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THE

HISTORY AND PRINCIPLES

FOR THE PUBLIC SERVICE

OF THE

LAW OF EVIDENCE,

AS ILLUSTRATING

OUR SOCIAL PROGRESS.

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BY

JOHN GEORGE PHILLIMORE.

"And judgment is turned away backward, and justice standeth afar off; for truth is fallen in the street, and equity cannot enter."

"But the liberal deviseth liberal things, and by liberal things he shall stand."—*Isaiah*, xlix. 14, and xxxii. 8.

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PREFACE.

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OF THE GOVERNMENT OF INDIA.

It has been my endeavour in the following pages, not only to illustrate the law of evidence by our political and social history, but to elucidate our history by an inquiry into that portion of our law. Many passages that might appear to those who were not acquainted with my purpose, (which no title that I could hit upon would quite adequately disclose), mere digressions from the subject, are, in truth, strictly and immediately connected with the main object I had in view when I began this undertaking. That object was to interweave law and history, to employ one and the other alternately for the illustration of both. I am not aware that the field which I have entered upon has ever been trodden in this country before; and yet, I am sure, it is one which, if properly cultivated, might yield the richest and most abundant harvest. In other countries, the subject is one on which the greatest genius and the most assiduous industry have been exerted; the names of Vico, of Montesquieu, and of Herder, will occur to all

who have directed their attention to such pursuits, as those of men, who, by their efforts in this direction, have conferred signal and lasting benefits on mankind; and though he was inferior to them in scope and originality, and too much hampered by implicit deference to a fraudulent, odious, and despotic government, it would be most ungrateful to omit the name of Savigny in any account of those who have contributed to embellish and enlarge the patrimony of the lawyer, by incorporating with it the fair and fertile regions by which it is immediately surrounded.

It has been the habit of our writers to consider law, not as it ought to be considered, as a province of a vast continent, locked in on every side by contiguous territories; but as an island

"Placed far amid the melancholy main,"

cut off from all communication with other districts,—as a sort of Japan, in the Geography of the mind, where, as among the ancient Romans, the words stranger and enemy are synonymous; all access to which is jealously prohibited, and of which the coasts are guarded by the rigour and gloom of an inexorable exclusion.

But though the full knowledge of truth belongs to God alone, yet is the pursuit of it man's most exalted privilege, as indifference to it is the attribute of the beasts that perish. What light is to the body, that evidence is to the soul; what the one is without, that the other is within; and it would be, if I may borrow Lord Bacon's imagery, as reasonable to suppose,

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because light is insensible to the touch, that it is without value, as to suppose that any rules for the investigation of truth can be without importance to the philosophical inquirer. Nor was the gratification of the reader's speculative curiosity the sole or principal object I proposed to myself in writing upon this subject;—my purpose was wider and more ambitious. By dwelling upon the facts disclosed in the history of judicial proceedings among us, I thought the argument for legal reform would become clearer and more irresistible; I thought that this subject might be so treated as to interest even the general student, and attract the notice of those who, as they have no professional motive to undertake the drudgery of technical details, would also be free from that professional bias, which too often interferes with a just appreciation of facts that sophistry may endeavour to elude, but which ignorance alone can venture to deny. He indeed will have derived from history but few of the salutary lessons that it may teach; he will have but a superficial knowledge, especially in this age, of its moral value, and of the philosophy which its examples inculcate, who is totally ignorant of that positive law which is the form given to justice by different communities. Varying in different countries, and stamped with the impress of the habits, feelings, and passions of its authors, this law will still be found, in so far as it is entitled to respect, in so far as it is adequate to the wants and exigencies of the community, in so far as it is irrefragable, solid, and durable, to be but the modification of that eternal essence which man may

indeed conceal or adulterate, but which it is beyond his power to obliterate or to destroy.

As the same law which holds the planets in their orbits causes the drop of water to fall back into the basin from whence it rose, so the law which gives security to life, and is the bulwark of civility, and the law which regulates the most mechanical detail of trivial practice, owe their binding power to the same cause, and derive their authority from the same principle. Different writers have assigned to that principle a different name; by some it has been called virtue, by some utility, some have attributed its recognition to an inevitable consequence of increasing experience, others have appealed for its sanction to a law innate and universal. But be its origin what it may, the controversy is one of words only, so long as all agree that it speaks a language which none but those depressed below the level of the species can mistake, and enforces obedience by motives that none but the profligate can disobey.

Thus, although it may be difficult, perhaps impossible, to trace the exact confines of natural and positive law,—to shew precisely when an institution is law, because it is right, and when it is right, because it is law, grievous, indeed, is the error of supposing that they must not ultimately rest on the same foundation, and that the one must not always be the measure and criterion of the other. And in order to ascertain the true character of our institutions we must have recourse to history, for that is the mirror which time holds up before the eyes of successive generations, and

in which the follies and errors and improvements of those who have pursued the same path with themselves are faithfully reflected. The laws of a country should be considered as parts of one great whole, for in this connection alone shall we be able to find their real import and their partial justification. But let us not forget that what, historically speaking, is their apology, is, so far as the present time and the present age are concerned, their most decisive and overwhelming condemnation.

The cradle is necessary for the child; but let us not insist on rocking the grown man in it. Special pleading (*a*)—unprofessional judges—masses of written evidence in one Court—want of publicity in another—conflicting systems pursued on different sides of Westminster Hall—statutes which, from their number, prolixity, confusion, and tautology, are the jest and scorn of Europe—fees in Courts of criminal justice—the want of public prosecutors—and, above all, the absence of a Code,—these are the flagrant and peculiar evils of our system,—evils which judges and lawyers in all times have eulogised, but which ne

(*a*) That where a nation has so far advanced in civilisation as to recognise property, it should be possible that the study of such cases as Brent's case (2 Leon, 14), Delamere's case (Plowden), Chudleigh's case (1 Coke Rep. 120), could be necessary for the knowledge of the laws which regulate its distribution, will amaze our posterity. The doctrine of "scintilla juris" to feed contingent uses, Popham's opinion that uses were impious, the opinion of other judges that the estate that feeds uses is "in nubibus, or in terrâ, or in custodiâ legis," are proofs of portentous folly that no human beings writing on any subject, no Hindoo faquir, nor any of the Sacheverells, whether of Queen Anne's time or our own, have ever surpassed. See Sugden on Powers, vol. 1, chap. 2.

sophistry and no mistaken interest will long be able to maintain. If any labours of mine shall in any degree tend to awaken the community to the great cause of Law Reform, I will cheerfully encounter all the hostility which they who endeavour, with whatever success, to expose inveterate and extensive evils must always lay their account to meet. The hatred of the powerful, and the rancour of the base, —the arrow that strikes in the noon-day, and the pestilence that walks in darkness,—the whisper that vibrates in the ear of greatness, and the open shout of enmity and derision,—shall be welcome in such a cause.

——— *ἐπεὶ οὐχ ἱερήιον ὐδὲ βοέιον.*

If no risk were to be run, what child or what woman might not attempt reform? The most selfish and frivolous of coxcombs might endeavour to promote the public good, if no sacrifice, no industry, no resolution were required for such an undertaking. "Propositâ INVIDIÃ, morte, pœnâ, qui nihilo segnius rempublicam defendit, is vir vere putandus est." Obscurity and insignificance are a scanty price for the consciousness of having acted such a part,—a consciousness that must fill the mind with a satisfaction, for the want of which no splendour or station compensate, as it is one which no external honours can bestow.

TEMPLE,
April, 1850.

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HISTORY

OF THE

LAW OF EVIDENCE.

CHAPTER I.

FEW subjects are more interesting, none more instructive, if properly pursued, than the progress of opinion. It confers on history its chief value—it furnishes philosophy with its most certain guide, and although the indications of its path are various, the codes, institutions, statutes, and judicial proceedings of different countries may, perhaps, and more especially, where the people possess anything like freedom, be considered its most authentic and abiding monuments. The popular literature, which is the most direct representative of the time, seldom reaches posterity, nor is there any reason to suppose, that this age and country will furnish more than the common number of exceptions to so general a rule. Who now reads the Jugemens des Sçavans or even Le Clerc, or the Gentleman's Magazine or the Monthly (*a*) Review; nay, who reads Addison or Bolingbroke? But when we want to know the full extent of infamy in which the chosen representatives of a country calling itself free can steep themselves, and to what lengths their abject compliance with the will of the worst of modern tyrants can reach, we still turn to the statute book of Henry the Eighth. When we desire to ascertain the incorrigible tendency of a certain class of the community to interfere with the right of private judgment, we refer to the acts

(*a*) *i. e.* of the last century.

of Elizabeth and Charles 2, passed under the influence of the hierarchy—and if it is our object to prove the terrible evils of judicial pedantry, if we want to shew how substance may be sacrificed to form, how murder may be committed, and tortures too horrible to be named, inflicted in cold blood with legal solemnity under the eyes of the stupid multitude, amid invocations of the Deity, and solemn panegyrics from the judges on the humane impartiality of the law, which after several pages of gibberish had been mumbled to a prisoner condemned him to an excruciating death, sometimes without any trial at all, and always without allowing his witnesses to be sworn, we still think of the scenes in which the lawyers of the Tudors and Stuarts, the Cokes, and Saunders', and Scroggs, and Sawyers, and Jeffreys's, were actors.

