other Lies, against them  
 “ the said Citizens; and by this Means they are  
 “ minded to set your Jurors against you. *Obs.* This  
 “ is likely enough; they’ll leave no Stone unturn’d,  
 “ to suppress the Truth. I understand, I should  
 “ have been prosecuted by Bill the last Sessions, but  
 “ that the High-Flyers did not like the Jury; nay,  
 “ they say, they don’t like the two Sheriffs, be-  
 “ cause they won’t pack Juries to find innocent  
 “ Men guilty.”

This is the last of the Libels. Now whatever you admit concerning these, the same is proved concerning the other two, except that of the Volume. These he did receive from Mr. *Tutchin*, or by his Agent. He also paid Mr. *Tutchin* upon the same Account that he paid for the rest, and they were printed here in *London*, and published. Now Mr. *Tutchin* did not at any Time complain that they were not printed according to the Copies sent. As to the Copies they are lost all of them but one of these four. There are divers others, but they concern not this Information, but one, and that is Mr. *Tutchin*’s Hand, the same Hand as the other Papers, and by that Copy the Paper was printed, and Mr. *Tutchin* also received the Money for it. So that now you have heard this Evidence, you are to consider whether you are satisfied that Mr. *Tutchin* is guilty of writing, composing, and publishing these Libels. They say they are innocent Papers and no Libels, and they say nothing is a Libel but what reflects upon some particular Person. But this is a very strange Doctrine, to say, it is not a Libel reflecting on the Government, endeavouring to possess the People that the Government is Male-administred by corrupt Persons, that are employed in such or such Stations either in the Navy or Army.

To say that corrupt Officers are appointed to administer Affairs, is certainly a Reflection on the Government. If People should not be called to account for possessing the People with an ill Opinion of the Government, no Government can subsist. For it is very necessary for all Governments that the People should have a good Opinion of it. And nothing can be worse to any Government, than to endeavour to procure Animosities, as to the Management

of it; this has been always look’d upon as a Crime, and no Government can be safe without it be punished.

Now you are to consider, whether these Words I have read to you, do not tend to beget an ill Opinion of the Administration of the Government? To tell us, that those that are employed know nothing of the Matter, and those that do know are not employed. Men are not adapted to Offices, but Offices to Men, out of a particular Regard to their Interest, and not to their Fitness for the Places; this is the Purport of these Papers.

Now they on his Behalf insist on these Things: First, they say you do not prove any Crime against him in *London*. Indeed it is not proved that he writ them in *London*; but the Question is, whether there is not Proof of the Composing and Publication in *London*? There is Proof that they were sent to Mr. *Hove*, in order to print them in *London*. Now, whether he received them from him in *London* or no (but suppose out of *London*) yet if he received them to print them in *London*, that is a Publication in *London*. If they scruple that Matter it shall be specially found. If they were delivered to be printed at *London*, I must leave it to your Consideration, whether you will not find him guilty of publishing them in *London*. They were some of them printed in *Fanechurch street*, and others in *Gracechurch-street*. He knew where the Printer lived, the Contract was made, and he was paid for them. Gentlemen, I must leave it to you; if you are satisfied that he is guilty of Composing and Publishing these Papers at *London*, you are to find him Guilty.

*Then the Jury withdrew, and about a Quarter of an Hour after return’d into Court.*

*Clerk.* Answer to your Names, &c. How say you, Is *John Tutchin* guilty of the Charge laid against him, or Not Guilty?

*Foreman.* Guilty of Composing and Publishing.

*L. C. J. Holt.* They appeal from my Opinion; they don’t find the Writing in *London*, but they find him guilty of Composing and Publishing in *London*, that is, supposing he did write them out of *London*, and deliver them in order to be printed in *London*.

*Mr. Soll. Gen.* Do you find that the Papers, the several Copies of these six *Observers* were delivered to be printed in *London*?

*Foreman.* Yes, guilty of Composing and Publishing, but not of Writing.

*Mr. Soll. Gen.* Do you find him guilty of the whole Charge, except the Writing?

*Foreman.* Yes.

*Clerk.* Gentlemen, hearken to your Verdict, you say *John Tutchin* is guilty of the whole Information, except the Writing?

*Foreman.* Yes.

*Clerk.* And so you say all?

*Jury.* Yes.

*November 13.*

*Mr. Att. Gen.* MY Lord, Mr. *Tutchin* has given me Notice that he will bring an Appeal in arrest of Judgment; and indeed he has given publick Notice of it, for it is put into the News-Papers.