So too, the abolition of all the feudal abuses in one night, amidst the first transports of recovered freedom, in the first thrill of a regenerated nation, and the enactment of the Code Napoléon, that greatest trophy of modern wisdom, after long and searching deliberation are as characteristic of the genius of the French people, and its aptitude for jurisprudence, as the preservation of trial by battle till the year 1820, the actual existence among us of the method of pleading in force in Edward the First's time, the timid reform, and pertinacious defence of the most flagrant abuses, are of the English dislike to change, and surprising incapacity for generalization.

The Law of Evidence, which I now propose to investigate, is also one of the landmarks of civilization which it is impossible for the philosophical inquirer to overlook. It well deserves the attentive examination, not of the jurist only, but of all who study with interest the subject I endeavour to recommend. It constitutes a most important part of human opinion; it has fluctuated with the vicissitudes of society; it has advanced with its progress, and declined with its degradation. For it was when all the resources of superstition were exhausted, when the relics which were the most awful of all

guarantees in a barbarous age, failed to ensure the veracity of a witness, that the judge in mere despair and conscious of his inability to discover the truth, called upon Providence to supply by a special interposition, the want of human judgment, and sagacity. This is the origin of ordeal and trial by battle. Afterwards, we find, that owing to the Roman law, which the church was not able, nor, indeed, willing altogether to corrupt, some rules of evidence were laid down, and a regular system of examination was established. The system of examination still blindly followed in our Court of Chancery, originated beyond all doubt, with the church in the middle ages; and while, notwithstanding the authority of the church, the more beneficial principles of public trial were slowly making their way, the judicial history of Europe teems with evidence of the little reliance that can be placed on human testimony—charges that we know to be impossible, of witchcraft, of direct intercourse with evil spirits, were solemnly confessed by wretched victims, bewildered by terror, and infatuated with superstition. I propose to state the rules of evidence as established by the Law of Justinian, by the Canon Law, by the French Law, as it existed in the time of Pothier, and as it is modified by the Code Napoléon, and to trace as far as they can be traced, in proceedings confused, flexible, and anomalous, as our criminal trials, where the decision of one judge was often overruled by his successor, the gradual application of the principles of the law of evidence, as it is at present exemplified in English courts of justice.

ROMAN LAW OF EVIDENCE (*b*).

"To suppose that any fact can be known to any intellect without evidence, is absurd and implies a contradiction. If a fact is evident to any understanding, there must be evidence

(*b*) "L'esprit ne sait véritablement que ce qu'il voit avec évidence." Malebranche Recherche de la Vérité, Liv. 3, c. 4.

of it visible to that understanding. No mind created or uncreated can see evidence where there is none, for that is to see that to be which is not; and, therefore, supposing what is impossible, any truth absolutely without evidence, such a truth would be necessarily and for ever unknown. Infinite wisdom will discern what to all other beings is inscrutable; but it will not discern that which does not exist, for to it that non-existence, as to which created minds may doubt, will be certain and apparent.

The word which most nearly corresponds to our term evidence in the Roman law, is *probatio;* both expressions comprehend everything by which a doubtful matter may be rendered more certain to the judge. It would be erroneous to suppose, from the mutilated fragments of Roman law, which we possess, that the wholesale exclusion of particular classes of witnesses, was in that system a positive and inflexible maxim. The rescript of Hadrian to Varus, to the effect that the judge is best able to ascertain what degree of credit is due to witnesses, shews that many of the objections which later civilians applied to the competence, were, in fact, aimed at the credibility of witnesses (*a*). So, in the rescript in which that of Hadrian is cited, the general principles of evidence are insisted upon. "What arguments and in what degree, amount to proof in each case cannot accurately be defined. Sometimes the number of witnesses—sometimes their rank and authority—sometimes the unanimous voice of public fame, establishes the proof of the matter under investigation. All the direction I can give is, that you should not tie yourself down to any one particular species of proof, but allow your own belief to decide, what is and what is not sufficiently established" (*b*). Much has been written on the subject of the law of evidence, especially in later times, by persons learned in the

(*a*) Dig 22. 3; Cod. 4. 19; Dig. 22; 5 Cod. 4. 20.

(*b*) Burke, vol. 14. Report of the Committee to inspect Lords' Journals, vide note (*a*), page 20.

Roman law, and much ingenuity has been employed on the doctrine of indications and presumptions. The subtile disquisitions on these and other matters of jurisprudence, before the complete revival of letters, often degenerate into absurdities so gross that they almost remind the reader of the English reports, and justify the severe censure of Rabelais, who was a complete master of that and every other branch of learning.

So various and fleeting, however, are the motives which govern human affairs, the forms which they assume, and the effects which they produce, that no attempt entirely to methodize the rules of evidence, can be successful and complete. The only universal rule that can be laid down is, that the best evidence should be given of which the case admits. To all other rules, even to the soundest and most general of all, the exclusion of hearsay, exceptions must be numerous, and the wider and more comprehensive the view may be that the student takes of this vast and almost infinite subject, the more disposed will he be to adopt the maxim always acted upon by Lord Mansfield, though frequently rejected by the narrowness of the present age, that it were better there were no rules than that there should be no exceptions.

ONUS PROBANDI.

The first and most important question presented by the law of evidence, is on whom does the "onus probandi" rest? This was answered by the civilians; first, by the maxim, that it was for the actor to prove his case; and secondly, that he who made an allegation was to prove it, "ei incumbit probatio qui dicit non qui negat." The defendant, on the other hand, who admitted the truth of the plaintiff's case, but answered it by the allegation of some fact, which, if true, put an end to his demand, was bound to prove that allegation.

Reus in exceptione actor est. "If," says the Code *de except. si quidem*, "you say the plaintiff cannot establish his case by proof, no other defence is necessary; but if you confess the

truth of his statement, and assert a reason against its consequences, that is the matter of investigation."

Thus the general rule of law was clear and certain. That when the fact on which the plaintiff rested his case was denied by his antagonist, the burden of proof was on the plaintiff—to this principle and the specified exceptions, every case in the Digest may be reconciled.

When the fact was not denied, by the defendant, when in the words of the Roman jurists, the exceptio became the intentio; as we should say, the plea took the place of the declaration. (*c*) "Reus probare debet exceptionem quasi intentionem," and several instances are given in the Digest, 22. 3. 19. "In exceptionibus dicendum est reum partibus actoris fungi oportere, ipsumque exceptionem velut intentionem implere, ut putas si pacti conventi exceptione utatur, docere debet pactum conventum factum esse." p. 11. As an instance of the application of this rule, the case may be cited in which the heir is sued by a legatee. He defends himself by the Falcidian law, that is, by asserting that the estate of the deceased is insufficient—here the onus of the proof is on the heir. He admits the will and the bequest, and is, therefore, bound to shew why the obligation apparently thence arising does not exist. There is a law in the Code *sive possidetis* (*d*), which flings the onus of proof even on the possessor of an estate. Two *emancipated* sons were in possession of a farm; this farm, after the death of their father, was claimed by his heirs; they alleged that it had been given to them by their father, and it was held that they were bound to prove this allegation. "Mirum quidem plerisque videtur," says Donellus, "cur eos qui possessores erant aliquid probare debere dicant;" but he adds, there is nothing strange about the matter. "Nam cum ea prædia fuerint patris decessoris vel ipsâ

(*c*) Cujac. 7. 872. Anglicé. As it is for the plaintiff to prove his declaration, it is for the defendant who admits and answers it to prove his plea.

(*d*) Cod. 5. 19, § 16.

emancipatorum confessione . . . . constet autem petitores ei hæredes exstitisse" . . . . "quia possessores factum esse dicunt quod *non* constat—et adversarii negant ex eâdem regulâ quobare illos oportet." So the general rule was that the affirmative and not the negative was to be proved; but this rule admitted three exceptions:—

First, when although the phrase was negative, it involved an affirmation, "forma verborum negativa re ipsâ affirmativa est," as if the suitor said that the son was *not* emancipated, or that his house was not liable to a particular servitude.

Secondly, if the presumption was in favour of the affirmative; so according to the very elegant and refined (*e*) reasoning of Paulus, in the case where the defendant allowed money to have been paid to him, but asserted that the payment was in discharge of a debt, Paulus held that it was for the plaintiff to shew that the money paid was not a debt.

Thirdly, when the burden of proof was cast on the defendant, who denied a fact on account of his official character, *e. g.* if the guardians of a ward were insolvent, and unable to liquidate the debts due from them to their ward's estate. The magistrate who appointed them, if he denied that they were insolvent at the time of their appointment, was obliged to prove his assertion.

But it may be remarked, that in most suits, both parties affirm one set of propositions, and deny another; and the rule "nobody is bound to prove a negative," which common-place people are so fond of quoting, even when it is not false, is liable to great doubt and must be taken with many exceptions.

The trite absurdity, that no one is bound to prove a negative, owes its origin to the misinterpretation of the following passage in the Code, lib. iv. tit. 19, s. 23. "Actor quod asseverat probare se non posse profitendo, rcum necessitate monstrandi

(*e*) 22 Dig. 22. 3. 25. 1. But if the defendant denied the receipt of the money in the first instance, and the payment of it was proved, the onus of shewing that it was a debt was cast on the defendant.

contrarium non astringit quum per rerum naturam *factum negantis*, probatio, nulla sit." The meaning is clearly qualified, but the latter part of the sentence was taken without reference to the former, and turned into a universal proposition. The Commentary of Cujacius, tom. 7, p. 867, is worth quoting, as it puts the whole matter in a very clear light.

"Sunt quædam negationes, quæ effectu affirmationes sunt, ut habemus de actionibus negatoriis in § æque, de action. ut, si nego testatorem fuisse sanæ mentis, affirmo furiosum fuisse: itaque probare debeo, l. nec codicillos, c. de codicill. Sic etiam, si nego adversarium aliquid jure posse facere, id dico, non potest hoc jure facere, utor auctoritate juris, eam debeo proferre, vel legem vel constitutionem, qua id probetur, l. 5, hoc tit. Nam in probationibus non sunt tantum testes, sed etiam leges, item quæstiones, id est tormenta: Item jusjurandum. Item, si nego emancipationem esse factam præsentibus testibus, vitium emancipationis allego. Itaque id probare debreo, d. l. 5, hoc tit. Item, si nego me Romæ fuisse eo tempore, quo cædes facta est, id dico, me alibi fuisse, id probare debeo, l. pen. in fi. c. de contr. stipul. Item, si nego te esse ex illa gente, vel propter emancipationem, qua constat tolli gentem, vel quia dico quod sis suppositus, id probare debeo. Et sic fieri potest, ut cum de gente quæritur, uterque probet, quæ ex his validiores sint, judex æstimabit verum infitiationes per rerum naturam non possunt probari, ut si accusatus cædis dicat non feci."

There is a remarkable law (*f*), which flings the burden of proof on the defendant, where the plaintiff substituted a legal, for an illegal will; if in the first will there was a tacitum fidei commissum, a trust that the heir would pay a sum to a person whom the law would not allow to receive it; which sum was forfeited to the state, and this (though no mention was made of it in the will), was proved by the guarantee given by the heir

(*f*) Dig. 22, tit. 3, l. 3; Cujacius, vol. 7, p. 867, b. 10, l. 4.

for its execution; then in the event of a second will, it was for the heir to prove that the testator had changed this illegal intention, "probatio mutatæ voluntatis ei incumbit qui convenitur." The presumption which exists against the heir flings the burden of proof on him.

So the buyer of a runaway slave, if he wished to recover the price from the seller, was bound to shew that the slave had run away while in the possession of the latter, and for this purpose the slave was a sufficient witness, in the absence of other proof, "servi responso standum est;"—if the heir was not mentioned in an obligation, the burden of proof rested with him who wished to shew that the testator did not mean to comprise the heir, "quia plerumque tam hæredibus nostris quam nobismet ipsis cavemus."

PRESUMPTIONS.

The civilians and canonists of the middle ages distinguished three sorts of presumptions.

1. Præsumptiones juris et de jure, against which no evidence was allowed. These were unknown to the Roman law.

2. Præsumptiones quæ solæ fidem non faciunt sed si alia concurrant juvant ad fidem faciendam. Of this an instance will be found, Dig. 22. 3. 26, "Procula quum magnæ quantitatis," &c. These were called "hominis."

3. Præsumptiones juris, which were assumed till the contrary was proved to be true, *e. g.*, that every citizen was qualified to take advantage of a legal right. Dig. 22. 3. 19. 2.

That the heirs of a contracting party were included in his contract, "Si pactum factum sit quo hæredis mentio non fiat" . . . . "de ipso duntaxat non de hærede ejus quoque convenisse petitor probare debet quia plerunque tam heredibus nostris quam nobismet ipsis cavemus." Dig. 22. 3. 9.

That a formal act, as emancipation, was valid. That a debt was paid when the instrument securing it was cancelled. Dig. 22. 3. 24.

Solemn declarations of parents in questions of status, but

not under all circumstances, as "a matre iratâ." Dig. 22. 3. 29. § 1. In questions of status, the actual possession or apparent possession. "Siquidem," says Ulpian, the suitor, "in possessione libertatis fuit sine dubio ipsum oportebit ingenuitatis causam agere docereque se ingenuum esse, sin vero in possessione ingenuitatis sit et libertinus esse dicatur .... hoc probare debet qui eum dicit libertum suum."

The exception to this rule was, where the actual state of things had been caused by violence. "Si quis liberum hominem vi rapuerit in vinculis habuerit is indignissime commodum possessoris consequcretur." The student of history may remark the symptoms of the advancing decrepitude of the empire, and the growing difficulty of providing functionaries for the irksome duties cast on free citizens; in the laws of the emperors, declaring that the mere fact of having filled stations of trust and honour (especially that of "limenarcha," or superintendent of a port), was no presumption against a servile condition. Cod. de liber causa, 7. 16. 11; 7. 16. 38.

WRITTEN EVIDENCE (*g*).

The principle of the early civilians, as to the admission of oral and written evidence, is laid down by Gaius, Dig. 22. 4. "In re hypothecæ nomine obligata ad rem non pertinet, quibus sit verbis, sicuti est et in his obligationibus, quæ consensu contrahuntur; et ideo et sine scriptura si convenit, ut hypothecæ sit, et probari poterit, res obligata erit, de qua conveniunt. Fiunt enim de his scripturæ, ut quod actum est, per eas facilius probari possit; et sine his autem valet, quod actum est, si habeat probationem, sicut et nuptiæ sunt, licet testatio sine scriptis habita est" (*h*).

Paulus, Liv. 5, tit. 15, § 4, draws the distinction with great accuracy: "Testes cum de fide tabularum nihil dicitur adversus

(*g*) "Instrumentorum nomine ea omnia accipienda sunt quibus causa instrui potest." 22. 4. 2. Dig. But in a narrower sense it was confined to written evidence.

(*h*) "Proprietatis dominium non tantum instrumento emptionis sed et

scripturam interrogari non possunt," that is, where the authenticity of the written instrument is undisputed, oral evidence is not admissible to contradict it. So in the first Law Cod. de testibus, "contra scriptum testimonium, non scriptum testimonium non fectur."

Justinian limited the right of oral proof; where the debt was founded on a written document he forbad the use of oral testimony, unless the debtor could produce five witnesses who would swear that they saw him pay the creditor, "debent testari se vidisse debitorem solventem, non etiam se audisse id ex aliis." Cuj. vol. 9, p. 279. "Vel testari debent se audisse creditorem dicentem sibi solutam pecuniam"—and it was necessary that they should have been summoned for the express purpose—"non rogatis non creditur." If, however, the written evidence was destroyed or had perished by accident, or if the transaction had not been consigned to writing, he allowed the oral evidence of five witnesses not "rogati," to discharge the debtor; this he thought the utmost limit (prout possibile est) to which it was possible for him to proceed. We shall presently see that in France, and England, the principle acted upon by Justinian has been much developed, in its application.

A writing produced against any one in a court of justice, is either public or private; if private, it is written by the party against whom it is produced, or by the party who produces it, or by neither. If it was written by the party in whose favour it was produced, it was of itself unavailing.