*L. C. J. Holt.* Is he here?

*Mr. Mount-*

Mr. Mountague. Yes, my Lord, he is about the Court.

Mr. Att. Gen. Call him.

Cryer. John Tutchin, Gentleman. (Then he came into Court).

Mr. Mountague. May it please your Lordship to favour me a few Words in Behalf of the Defendant, John Tutchin. He was tried before your Lordship at the Guild-Hall, London, on Saturday was seven-night, for being the Author, Composer and Publisher of some Papers entitled, *The Observer*; and there is a Verdict enter'd against him, and now he appears to submit to the Judgment of the Court, which he humbly hopes shall not be given against him. For, my Lord, in the first Place I beg Leave to take notice that we think there is Cause why your Lordship should set aside the Trial that has been had; for we look on all the Proceedings upon the Writ of *Distringas*, on which the Verdict is taken, as null and void. This is an Information against Mr. Tutchin for a Libel; and the Facts laid in the Information are said to have been transacted within the City and County of London. To this Information he pleaded the last Trinity Term, and the *Venire Facias* was awarded the last Day of that Term, Return. *Die Lunæ proximæ post tres Septimanas Sancti Michaelis*, which your Lordship knows was October 23, the first Day of the Term, and the *Distringas* should have issued the very same Day; but it so happens that the *Distringas* in this Case does appear to have been sued forth October 24, which is a Day after the Return of the *Venire*, and therefore we say the *Distringas* is naught, and all the Proceedings thereupon are null, because there is no Award of the Court to warrant this *Distringas*. In the next Place we say, that the Return, neither of the *Venire* or the *Distringas*, are as by Law they ought to be; for the Return of the *Venire* is *Die Lunæ proximæ post tres Septimanas Sancti Michaelis*, and the Jury are to be brought *coram Domina Regina apud Westm. Die Jovis prox. post*; and the Return of the *Distringas* is *Craft. Anim.* with an *Hab. Corpora coram Regina apud Westm.* For both which Reasons we think it naught, because when any Proceedings in Criminal Matters are laid in a foreign County, the Process must be made returnable at a Day certain. Day might be given *coram Regina ubicunque*.

L. C. J. Holt. You mean at a common Day; and it is so, whenever Indictments are removed hither by *Certiorari* out of foreign Counties.

Mr. Mountague. My Lord, we think there is no Difference to be made between the Proceedings in London, and other Counties more remote from Westminster.

L. C. J. Holt. In Informations exhibited by Mr. Att. Gen. in this Court for Crimes done in foreign Counties, 'tis usual to return the Process upon Day certain.

Mr. Att. Gen. My Lord, Informations are of the Nature of a Bill.

L. C. J. Holt. Process on an Indictment may be made returnable on a certain Day, if it be found in this Court; but if it be removed hither by *Certiorari*, it is otherwise.

Mr. Mountague. My Lord, we take it that the Process that has been hitherto taken out upon all Informations that charge Crimes on Defendants as done out of the County of Middlesex, has been made returnable on some common Return-Day, and not at a Day certain.

Mr. Att. Gen. It has always been allowed to be upon a Day certain, as well as upon a general Return-Day; and it is settled and declared so by the Court.

L. C. J. Holt. I am apt to think the Clerks have gone both Ways.

Mr. Att. Gen. A Man takes a long Day if he will.

Mr. Mountague. We have look'd over many Informations, and the Practice does not appear to have been so. But what does Mr. Attorney say to the first Exception we have taken? Here is a Discontinuance after the Return of the *Venire*, which was upon October 23, and the *Distringas* bears *Teste viceffimo quarto die Octobris*.

L. C. J. Holt. Ay, what can you say to that, Mr. Attorney? That very Day the Writ is enter'd there must be a *Distringas*.

Mr. Att. Gen. My Lord, I know not how it came to pass. I believe somebody has done it on Purpose. I desire the Clerk may give an Account of it. I never saw the Writ. I desire Time to know how this has been manag'd.

L. C. J. Holt. There must be a Continuance to that Day; if there be no Continuance, all is fallen.

Mr. Att. Gen. If they come again, we will see how this has pass.

L. C. J. Holt. If it be so, the Plea is discontinued, and you must plead *de Novo*.

Mr. Mountague. My Lord, seeing it is in Court, I desire it may be read now.

L. C. J. Holt. What need you make that Reflection? Do you think we will make any Alteration in it?

Mr. Mountague. I hope I may ask that without making any Reflection: I am sure I did not intend it so.