"Instrumenta (*i*) domestica seu annotatio si non aliis quoque adminialis non adjuvetur ad fidem sola non sufficit;" again, "Rationes defuncti quæ in bonis inveniuntur ad probationem sibi debitæ quantitatis solas, non sufficere sæpe res scriptum est," but they might be a foundation for the oath. The same

quibuscunque aliis legitimis probationibus ostenditur." Cod. 4. 19. 4, and ib. § 12; ib. § 9. If the written documents were lost other proof was received. Cod. 4. 21. 8; Cod. 5. 12. 15.

(*i*) Code Civil, 1329. Lib. 6. Cod. de Probat. 10.

principle was applied where the deceased in his will declared certain sums to be due to him, and certain people to be his debtors. Gallienus enforced it even where the fiscus was a party: "Exemplo perniciosum est ut ei scripturæ credatur quâ unusquisque sibi debitorem constituit."

This was a doctrine as old as Cicero (*k*). "Suum codicem testis loco recitare arrogantiæ est." Pro R. Am. So, Siculus Flaccus (*l*), a writer de re rusticâ, tells us that the models of estates made by the proprietors for themselves were not evidence. "Quidam vero possessionum suarum privatim formas fecerunt quæ nec ipsos vicinis, nec sibi vicinos obligant quoniam res est voluntaria." It was also a rule of Roman law, borrowed from the Greeks, that oral evidence was not admissible to contradict a written document agreed upon by the parties, *ἄγραφος μαρτυρία κατὰ ἐγγράφου μαρτυρίας ἰσχύειν ὸν δύναται*, which Paulus has copied, "si de fide tabularum nihil dicitur testes adversus scripturam interrogari non possunt" (*m*). In general, written evidence was not necessary, but if the parties had agreed that the contract should be in writing, parol evidence could not be adduced. The documents admissible, were syngraphæ, chirographæ (*n*), acceptilationes, apochæ, antapochæ, and in some cases written depositions. The apocha was the receipt given to the debtor by the creditor, the antapocha, the acknowledgment given to the creditor by the debtor, as a bar to the prescription of his debt, for the payment of interest within thirty years, took the debt out of the operation of the law of prescription. The form of the anta-

(*k*) This would have disposed of the case of Searle *v.* Lord Barrington, in which it was held that in an action on a bond, a receipt for interest, indorsed by the creditor, took the case out of the Statute of Limitations. "Personne ne peut s'acquérir un droit ni se rendre créancier d'un autre par des actes qu'il puisse faire à sa volonté." Domat. 2. 153.

(*l*) De conditionibus agrorum "Quidam formas quorum mentio est in ære sculpserunt."

(*m*) "Nisi scilicet id nominatim actum sit inter contrahentes, ut contractus redigeretur in scriptis—aliter enim contractus sine scripturâ non valet." Cujac. 10. 968.

(*n*) Novell. 73; Novell. 49. 1. 2; Novell. 90. 1. 2.

pocha was:—"Titius fateor me Caio anno illo die illa tot sōl-visse annui reditus nomine quem ei debeo ob fundum—vel tot usurarum nomine ob creditam mihi pecuniam." So the documents drawn by the Tabelliones (*o*), the Monumenta Census, and the Acta Judiciaria, were conclusive evidence. The Code, l. 2, Lex Cornelia de Falsis, shews that a public document proved itself, and could only be impeached by him who asserted it to be a forgery.

If the instrument was written by a stranger to the cause, it was inadmissible.

The formal declaration (in actis) of the parents to the status and birth of the child, "Sive hunc filium suum esse sibi eo die natum sive non esse in actis professi sunt," Donellus, 1341, was an exception to this rule (*p*). Julius Capitolinus, in the Life of Marcus Antoninus, tells us, that the emperor ordered the birth of every free citizen to be registered with the præfectus ærarii. He also established public officers of registration all over the empire, who were so far to discharge the duty fulfilled by the præfectus ærarii at Rome, in the provinces, "Ut si quando de statu quæstio esset probationes indepeterentur quis a quo editus esset." So the letters written by fathers as to their children, if clearly authenticated, "Probationes quæ de filiis dantur non in sola affirmatione testium consistere, *sed et epistolas quæ* (*q*) *uxoribus missæ allegarentur*

(*o*) Procopius has described the Tabellio, *ἐπὶ τῆς ἀγορᾶς καθημενος ὅς, ἐπετελει τὰ τῶν πολιτῶν γραμματεῖα ἑκαστοι οἰκείοις ἐπισφραγίρων αυτὸς γραμμασιν, ὅνπερ ταβελλιῶνα καλοῦσι ρωμαῖοι.*

(*p*) "Liberales causas ita munivit ut primus juberet apud præfectos ærarii Saturnini unumquemque civium natos liberos profiteri intra trigesimum diem nomine interposito, per provincias Tabulariorum publicorum usum instituit apud quos idem de originibus fieret, quod Romæ apud præfectos ærarii." Jul. Cap. Vit. In. An. For the old law, see Suetonius Tiber. 5; Caliq. 8.

(*q*) This illustrates the absurdity of the decision in Doe dem. Wright *v.* Tatham, by which in a question, whether A. was or was not insane, letters by third and entirely disinterested parties, written to A., and treating him as sane, were held inadmissible. It is difficult to conceive evidence

si de fide earum constiterit nonnullam vicem instrumentorum obtinere decretum est;" (as in their registers the time of birth was stated, we find them repeatedly cited as evidence of age). And the principle of this decision, says Donellus, is most just, and his words are well worth quoting:—"Non tam enim horum professio est de se ad alium pertinente quam de suâ cum de liberis affirmant et profitentur aliquid cum præsertim id tum faciunt cum nullum adhuc commodum aut incommodum filiorum versatur quo tempore eorum professio ab omni mendacii suspicione maxime aliena est, quia sane nihil fuit cur in eâ rementiatur."

A party then only can be affected by documents which he, or some person by his order, has written; but even a (chirograph) writing in the hand of the person sought to be charged with a debt (for the Roman law knew nothing of our distinction about deeds) did not prove the debt or security, unless the cause of the obligation was specially set out in the document produced; "sin cautis indebite exposita esse dicitur et indiscreti loquitur." Nay, even if(*r*) in one written document, produced and admitted, any mention was made of another written document, the production of the latter was not excused, nor could any statement or recital in the first be admissible to prove a debt or obligation set out in the second. But the literal copy of an inventory, taken before a judge and with his authority, was admitted, "hæc enim non exempla

more satisfactory, or which any one anxious to ascertain the truth would seize upon with more avidity. Mr. Baron Alderson's argument is, however, a most acute and ingenious defence of the English law.

(*r*) "Commemorationem in chirographo pecuniarum quæ ex aliâ causâ deberi dicuntur, vim obligationis non habere." Dig. 22, § 3, 31; Novell. 119; nor was the omission to recite a sum which it was not the object of the deed to secure any argument to prove such a sum not due. Dig. 44, § 7, 29. "Lucio Titio quum ex causâ debiti pecunia deberetur et eidem debitori aliam pecuniam crederet, in cautione pecuniæ debitæ non adjecit sibi præter eam pecuniam debitam sibi ex causâ judicati. Quæro an integræ sint utræque Lucio Titio petitiones Paulus respondit nihil proponi cur non sint integræ."

sed authentica recte dixeris." Private instruments might, as has been said, be disputed, and even if they had been once admitted, the party might recall his admission (*s*).

If the party admitted the instrument to be in his handwriting, but yet disputed the truth of what he had written, and if he admitted that no violence had been used towards him, and that he had not signed one instrument while he supposed himself to be signing another, but affirmed that he had acknowledged the receipt of money which he expected to be paid, but which had been withheld, or that for some reason or other he had been obliged to conceal the truth, he was bound to prove his case by written documents; for instance, if a legacy of fifty aurei was left and the heir made himself responsible for a hundred, he might produce the will to cut down his obligation. If, however, the defendant relied on fraud or violence he might prove his case by witnesses.

Hitherto it has been taken for granted, that the documents produced were genuine; but if their authenticity was disputed, another class of questions arose (*t*). First, we come to the division between public and private documents. Public documents were those either comprehended actis publicis, or registered among them by the advice or command of later emperors (actis insinuata). Such were records of public trials kept in the place assigned for their custody, or declarations made before a magistrate and inserted solemnly among the public archives.

(*s*) But if the party had formally renounced them he could not bring them forward. Cod. de Probat. 4. 19. 3.

(*t*) In order to prevent forgery, Suetonius says, that in Nero's time it was provided, "Ne tabulæ nisi pertusæ de ter lino per foramina trajecto obsignarentur." Ner. Vit. Cap. 17. "Amplissimus ordo decrevit eas tabulas quæ publici vel privati contractus scripturam continent, adhibitis testibus ita signari ut in summâ marginis ad mediam partem perforatæ triplici lino constringantur atque impositum supra linum ceræ imprimatur—ut exteriores (scripturæ) fidem interiori servent—aliter tabulæ prolatæ nihil momenti habent." Paul. recept. sent. 5. 25. 5. Novell. 47. 1; 73. 7.