Then the Record was read.

Mr. Att. Gen. Come again To-morrow.

Mr. Mountague. Mr. Tutchin, then you may go for To-day; but be here again To-morrow.

L. C. J. Holt. Is the *Venire* made returnable *Die Lunæ*?

Mr. Mountague. Yes, my Lord, it is; I look'd upon it.

Mr. Att. Gen. I will see if it can't be found out.

November 20.

L. C. J. Holt. Mr. Attorney, will you go on?

Mr. Att. Gen. My Lord, we are ready, if they will maintain their Exceptions.

Mr. Mountague. My Lord, we think we have no Occasion to cite many Authorities and Presidents to maintain the Exception, when it is apparent that there is a Discontinuance; the Reading of it makes it appear, that the *Distringas* was sued out a Day after the *Venire*, so that here is a *Nisi Prius* that has been issued out erroneously. The Statute says the Day and Place for taking Inquisitions must be in *Præsentia Partium*. And 'tis plain, the Day and Place mentioned in this Writ was appointed when the Defendant was not in Court, and therefore is null and void.

L. C. J. Holt. In *Præsentia Partium*, where is that required?

Mr. Mountague. By the Statute of *Nisi Prius*, which says, *nec alterminentur hujusmodi Inquisitiones coram aliquibus Jussiciarijs de Banco nisi statuatur certus*

*certus dies & Locus in Comitatu in Prasentia Partium.*

*L. C. J. Holt.* Which Statute do you mean?

*Mr. Mountague.* The Statute of *Westminster* the Second, *cap. 30.*

*L. C. J. Holt.* Call for that Statute.

*Mr. Att. Gen.* My Lord, I desire that they will maintain their Exception, for I am in the dark about it, and that they may maintain it by the Authority of the Law, and not only by an *ipse dixit*, and a Noise in the Town.

*L. C. J. Holt.* They say the Exception maintains itself.

*Mr. Att. Gen.* My Lord, let them go on first, and then we will answer them. If they will rely upon this Exception without Authority, then we must pray the Judgment of the Court; but if they will bring Authority for it, we do desire to hear them, and shall give them an Answer.

*Sir T. Powis.* My Lord, if they have any other Exception to make, I desire they may make it now.

*Mr. J. Powel.* *Mr. Mountague*, you have made one Exception, that is, of the Discontinuance of the Process; now, if you have any other Exceptions to make, you may make them now.

*Mr. Mountague.* My Lord, the Exceptions I have hitherto taken, have been to the Trial. I mention'd this, and I mention'd another which I do not insist on; since I understand it has been otherwise settled, that is, about the Return of these Writs upon a Day certain; which, my Lord, I did look upon to have been wrong; because I did not think *Mr. Attorney* could shew any Precedents of any such Returns to warrant this; for I can find none, and I have searched in the Time of King *Charles I.* and in King *Charles II.* and King *James.*

*L. C. J. Holt.* If a Suit be commenced in the *Common-Pleas* by Bill, as if an *Attorney* shall file a Bill there, the Process is made returnable at a Day certain, and here our Proceedings by Bill are always at a Day certain. Now an Information which is originally filed here, is in nature of a Bill, and the Proceedings therefore may be confined to a Day certain; but if any Indictment be brought hither by *Certiorari*, the Process must be returned at a common Day, and not at a Day certain. We had this Matter under Consideration before, upon another Occasion, and we thought it very reasonable the Proceedings on Informations here should be the same as the Proceedings by Bill, which are returnable on Days certain from any County of *England.*

*Mr. Mountague.* My Lord, if that be your Opinion, I have nothing to say to it. I have some Records here in my Hand, some in King *Charles's* Reign, and some in King *James's* Time, and all these are made returnable on the common Return, and one of these Records was settled by Sir *William Jones.* As to what the Officers say, they are divided I find; for some of them have told me, it is quite contrary to what *Mr. Harcourt* reports the Course of the Court to be.

*Mr. Att. Gen.* My Lord, I dare appeal to you, whether this has not been argued twenty Times.

*Mr. Mountague.* My Lord, let *Mr. Attorney* shew Precedents.

*Mr. Att. Gen.* You must shew Precedents.

*Mr. J. Powel.* It is otherwise when there is an original Proceeding.

*L. C. J. Holt.* Have you any more Exceptions?

*Mr. Mountague.* I rely on the first Exception. It lies on *Mr. Attorney* to answer this Exception.