Copies and abstracts were not admissible (*u*). Cod. 8. 54. 30. Constantine orders all gifts to be registered at Rome, apud magistrum census; in the provinces elsewhere; and when so registered, they had the force of public documents, and their authenticity could not be disputed, "obtineant inconcussam et perpetuam firmitatem." So we find in the Digest, 22. 3. 10., "census et monumenta publica potiora testibus esse senatus censuit." Cicero de legibus, 3, says, "censores populi ævitates soboles, familias, pecuniasque censento;" and the censors' register were evidence as to the age, offspring, and fortune and status of the citizen. It has not been generally remarked, so far as I know, that one mode of emancipation of slaves was by the census: if the master allowed his slave to give in to the censors an account of his, the slave's fortune, he became a Roman citizen, and was "liber censu." These public records required no corroboration by witnesses; but to establish the writings prepared by notaries, Tabelliones witnesses were necessary. It was necessary to produce evidence "rei gestæ," Novell. 73, even though such documents were in one sense public, to distinguish them from writings which no public officer had assisted to prepare. "Aliud est," says Donellus, "monumentum publicum cujus fides est publica, aliud publicum instrumentum." The authenticity of the latter, and of all previous writings, might of course be questioned; if questioned, it was proved either by witnesses or comparison of handwriting. The witnesses to prove a public document required by Justinian, were the Tabellio, the amanuensis whom he employed, and the treasurer to whom the money was paid. If the two latter were dead or absent, the evidence of the former was sufficient. "Quod si Tabellio defunctus sit habebit instrumentum fidem tam ex testimonio amanuensis, annumeratoris et testium, quam ex collatione adimpletionis instrumenti si autem nullus horum adsit sola collatio adimple-

(*u*) "Quicunque a fisco convenitur, non ex indice, (a short abstract), et exemplo alicujus scripturæ, sed ex authentico conveniendus est." 22. 4. 2.

tionis non sufficiet, sed etiam examinandæ sunt subscribentium contrahentium scripturæ. Novell. 73. § 3. If the writing was strictly private, Justinian, Novell. 73, required the attestation of no less than three witnesses who were present when the disputed instrument was written. "Sed et si quis instrumenta mutui aut alterius contractus conficiat, neque id velit componi in foro, non aliter scriptum testimonium fidem habere videtur, nisi et fide dignorum non minus quam tuum testium habeat præsentiam." And again, "si quis cum vel deponit vel mutuum dat vel aliter contrahit contentus sit solâ scripturâ ejus que contrahit eo loco erit ut sciat se fiduciam contraxisse et de illius fide se totum pendere." This rule was afterwards modified by the condition that the sum must exceed a pound of gold, and the contract be made in a city, otherwise the old rule quod usque in Republicâ obtinuit was to prevail. The old rule was, that two witnesses were sufficient, and that writing might be proved by comparison of hands.

The writings prepared by Tabelliones were entitled to more authority. In the first place, a particular form was prescribed, according to which they were to be drawn up. Novell. 47, ut nomen Imperatoris. Two witnesses were required by Justinian, Novell. 93, to prove the res gestæ whose names were subscribed by the notary to the instrument. Where the contracting parties were illiterate, where the transaction took place in a city, and where the property disposed of exceeded one pound of gold, five witnesses were required. If the instrument was disputed, the following order of proof is required by Justinian. First, the witnesses whose names are annexed to the instrument (73 Novell.); if they were dead, the notary was examined, and if he confirmed the deed, his evidence was sufficient. If he said that the writing was not prepared by him, but by an assistant, the assistant was called. If the witnesses and the minister, and the tabellio were dead, recourse was had to comparison, "tum ad comparationem rerum scriptarum ab eodem tabellione venietur et si quæ erunt contrahen-

tium aut testium subscriptiones eorum quoque scripturæ aliæ examinabantur et conferentur." After the oath of the party disputing the instrument, "se comparationem hanc litterarum non calumniæ causâ postulare—et omni aliâ probatione destitutum venire." The writings from which the comparison was drawn were to be proved, if private, by the evidence of three witnesses to be those of the deceased, or if public, they were to be official, and written in foro. Justinian, in the 73 Novell., quotes a remarkable instance of an error into which a court of justice in Armenia had been betrayed by comparison of handwriting.

All these rules suppose the production of the original instrument, a copy or an epitome (index), was not admissible, "ne a fisco quidem." Any one against whom a document was produced might impeach its authenticity, if he swore that he did so in good faith, "modo de calumniâ juret," that is, not for the purpose of delay; and this obliged the party producing it to produce the same document again, or to swear that the omission to do so was "sine dolo;" if he did neither, the document was held to be spurious. Cod. de fid. Jus. 4. 19.

If the authenticity of the instrument was disputed either in a civil or criminal proceeding, the producer first established its genuineness, and then the party assailing it brought forward his proof. Cod. 9. 22. 24, ad Leg. Cor de falso.

The crimen falsi did not attach to those who antedated a receipt, though such a proceeding was illegal. "Paulus respondit repetita quidem die (*i. e.* antidatè) cautionem interponi non debuisse, sed falsi crimen quantum ad eos qui in hoc consenscrunt contractum non videri." 22. 5. 3. Dig.

HEARSAY EVIDENCE.

With regard to direct and hearsay evidence, the same difference existed in the civil law as in our own. "In eo," says Donellus, "de quo dicet ita fidem fecerit—si tanquam de

re sibi cognitâ et compertâ dicet—quam se oculis vel auribus vel sensu aliquo percepisse dicet . . . . non si se audivisse dicet—aut quod dicat ratione aliquâ colligat." The question is, what did the witness see or hear? It is obvious that what other people saw or heard is no reply to it. Evidence of reputation was, however, admissible, as in common reason it ought to be, to establish private rights.

"Quum quæritur," says Labeo. cit. Dig. 39. 3. 8, "an memoria extet facto opere, non diem et consulem ad liquidum exquirendum sed sufficere si quis sciat factum . . . . nec utique necesse est superesse qui meminerint verum etiam si qui audierint eos qui memoriâ tenuerint." The question is, was there "memoria operis facti?" And it *is* a direct answer to that question if the witness says that he has heard it; for that the witness has the evidence of his senses. The inference to be drawn from that evidence is another question; nor would any law founded on general principles allow the answer to be evidence in a case to settle the boundary of a parish, and refuse it in a case to settle the boundary of an estate, where the boundaries were the same, as if the value of the evidence could be varied by the nature of the property to which it was applied. It might as well be said that the evidence would be good if the land to which it related was sown with wheat, and would be bad if it was sown with turnips.

"Non debet," says Cujacius, in his Commentary on this law, "igitur inquirere quo consule, aut quo die factum sit, sed solum an aliquis sit qui meminerit, nec opus est ut quis viderit sed ut aliquis audierit satis est, hâcque in re testimonium de auditione valet." 7. p. 88. "Tum," he proceeds, "non extat memoria cum nemo est qui meminerit vel audiverit ab his qui meminerant," rather a more rational criterion than the time of Richard the First. The Romans called hearsay cæcum testimonium (*v*).

(*v*) Donatus on Andria, act 5, § 4. "Multi alii in Andro tum audivere." "Hoc testimonium cæcum dicitur: testimonium enim modus

WITNESSES—NUMBER (*w*).

The civil law (*x*), from the days of Scævola, rejected the evidence of a single witness, however unimpeachable his character. Constantine, however, made an exception in favour of bishops. He ordered that a single bishop should be believed, "testimonium ab uno licet episcopo perhibitum omnes judices incunctanter accipiant." A very short experience of this implicit faith in episcopal veracity seems to have satisfied the legislator; and the next edict is one forbidding them to give evidence at all, or in any numbers, "nec honore nec legibus episcopi ad testimonium dicendum flagitentur." "Id est," says Cujacius (*y*), whether they wished it or not, "nec volentes nec inviti." Two witnesses were in general sufficient. Seven (*z*) were required to establish a will; five to prove a codicil. And when a debtor bound by a written instrument asserted that he had paid his debt, and produced no written evidence of payment, Justinian obliged him to prove his statement by the testimony of five witnesses, who had been expressly called upon to witness the transaction. "Exigimus ut testes ab eo qui producit ad hoc ipsum rogati sint." Nov. 90. Ten witnesses were required to prove the confarreatio, or the most solemn form of Roman marriage.