*Mr. Att. Gen.* My Lord, I desire they may shew any Case or Resolution of Law, that the *Distringas* should bear *Teste* the same Day the *Venire* is return'd upon. The *Distringas* is awarded on the Roll upon the first Day of Term; and the *Venire* is returned the first Day of Term: And at the same Time it is awarded, that there shall be a *Distringas*, Day is given to the Party; that is the Warrant: For the *Distringas* and the *Teste* never appear upon the Roll. If they have any Authority, I desire they may shew it. My Lord, I think we can satisfy you, that it is right; or that it is amendable. This is a Maxim of the Law, *There must be Authority.*

*L. C. J. Holt.* It may be the Thing is so plain, as to need no Authority.

*Sir T. Powis.* I desire to know, whether the Award of the *Distringas* is right on the Roll, I take it, that the *Venire* is return'd the first Day of the Term; and that there is thereupon a *Distringas* awarded returnable, *Die Jovis prox. post Crast. Anim.* I beg to know, whether it be so or no?

*L. C. J. Holt.* I have it in my Hand; and I was apprized of that before; and was going to state it. For the Continuance of the Roll is right. The *Venire Facias* is return'd, *Die Lunæ prox. post tres Mich.* On which Day, the *Attorney* appears on the Queen's Behalf; and the Defendant appears likewise. What is then done? *Idco præceptum est Vicecomitibus London, quod distringant eos; itaque habeant Corpora eorum coram Domina Regina, Die Jovis prox. post Crast. Anim.* Now, on what Day must this Award be said to be? That must be that Day whereon the *Venire* is said to be return'd, which is, *Dies Lunæ prox. post Tres Mich.* The Award of the *Distringas*, therefore, by the Roll, is that very Day, the 23d: But the *Distringas* bears Date, not the 23d, but the 24th.

*Sir T. Powis.* Now do they rely on it, that notwithstanding the Roll has awarded it *Die Lunæ*, yet because the *Distringas* is dated *Die Martis*, do they rely on it, that this is to prevail, without any more to be said to it.

*L. C. J. Holt.* This is the true State of the Matter. Now there is no Discontinuance on the Roll; for it appears on the Roll, that the *Distringas* was awarded the 23d.

*Mr. Broderick.* The Objection is, That the *Distringas* has been sued out without Warrant. They ask for Authorities. I believe we might shew Twenty.

*Mr. Att. Gen.* My Lord, I desire they would cite some Authorities of the Twenty they speak of. I can shew them Cases, where the *Distringas's* have been *Tested* out of Term, or upon the *Sunday*: These are to be set right. I would be glad to see any Authority, wherein it appears the *Distringas* must be the same Day. I would be glad they would do more than say it.

*Mr. Mountague.* My Lord, before I answer this, I would ask, whether that Roll be the *Nisi Prius* Roll, or the Plea Roll?

*L. C. J. Holt.* It is the *Nisi Prius* Roll.

*Mr. Mountague.* My Lord, the Plea Roll has been made right since I took my Exceptions. The *Nisi Prius* Roll ought to be a Transcript of the Plea Roll.

*Mr. J.*

Mr. *J. Powel*. The *Nisi Prius* Roll is made out of the other: If the *Nisi Prius* Roll be good, it is well enough.

Mr. *Mountague*. My Lord, to have a Transcript of a Roll that has been made up since, is not right.

Mr. *Att. Gen.* My Lord, he strikes at the Root of the Court.

Mr. *Broderick*. My Lord, I would take notice, that it is the Course of the Court, that the *Distingas* shall bear Date the Day of the Return of the *Venire*. The Clerks tell me, they never knew it otherwise.

Mr. *J. Powel*. The Award is right; but you have not taken out a Writ according to the Award of the Court: Whether that will be warranted?

Mr. *Att. Gen.* They have no Authority, but the Reason of the Thing; and then I think we may give this short Answer: We do affirm, That it is right as it is: But if it were not right, we say it is amendable.

*L. C. J. Holt*. All the Matter will be to prove that it is amendable.

Sir *T. Powis*. If need be, we may put the Matter into the right Way: For if the *Distingas* be not the same Day with the Award, we pray that it may be amended.

*L. C. J. Holt*. By what Law must it be amended? You are in the Affirmative: If you acknowledge it wants Amendment, by what Law must it be amended?

Sir *T. Powis*. It is amendable by the Common Law.

Mr. *J. Powel*. You say it is no Fault; and if it be, it is amendable by the Common Law.

*L. C. J. Holt*. First let us know whether it needs Amendment? And then next, whether it can be amended?

Sir *T. Powis*. My Lord, let them shew that it needs Amendment: For if they make Exceptions, and say no more, and we proceed to answer them, then they may come upon us again with new Matter, and so there will be no End.

Mr. *Mountague*. When we were in the Affirmative in our Exception, we did give some Reasons why we said it is not right.

Mr. *J. Powel*. The Party was in Court the 23d. Then they awarded the *Distingas* in his Presence; so that the *Nisi Prius* was awarded in the Presence of the Party: The Award of it is *Die Lunæ*. But here's the Fault: They did not make a right *Teste* that Day; so that the Fault is, the *Distingas* that is sued out.

Mr. *Mountague*. On *Monday* there is an Award of the *Nisi Prius*; but on *Tuesday* it is taken forth. Now we say, that it is not according to the Writ awarded: For the Writ bears *Teste* the Day after; and upon that Account we say, the Proceedings are null. My Lord, Mr. *Attorney* asks for Precedents for this: But, with Submission, we take it to be plain, that the Motion made for the amending this Thing, supposes it not to be right.

*L. C. J. Holt*. The first Question to be debated, is, Whether this be a right Trial? or if not, Whether it be a Discontinuance of the whole? The *Distingas* bears Date the 24th of *October*; the Roll is the 23d of *October*; and there is no such Writ then taken out, but the Day after; so that the *Teste* is not according to the Roll. When a Writ is not awarded according to the Roll, what the Consequence will be, is another Matter.

Mr. *Att. Gen.* I beg your Lordship's Direction in this Matter. It deserves a great deal of Care;

for there has been a great Noise in the Town about it. However, we will go your Way. Whether they begin first, or we, I am very easy.

*L. C. J. Holt*. It is not warranted by Award of the Court. This is a Matter of the greatest Consequence to the Government.

Mr. *Broderick*. Mr. *Attorney* speaks of a Noise about the Town: I concern not myself about that, nor any further in this Case, than as it may be the Case of every Subject of *England*.

*L. C. J. Holt*. He is found to be the Author of the *Observators*.

Mr. *Att. Gen.* I do not speak it now upon the Business of this Prosecution; for he is so inconsiderable, that it matters not much how it goes. But if this be not amendable, it will blow up all Proceedings. Every Man must have Justice; and God forbid but he should.

Sir *T. Powis*. My Lord, if it be thought proper, we will go on. Your Lordship observes, what Warrant there was for a *Distingas*; and that it is rightly awarded on the Roll, which is a Warrant to the Clerk for a *Distingas*, and by Consequence if the *Distingas* be not made according to that Award, it is the Misprision of the Clerk. Now if we do admit this to be out of all the Statutes of Amendment (tho' it is fit to be considered whether some Statutes do not warrant it) but suppose it should be out of all the Statutes of Amendments; yet by the Common Law it may be amended.

There were Amendments at the Common Law before any Statute, both in civil and criminal Matters; and these Amendments chiefly regarded the Process of the Court, and such Errors as were occasioned by the Inadvertences or Neglects of the Officers; but especially in the same Term, during which Time the Judges have the Records of the Court in *Scrinio Pectoris*.

My Lord *Coke* says so expressly: And so was the Opinion of the Court in *Blackmore's* Case, in the eighth Report, fol. 156, 157. which is the great Case of Amendments.

That Book says, fol. 156. b. Without question, at Common Law, the Default of Entry of a Continuance, or of an *Essoign* (which was the Misprision of the Court itself in the Form of the Entry) was amendable by the Court. And the Objection here is, that there is a Discontinuance: And the Instance there given from the Case in 5 *Ed. III.* fol. 25. is very considerable; where, after a *Venire Facias* issued, and an Award *Quod jurat poniter in respectum*, in the Entry whereof there was a great Mistake of the Parties, which made a Discontinuance, and yet amended at the Common Law.

The Instances of Amendments at Common Law, out of the Old Books are many: 22 *Edw. III.* fol. 7. b. and 10. a. where a Discontinuance was amended. 29 *Edw. III.* fol. 32. b. a *Habeas Corp. Jurator.* amended. 7 *Hen. VI.* 29. *Broke, Tit. Amendment,* 32. 4 *Hen. VI.* 16. b. By which Book it appears, that the Judges had Power to amend in many Cases at the Common Law, in the Case of a common Person. And if in the Case of a Subject, much more in the Case of the King: For, by the Common Law, the King had many Privileges and Advantages in legal Proceedings, which a Subject had not: And the King, in his Suits, hath many great Prerogatives. The King may plead one Title, and afterwards wave it, and plead another. He may wave a Demurrer, and afterwards take Issue. And many other Privileges be-



long to the Crown, of this nature, which a Subject hath not.