"Testes possunt esse quibus non interdicitur testimonium,"

duplex est, manifestus qui certos testes, et præsentes habet: cæcus in quo multitudinem, aut civitatem dicimus scire ut Cicero: testis est tota Sicilia: quod tamen audientem concernat. Est etiam in cæco jusjurandum, tabulæ, absentesque personæ." Cujac. 9. 280.

(*w*) Valerius Maximus, 4. 1; Cod. 4. 20. 1. 9. "Ubi numerus testium non adjicitur etiam duo sufficiunt." Dig. 22. 5. 12.

(*x*) "Manifeste saucimus ut unius omnino testis responsis non audiatur." Cod. 4. 20. 9. s. 1. "Redeant Scipiones et Catones," says Quintilian, "vel alia quæcunque clarissima nomina, unius testimonium nunquam habebitur pro legitimo."

(*y*) Vol. 10, p. 967; Cod. 1. 3. 7; but see Novell. 123, c. 7.

(*z*) The Servilian Law repetundarum required 120. Val. Max. 8. 5.

stands at the head of the Chapter on Witnesses in the Roman Law. It recognises the privilege of giving evidence in a court of justice as a social right.

The Roman law as explained, adopted, and in some degree altered, by later civilians divided mankind as witnesses into different classes; some were not allowed to give evidence at all, others were not allowed to give evidence in particular cases, and against particular persons. The evidence of slaves was in civil cases inadmissible, where any other testimony could be procured, no faith was to be given to their statement unless they had been tortured, they could only give evidence as to what themselves had done, and even that might not be given for or against their masters. In criminal cases slaves might be examined, but not, except in some few cases, against their masters. They might give evidence in an action against their former master of having run away, if no other evidence could be had. "In se enim interrogari non pro domino aut in dominum videntur" (*z*).

Of freemen, some were excluded from giving evidence, "propter lubricum consilii," others on account of the turpitude and infamy of their life; under the first head were included all impuberes, and persons under twenty; the latter known were excluded only in criminal cases. Women could not be witnesses of a will or contract; in all other cases their evidence was received. With regard to those excluded on account of the infamy and turpitude of their life, the early interpreters of the Roman law laid down too broad a rule, when they said generally "infames testimonium non dicere," were this so, the law would not have designated some specially of this class as persons not to be received. The strongest proof of this is that Papinian doubts whether a witness "calumniæ damnatus"

(*z*) "Servum dupla emi qui rebus ablatis fugit, mox inventus præsentibus honestis viris an et in domo venditoris fugisset? respondit fugisse —Quæro an standum sit responso servi—Paulus respondit si et alia indicia prioris fugæ non deficiunt tunc etiam servi responso credendum est." Dig. 22. 3. 7; so also Dig. 21. 2. 582, *de ædil. ed.*

wes admissible, and decides that he is, adding, that the judges were to form their opinion for themselves as to the value of his testimony; now that such a person was infamous the law "de his qui notantur infamiâ" sufficiently establishes; it is therefore clear that a person infamous was not necessarily inadmissible. Callistratus also tells us that the "lex Julia de vi" excluded as witnesses, qui se a reo parenteve ejus liberarit—the impubes, the judicio publico damnatus, and not in integrum restitutus.

The exception to this rule was, where the handwriting of the Tabellio who had drawn up the deed was denied, his evidence was sufficient to prove that he had written it. Novell. 73.

The man in prison or public custody, the man who had hired himself to fight with beasts, women who gained or had gained money by prostitution, and those convicted of taking money to give or to withhold their evidence were excluded; again (*a*), the freedman could not give evidence against his patron, nor could a woman convicted of adultery be received, nor any one in short convicted "judicii publici" (*b*): some confusion has arisen from the passage I have cited from Papinian, which allows a person "calumniæ damnatus," with a caution as to its effect. The calumniæ damnatus was not "judicio publico damnatus," not only was the "judicio publico damnatus," but the judicio publico *reus* was while the charge hung over him inadmissible. The father could not give evidence against the son or the son against the father.

They who were excluded by the Julian law were excluded

(*a*) "Ita ut non solummodo sponte prodire non audeant sed ne vocati quidem injudicium venire cogantur." Cod. 4. 20. 12.

(*b*) Dig. 22. 5. 3. 5; Cujac. vol. 7, 884. Calūmniæ judicium non est publicum. That the judgment calumniæ was not publicum may also be proved by Dig. 48. 16. 2. "Calumniatoribus pœnæ lege remniâ irrogatur," now the lex remnia was a private law, "non omnia judicia in quibus crimen vertitur publica sunt, sed ea tantum quæ ex legibus judiciorum publicorum veniunt, ut Julia majestatis."

from giving evidence in all other cases. This appears not only from analogy and the reason of the thing, but from the very words of Paulus, "Hâc lege damnatus testimonium publice dicere prohibetur." Dig. 48. 11. 6, 1 L. 1, Report. We may add to the list of the excluded a person convicted "ob carmen famosum." The "arenarius testis," that is, the man who had hired himself to fight with beasts in the arena, and others like him excluded, "propter ignominiam vitæ," were admissible if no other evidence could be procured, but no reliance was to be placed on what they said, unless they were tortured. Thus in fact crime and infamy never entirely shut out the evidence of a witness. This, however, was misunderstood by the early interpreters of the Roman law, and in consequence a different rule was adopted by the canonists, that is, by the civilians who drew up the letters and decrees (sententiales decretales) of the Roman Pontiffs. This is the reason why I have dwelt on this part of my subject at so much length.

Having considered the general rule, let us now inquire into the particular persons whose evidence was inadmissible in particular cases. This will depend upon those in favour of or against whom the witness is brought forward. It was a rule that witnesses whom the accuser brought from his own household were not to be examined. "Testes eos quos accusator de domo (*c*) produxerit interrogari non placuit." Neither were witnesses in the power of the party producing them. "Idonei non videntur esse testes quibus imperari potest ut testes fiant." No one could be a witness in his own cause, or in a cause from which if decided in any particular way, he expected any benefit. So, if the buyer was evicted of property he had purchased he could not call upon the seller to prove his case. But the Roman law went further,—the patronus could not give evidence for his client. The legatee might, however, be the witness of a will on this ground. His evidence was given when he recognised

(*c*) "Nullus idoneus testis in re suâ intelligitur." Dig. 22. 5. 10.

the handwriting not in favour of himself but of the heir, and it was possible that the heir might not accept the inheritance, "potest hæres hæreditatem non adire," in which case the will was invalid. If, however, the heir accepted the inheritance and the legacy was due, it was due, not because the will was established, but because the inheritance was accepted.

The passage cited in the note (*e*) will serve to shew how well the Roman law deserves the title which D'Aguesseau was so fond of applying to it, of "raison écrite." Directions cannot be more simple and luminous than those which it prescribes. Though we by no means possess materials on which to ground a perfect notion of the Roman law of evidence, it is evident that their rules bent to necessity and that great latitude was given to the discretion of the judge. This is proved by the passage "si ea rei conditio sit ubi arenarium testem vel similem per-

(*e*) 3. "Callistratus, libro iv. de cognitionibus. Testium fides diligenter examinanda est. Ideoque in persona eorum exploranda erunt in primis conditio cuinsque, utrum quis decurio, an plebeius sit, et an honestæ et inculpatæ vitæ, an vero notatus quis et reprehensibilis, an locuples vel egens sit, ut lucri causa quid facile admittat, vel an inimicus ei sit, adversus quem testimonium fert, vel amicus ei sit, pro quo testimonium dat; nam si careat suspicione testimonium vel propter personam, a qua fertur, quod honesta sit, vel propter causam, quod neque lucri neque gratiæ neque inimicitiæ causa sit, admittendus est. § 1. Ideoque Divus Hadrianus Vivio Varo Legato provinciæ Ciliciæ rescripsit, cum, qui indicat, magis posse scire, quanta fides habenda sit testibus. Verba epistolæ hæc sunt: Tu magis scire potes, quanta fides habenda sit testibus, qui, et cuius dignitatis, et cuius existimationis sint, et qui simpliciter visi sint dicere, utrum unum eundemque meditatum sermonem attulerint, an ad ea, quæ interrogaveras, ex tempore verisimilia responderint. § 2. Ejusdem quoque Principis extat Rescriptum ad Varelium, Verum de excutienda fide testium in hæc verba: Quæ argumenta ad quem modum probandæ cuique rei sufficiant, nullo certo modo satis definiri potest sicut non semper, ita sæpe sine publicis monumentis cuiusque rei veritas deprehenditur, alias numerus testium, alias dignitas et auctoritas, alias veluti consentiens fama confirmat rei, de qua quæritur, fidem. Hoc ergo solum tibi rescribere possum summatim, non utique ad unam probationis speciem cognitionem statim alligari debere sed ex sententia animi tui te æstimare oportere, quid aut credas, aut parum probatum tibi opineris." Dig. Lib. 22, tit. 5. 3.

sonam admittere cogimur," &c., and that the judge might disregard the testimony of competent witnesses, appears from this passage, "calumniæ damnati," "neque lege Remniâ prohibentur et Julia lex de vi, et repetundarum et peculatûs eos homines testimonium dicere non vetuerunt—verumtamen quod legibus omissum est non omittetur religione judicantium—ad quorum officium pertinet ejus quoque testimonii fidem, quod *integræ* (*f*) *frontis* homo dixerit, perpendere."