And particularly in the Matter of Amendments by the Common Law, the King had a Privilege, which a Subject had not.

\* An Original Writ was not amendable for a Subject at the Common Law, but in the Case of the King it was.

Therefore in *Blackmore's Case*, fol. 156. b. it is said, That if a *Quare impedit* be sued forth on the Behalf of the King, and the Writ is *presentere* instead of *presentare*; it may be amended in the Case of the King, after Exception taken; but not so in the Case of a Subject.

And so in *Fitz. Amendment*, 12, 19, 22, several Amendments at Common Law, especially in the Case of the King.

Another Advantage which we have in this Case is, That we are in the same Term wherein the *Distingas* was awarded and made forth.

And in the same Case of *Blackmore*, fol. 156. b. 157. a. it is said, That at the Common Law, the Judges may amend as well their Judgment, as any other Part of the Record, in the same Term. For during the Term, the Record is in the Heart or Breast of the Court, or of the Judges, and not in the Roll: But in another Term, by the Common Law; Misprisions of Clerks in Process were not amendable by the Court; for in another Term, the Roll is the Record. So says that Book.

But here we are in the same Term: And it is the Misprision of the Clerk in Process, and in the making out a judicial Writ, which is in the Power of this Court, as issuing out from hence, whereas Original Writs issue out of *Chancery*: And Judicial Writs are often amended, where Originals are not. *Vide Brook's Amendments*, 20, 22. Owen 62.

But if this were not amendable by the Common Law, it is amendable by Statute.

The first Statutes for Amendments were 14 *Edw.* III. cap. 6. 9 *H. V.* cap. 4. and 4 *H. VI.* cap. 3. which extends to the Amendment of a Letter or a Syllable; but the Judges were wonder'd at in Parliament for their great Nicety, when they ask'd the Question there, whether they might not amend a whole Word; as appears in 39 *Edw.* III. f. 21. And 40 *Edw.* III. f. 34. b. they were told that undoubtedly they might.

Now here is nothing to be amended but a Figure: And this Statute being general, seems to extend to our Case.

The Statutes most to our Purpose are 8 *H. VI.* c. 12. whereby it is enacted, that the Judges may reform and amend all Defects in any Record, Process, Plea, Warrant, Writ, Pannel or Return (except Appeals, Indictments of Murder, and Outlawries for the same; and Additions left out in original Writs, Exigents, and other Writs of Proclamation, contrary to the Statute of *H. V.*) so that by such Misprision of Clerks, no Judgment shall be reversed or annull'd. And again, the Statute of 8 *H. VI.* cap. 15. ordains, that the King's Justices, before whom any Misprision or Default shall be found, be it in any Records and Processes depending before them, as well by way of Error as otherwise, or in the Returns of the same, by Misprision of the Clerks, or other Officers or Ministers whatsoever, in minute Matters (such as this is) they shall have Power to amend such Misprision, upon Examination thereof, according to their Discretion; except the Processes and Records

of Felonies and Treasons and the Dependancies thereof.

Now by Reason of the particular Exceptions in these Statutes, and by reason that the following Statutes of *Jesail*, in 32 *H. VIII.* 18 *Eliz.* 21. *Jac.* I. &c. do not extend to criminal Cases, an Opinion hath been taken up among some Persons, that no Amendment can be made in criminal Matters by any Statute; which is a strange Mistake.

For these two Statutes of 8 *H. VI.* cap. 12. and cap. 15. being general Laws, and in general Words, they, in Cases not excepted, extend to Amendments to be made by the Judges in criminal Prosecutions, as well as in Civil Causes, without Distinction: And the special Exceptions, after the general Words, are the highest Proofs imaginable. For nothing could be more absurd and vain, than carefully to except, what the Words precedent, without such Exception, would not have reach'd or extended to; and that would highly reflect on the Wisdom of Parliament.

This will appear more fully by the following Series of Authorities, whereby the Judges have amended Discontinuances of this nature; in criminal Prosecutions at the Suit of the Crown.