A law of Arcadius ordered the judges not to allow more witnesses to be called than they considered necessary, for a reason which marks the condition of society, "ne effrænatâ potestate ad vexandos homines superflua multitudo testium protrahatur."

If the party producing the witnesses had closed his case he was not allowed to recall them when their evidence was impeached; lest, having learnt the defect of his case, he should "emendationem instituere." He might, however, alter his purpose before the adversary had disclosed his case; again he might encounter the case of his antagonist if new facts and allegations by evidence to contradict them. He could not however anticipate the case of his adversary or prove his replication before the exceptio was established; part of the proceeding is pointed out, Cod. 8. 36, § 9, de except. A party could not object, without special reason in one case, to witnesses whom he had called himself in another. Cod. lit. 4. 20. 19.

At first, as we know from Cicero and Quintilian, witnesses were examined, "coram et præsentes," by the advocates themselves, afterwards they were interrogated by the judge. Their depositions alone were insufficient, or when admitted were inferior evidence (*g*); "testibus non testimoniis creditur," was the

(*f*) The calumniæ damnati were branded on the forehead with the letter K.

(*g*) Il est de nécessité que le témoin comparaisse devant le juge. Domat. vol. 2, p. 164.

reiterated maxim of the Roman law (*h*), "alia est auctoritas præsentium (*i*) testium alia testimoniorum quæ recitari solent" (*j*). Again, even in the code, "Solâ testatione prolatam nec aliis legitimis adminiculis causam approbatam nullius esse momenti certum est." "Testationem solam illi vocant testimonia tabulis scripta quæ apud judicem proferuntur cum ipsi testes non producantur." Don. 26. 10. The early interpreters, no doubt, for the purpose of giving a colour to the oppressive system of the Canon law, (which by the way flourishes undisturbed in our courts of equity and the ecclesiastical courts,) chose to interpret these passages to mean that depositions were insufficient where the witness did not explain the grounds of his belief, whereas the meaning clearly is, that when the witness was not produced his deposition was insignificant. "In quo," the interpretation I have cited, "quantopere hallucinentur," says Donellus, "apparet," and Cujacius over and over again inculcates the same doctrine, vol. 7, p. 881. "In causis criminalibus non testimoniis creditur quoniam testes ἀυτοπροσώπως interrogandi sunt." There were two kinds of witnesses, those who were especially called upon to witness a transaction, and who were called superstites and arbitri, and those who were not (*k*). The first duty of a judge was to take care that the witnesses were sworn, not only as Asconius says in his Commentary on the Verrine Orations, that they may not say what is false, but lest they should keep back

(*h*) Quod crimina objecerit apud me Alexander a quo et quia non probabat nec testes producebat sed testimoniis uti volebat quibus apud me locus non est (nam eos interrogare soleo) cum remisi ad præsidem provinciæ ut is de fide testium quæreret et nisi implesset quod intenderat, relegaretur. Dig. 25. 2. 3. 3.

(*i*) Adrian refuses depositions. As he says Alexander accused Aper, and neither produced proofs nor witnesses, but wished to use depositions, "*quibus apud me locus non est* nam ipsos interrogare soleo," &c. Dig. de Testibus, L. 3.

(*j*) Dig. 22. 5. 3. 4.

(*k*) These witnesses were touched on the lower part of the ear. So in the Lex Bajuariorum (which, by the way, Savigny has not quoted) de reiniss. ille testis per aurem tahi debet.

what is true. "Non solum ne falsa dicant, verum etiam ne quæ vera sunt taceant." In the time of Justinian the parties were present when the witnesses were brought before the judge, and when they were sworn, but not during their examination. The party producing them was not allowed to see the depositions of his witnesses which were communicated to his adversary, and therefore he might call them (if excepted to) three times over to the same facts, without opposition—and a fourth (*l*) time after taking an oath to the effect, that he was ignorant of the testimony they had given, and that he did not bring them forward for the purpose of vexation.

In case of illness or legal impediment, the Judge might go to the witnesses, or even in some rare cases, where the matter to which they spoke was not very important, appoint some one else to receive and transcribe their testimony. Some persons also were excused in the latter days of the empire from appearing before the Judge; but it was expressly provided, that in criminal cases the Judge should hear the witnesses himself (*m*).

CONFESSION (*n*).

The effect given to a confession has varied in all countries—given freely without fraud and without violence it is the strongest and most irresistible evidence. It is, however, like all other guides to human judgment, sometimes fallacious. So long as torture was employed to obtain it, it was entitled to but little reliance, and Ulpian (*o*) tells us of a slave who confessed a murder, that he might escape from the cruelty of his master. Hence the maxim, "nemo auditur perive volens," to which, since torture has been abolished, but little value can be attributed. There is indeed a text "confessiones reorum pro exploratis facinoribus haberi non oportere si nulla probatio religionem cognoscentis instrurat," but probatio means argument from circumstances in that passage, and it is clear from Cod. de Pœn. l. 16, and Cod. ad leg. Jul. de vi public. l. 8,

(*l*) Novell. 90.
(*n*) Dig. 42. 2, de confessis.
(*m*) Novell. 90. 5. 18.
(*o*) Dig. 48, s. 18, s. 27.

that confession was generally considered equivalent to proof. "Nimis indignum esse judicamus," says the Code, 4. 30, § 13, "quod suâ quisque voce dilucide protestatus est id in eundem casum infirmare testimonioque proprio resistere." So far all is clear, but the difficulties which have led to much obscurity and contradiction, have arisen on the question when the confession is to be considered free and intentional. The compilers of the Digest and Code have not collected the principles on this subject under one head: "fides cuique contra se habebitur," and "non fatetur qui errat" are the two leading principles of Roman jurisprudence (*o*). The confession of a testator that money was due to a legatee, did not exempt the legatee, if more money had been bequeathed to him than the law allowed, from proving that the sum was in reality due to him from the testator. "Videtur enim eo quod ille plus capere non poterat in fraudem legis hæc in testamento adjecisse." Dig. 22. 3. 27.

And if the maker of a cautio on which money had been paid affirmed that the money paid had never been due, the onus was flung on the person who had received it, to prove that it in fact was a debt, unless, indeed, the cautio set out in express terms the consideration, in which case the debtor was bound. "Stare suæ confessioni nisi evidentissimis probationibus in scriptis habitis ostendere paratus sit serehæc in debite promisisse." 22. 3. 25. § 3. Dig.

The Roman law contained two remarkable institutions on this subject, which can only be understood if compared one with another. There were the confessio in jure and the interrogatio in jure.

If a defendant in the preliminary proceeding, when the formula was settled before the prætor, admitted the truth of his

(*o*) Cod. 2. 10. 2, de errore advoc. and the remarkable illustration, Dig. 22. 3. 15. "Quidam quasi ex Seiâ," where the mistaken admission, though not an estoppel, flung the "onus probandi" on the party admitting. And Cod. 1. 18. 5. Lit. "Quum falsâ demonstratione mutari substantia veritatis minime possit," &c.

adversary's statement, and did not attempt to impeach its effect by any other fact, this confession was tantamount to a condemnation.

This was the confessio in jure.

It should be borne in mind that the proceeding before the prætor was not that before the judge. The prætor's duty was to fix and ascertain the question upon which the judge was to decide, and to transmit it to him in a concise intelligible form. This was the proceeding in jure. In the case supposed no formal judgment was necessary, the accused was bound by his confession. This result was expressed by the maxim "confessus pro judicato habetur." Execution followed immediately, "adversus confitentem datus judex non rei judicandæ sed æstimandæ datur." Dig. 92. 25. To produce this effect, however, the confession must be a positive recognition of a specific claim, "certum confessus pro judicato erit, incertum non erit."

INTERROGATIO IN JURE (*p*).