2 *Cro.* fol. 502. *Harris's Case*. An Indictment for a Nuisance was prosecuted against *Harris*; and a Trial was had, and a Verdict against him. Afterwards it was removed by *Certiorari*; and upon View of the Record, it was found, that no Issue was joined: For the Clerk of Assize had omitted to enter the Issue, and so the Verdict was without an Issue. And upon Motion, the Court of *King's-Bench* order'd it to be amended; for it was the Default of the Clerk. And this was done divers Years afterwards, and in the Time of another Clerk of Assize. And it was order'd, that the Clerk of Assize which then was (for the former was removed) should amend it; which was done by inserting these Words, *Et Richardus Warer* (who was the former Clerk of Assize) *qui pro Dom. Rege sequitur similiter*, &c. And it was there said by the Court, That if such Faults should not be mended, many Trials upon Indictments should be overthrown.

There is another Case in the same Book: 'Tis in 2 *Cro.* fol. 529. *Parker vers. Sir John Curson & Ux.* It was an Information against *Sir John Curson* and his Wife for Recusancy; and the Issue was, *Quod præd. Magdalena dicit, quod ipsa non est inde culpabilis; & de hoc ponit se super Patriam, & Attornatus Domini Regis similiter*. Upon a Trial at Bar, a Verdict was given against the Defendants. It was afterwards moved in Arrest of Judgment, that there was no Issue joined; for it was only the Plea of the *Feme Covert*, and no Issue joined, or Plea pleaded for the Husband. And yet in *Regnard*, the Docket was right, which was the Warrant for the Roll; and the Omission of the Husband was the Misprision of the Clerk: Therefore it was amended in so material a Part, even in another Term.

Another Case is in *Cro. Car.* fol. 144. *Sir Humphry Tuston's Case*. A *Quo Warranto* was brought against the Corporation of *Maidstone*, for claiming divers Liberties. Judgment was enter'd by Disclaimer; and it was intended to have been only a special Disclaimer of all Privileges, by Pretence of a Charter bearing Date 17 *Jac. Regis*: But the Clerk in entering the Judgment had omitted those Words, *Virtute vel Prætextu Literar. Patent. given. dat. Anno decimo sept. Jac. Regis*: But upon Examination, the Court finding that it was merely the Mis-

Misprision of the Clerk, the Court was of Opinion that it was amendable by the Common Law, as well in the King's Case, as in the Case of a common Person; and in another Term too; for so it was, and it was amended accordingly.

There is a Case in 1 *Siderfin*. fol. 243, 244. The King *v. Percival, Godfrey, & al.*

Upon an Indictment for a Riot and a Battery, and Not Guilty pleaded, a *Venire Facias* was awarded *Vicecomitibus* of the City of *Canterbury*; and upon a Trial at Bar, a Verdict was given against the Defendants: And it was moved in Arrest of Judgment, that the *Venire Facias* and other Process, was directed *Vicecomitibus* of *Canterbury*, and the Return was made by one Sheriff only; but the Court amended it, by endorsing upon the Writ, that there was but one Sheriff of *Canterbury*. And this Amendment was made by the Common Law, and not by the Statutes of *Jesails*; altho' it was said at the Bar, that it was amendable within the Statute, because it was not a Case within any of the Exceptions; it being an Information at the Common Law. And the Case of *Sberington* and *Talbot* was cited, and the Book of 39 *Hen. VI.* 40. for the same Purpose. And with this Case in *Siderfin*, agrees our present Case; for it is not an Indictment or Information upon any Penal Statute, but an Information at Common Law.

Now, if this Opinion, as reported by *Siderfin*, be Law, then this Discontinuance is plainly made good by the Statutes of *Jesail*.

So in the Case of *Dolphin* and *Clark*, 2 *Cro.* fol. 64, 65. The Appearance and Issue were in *Hillary Term*, 1 *Jac.* the *Venire* awarded did bear *Teste* 23. *Jan.* 1 *Jac.* so the *Venire* awarded before the Issue or Appearance; but yet amended, for the Roll is the Warrant of the *Venire*, which was right. So where the *Teste* was upon a *Sunday*, it was amended: for it was the Default of the Clerk, in the mis-awarding of Process. So if *Teste* out of Term. So if it be *Viccom.* and says not of what County: Or if the King's Reign be mistaken; 2 *Cro.* fol. 78. *Lea v. Lacon.* The Roll being right, and a Judicial Process, it may be amended.

So *Telwart.* fol. 64. *Nevill v. Bates.* The *Venire fac.* was made returnable *Quind. Hill.* and yet bore *Teste* 12. *Feb.* which is the last Day of the Term: And yet, *per Cur.* it shall be amended in the Date of the *Teste*, for it is but the Default of the Clerk. And other like Instances there put.

The like in *Cro. Car.* f. 38. *Ayleworth v. Chadwell.*

So in *Cro. Car.* fol. 90, 91. *Moor v. Hodges.* The Issue was in *Trinity Term*; and the *Venire* and *Disstringas* were of Days in *Easter Term* before; and yet amended: For the Roll of awarding the *Venire Facias* was well enough; and the mislating the *Venire Fac.* which is a judicial Process, shall also be set right.

So in later Cases, *Trin.* 2. *Jac.* II. the King *v. Edes.* The Defendant was convicted of a Misdemeanor, upon an Information exhibited *per Robertum Sawyer, &c.* The Continuance was, *Ideo dies datus est præfat. Sum. Astrey*; resolved it might be amended.

And *Hill.* 3. & 4. *Jac.* II. the King *v. Holmes.* Upon an Information for a Riot, and the Defendant convicted; the Mistake of *Ostabis Martini*, instead of *Ostabis Hill.* amended.

We are here in a much stronger Case. The Defendant hath been found Guilty upon a fair Trial: And the Preamble of the Statute of 32 *Hen. VIII.* takes notice, That the setting aside of Verdicts, for

Discontinuances and other Misprisions, is a great Slander to the Common Law and Judges. The *Venire* and *Disstringas* are duly awarded upon the Roll; and the making the *Teste* of the *Disstringas* 24. *Oct.* instead of 23. *Oct.* is a plain Misprision: It is in a judicial Process; and it is in the same Term. And we humbly insist upon it, That it is amendable, both by the Common and the Statute Law. For according to my Lord *Coke*, in *Blackmore's Case*, f. 156, b. 157, a. it is hard to say, what the Court cannot amend in the same Term. For, says he, at Common Law, the Judges might as well amend their Judgment, as any other Part of the Record, in the same Term. For during the Term, the Record is in the Breast of the Court, and of the Judges, and not in the Roll. And therefore we pray this Misprision may be amended, if it stand in need thereof.

Mr. *Att. Gen.* My Lord, because this Matter has been press'd with so much Warmth, I must beg Leave to observe some few Things, in Answer to what has been said.

This is a Thing that not only concerns this single Prosecution, but it concerns all the Prosecutions for the Crown; and in all Cases, not only Criminal, but Civil. And, my Lord, if the Statutes of Amendments extend not to any other Cases but what they urge, the Case of the Crown is worse than that of the Subject. It is worthy of Consideration, what Things are amendable by Common Law; for if the Crown be left to the Mercy of the Clerks, it cannot but be of very ill Consequence. Therefore I hope we may take the Benefit of the Common Law.

My Lord, I would beg Leave to recite some few Precedents, to shew how the Common Law formerly stood. And the first I shall take Notice of, is the Preamble of the Statute, 32 *Hen. VIII.* cap. 30. There it is said, The staying of Judgment after the Verdict, is a great Scandal to the Common Law, and the Ministers of the same. And, my Lord, there is another Thing to be consider'd; That admitting the Common Law stood as it did before, there is a great Difference between the Proceedings of the Crown at the Common Law, and Civil Cases. The Crown had many Privileges at Common Law, which the Subject had not. And it will sound very harsh, that the Crown shall be left without those Helps by the Statute of Amendments, when so many of the inferior Subjects did not want the Help of them. For it is impossible this should not be thought of in Parliament, that some Care should be taken for the Crown in those Matters where it needed.

Now there is, in all our Books, Notice taken of a greater Privilege that belongs to the Crown, than to the Subject. There shall not be a Demurrer to the Evidence in the Case of the Queen, without her Council's Assent; yet in the Case of a Subject, there may be a Demurrer to the Evidence. So the Crown may either insist on a Demurrer, or wave it, and take Issue at Pleasure.

There is this likewise: Before Judgment, in a Criminal Case, the Queen may amend, but the Subject not.

Also by *Hardress Reports*, fol. 504. before Judgment, no Discontinuance may be in the Queen's Case, altho' the Issue was tried. The Attorney takes Issue to one Part; and it is pleaded, that this is a Discontinuance to the other. Now there can be no Discontinuance before the Verdict. And that Book goes further, and says, That the want of Con-