If litigation arose on a "questio præjudicialis" immediately affecting the person of one of the contending parties, the judge or the plaintiff was entitled to propose such a question to the defendant, who was competent to answer it. The answer was binding upon the defendant, and herein consists the resemblance of this proceeding with that of the confessio in jure. The difference between the two proceedings was, that the confessio applied to the very object in dispute, and superseded a formal sentence, whereas the interrogatio related only to a preliminary question, and therefore could never be a substitute for a judicial decree. Besides this particular case, any question might before the prætor be proposed by one of the parties to

(*p*) See *infra*, *Canon Law*. "Ubicunque judicem æquitas moverit æque interrogationem fieri oportere dubium non est." Ulp. ad ed. 22. 27. Pothier Pandect. Just. tom. 5, p. 138, 8vo. ed.

his antagonist, and if the party so applied chose to give a positive answer he was bound by his admission; of this there is an instance, Dig. 39. 5. 29. "Quidam in jure interrogatus nihil sibi debere tutoris heredes respondit; eum actionem jure amisisse respondit; licet enim non transactionem, sed donationis hæc verba esse quis accipiat attamen eum, qui in jure confessus est, suam confessionem infirmare non posse." It was on this doctrine that the extremely ancient form of the "cessio in jure" rested as a conveyance of property; which form, borrowed by the clergy from the civilians, and by the Norman lawyers from the clergy, was undoubtedly the origin of the mode of conveyance by fines and recoveries among us.

In the proceeding by "in jure cessio" the new owner claimed the property before the prætor—the prætor asked the seller whether he recognised the right of the claimant, and if the seller was silent or answered in the affirmative the prætor's "addictio" followed, which transmitted the property to the purchaser. "Post rem judicatam vel jurejurando decisam vel confessionem in jure factam nihil quæritur post orationem Divi Marci, quia in jure confessi pro judicatis habentur." Ulpian de re Jud. 42. 1. This "interrogatio" originally took place before the prætor, and answered many salutary purposes. "Ubicunque judicem æquitas moverit æque oportere fieri interrogationem dubium non est." De inter. in Jure, fac. 11. 1. 21. It assisted the prætor to prepare the "formula," and it saved the party who wished to ascertain the exact nature of his antagonist's demand from the labour and expense of bringing unnecessary proof before a judge. "Edictum de interrogationibus ideo prætor proponit quia sciebat difficile esse ei qui hæredem bonorumve possessorem convenerit probare aliquem esse hæredem bonorumve possessorem" says Ulpian, and Paulus adds, "quia plerumque difficile est probatio aditæ hæreditatis."

"Thus, instead of delighting in technical difficulties, and seeking out with morbid ingenuity every possible means to

prevent the real merits of a case from being brought at all under consideration, the Roman lawyers endeavoured to guard against such a calamity. Why, indeed, should a plaintiff be incumbered with unnecessary proof? Why should an honest suitor, in the instance before us, refuse to acknowledge whether he was the heir or not? The defendant might be interrogated what his share was of the inheritance of the deceased debtor in a "noxalis actio," whether he was the owner of the slave or animal that had done the damage? In an action for the "cautio damno infecti," whether he was the owner of the slave or quadruped that had done the injury? and so forth. On the answer, an "actio interrogatoria" was grounded, that is, a "formula" was prepared, in which the answer given was stated as a fact to be taken for granted in the inquiry: *e. g.*, "Quod N. F. interrogatus respondit se esse Seii hæredem ex semisse—si paret Seiium A. A. centum dare oportere M. N. in quinquaginta condemnato." These actions, Callistratus tells us, became less frequent in his time, and at last they ceased altogether, when the old system of formulæ was abandoned. "Quia nemo cogitur de suo jure ante judicium aliquid respondere." But the questions which had been put before the prætor were now put before the judge (judex). It should also be recollected, that with the "ordo judiciorum," the distinction between the prætor and the judex, the "jus" and "judicium," came to an end.

THE OATH.

When the power of the community cannot enable the ruler to attain his object, he has often had recourse to an authority which no son of man can escape. The dominion of law is limited, but that of conscience is universal; and to that mightiest of legislators, from whose tribunal there is no appeal, and whose edicts are never issued in vain (however we may deceive others always, and for a time ourselves), he has constantly

appealed to supply the defects of his own inherent errors and infirmities. If he cannot make the object of this appeal criminal in the eyes of his fellow citizens, he can make him odious in his own, and this is a punishment far more terrible and lasting than any that it is in the power of any earthly tribunal to inflict—

> Evasisse putas diri quos conscia facti
> Mens agitat miseros—et surdo verbere cædit?

In the Roman court of justice every witness was sworn. "Testis sine jusjurando non valeret," is the expression of Seneca (*q*). There are in the Digest two laws that well deserve attention, and that if reasoned upon as they ought to be, might, rescue our jurisprudence from the stain of such bigotry as that by which it now appears to be contaminated. The first is L. 5, tit. de Jurejurando: "Divus Pius jurejurando quod propriâ superstitione juratum est standum, rescripsit." Then follows the exception of oaths, "improbatæ publicæ religionis," which, where toleration is universal, would be unknown. Wherever a declaration is made in a court of justice by a member of a sect tolerated by law, which he believes to be binding on his conscience, that declaration is an oath, by whatever name the sectarian himself may think proper to describe it. Such is the opinion of Voet and Merlin (*r*), and of the Court of Cassation in France, in which this very point was raised and decided.

Where conscience begins law ends; and this grand principle, which, it seems, we do not appreciate, was recognised by a heathen legislator. "Quod propriâ superstitione juratum est standum." The law of the Digest, 33, sub eo tit., though it seems to contradict, does in reality confirm this doctrine, as it in fact says, "qui per salutem suam jurat

(*q*) De irâ, 2. 29. (*r*) Merlin Questio Jud. tit. Serment.

per Deum jurare videtur respectu enim divini numinis ita jurat." In the code de fide instrumentorum, the witness, it is said, must be sworn; and I contend that his declaration, under the circumstances, is an oath, in a country where his religion is not forbidden. Justinian admits the principle, but his own intolerance, and the intolerance of his priests, made its application impossible. In the 8th Nov. tit. 3, Justinian required every magistrate to swear on the four Gospels, the three persons of the Trinity, "et per sanctam gloriosam Dei genitricem et semper virginem Mariam et per sanctos archangelos Michaelem et Gabrielem," and to invoke upon himself, if he violated his oath, the lot of Judas, Gehazi and Cain. In the 1st of the 124 Novell, he requires the suitors to swear, tangentes Sacra Evangelia, that they have not bribed the judge.

OATH PROPOSED BY PARTY.

We now come to a species of evidence (*s*) which was common in Roman jurisprudence and which has been incorporated with the French code. This is the oath of one of the contending parties as to the matter in dispute. "L'esprit de notre code est de donner la plus grande latitude à la délation du serment décisoire" (*t*). Toullier, 10. 478. This oath was of two kinds:—Sometimes it was imposed by the judge (ex auctoritate judicis) to inform his conscience, in which case it is considered by Cujacius, rather as suppletory and adminicular, than as furnishing in itself complete and substantial evidence. Sometimes, it was offered by one of the parties to the other, in which case, it was of itself sufficiently conclusive.

(*s*) "Maximum remedium expediendarum litium in usum venit inrisiurandi religio, qua vel ex pactione ipsorum litigatorum vel ex auctoritate judicis deciduntur controversiæ."

(*t*) Quodsi deferente me juraveris et absolutas sis, postea perjurium fuerit approbatum Labeo ait de dolo actionem in eum dandum—Pomponius autem per jusjurandum transactum videri—quam sententiam Marcellus probat . . . . sufficit enim perjurii pœna. 4. 3. 21. 22. Dig.

"Dicit prætor eum a quo jusjurandum petetur solvere aut perdere cogam; alterum itaque eligat reus aut solvat aut juret." When the judge required the oath, the party to whom it was proposed, swore or lost his cause; when the oath was proposed to him by his adversary, he might either take it, in which case he won his cause, or send it back to the adversary, who, if he took it won, if he refused it, lost his cause. The last was the most gracious proceeding, "nemo dubitat modestius facere qui referat." Dig. 13. 5. 25. When the oath was sworn, if the action was one "certi condictio," execution followed immediately, "solvere cogendus erit a prætore." So if it was for an inheritance, it was equivalent to a judicial sentence—when it was necessary to ascertain the amount due, the case went before a judex. The tender of the oath must originate with the antagonist, neither party could by offering to make oath for himself, ensure a decision in his own favour, "nam si reus jurabit nemine ei jusjurandum deferente prætor id jusjurandum non tuebitur—sibi enim juravit—alioquin facillimus quisque ad jusjurandum decurrens, nemine sibi jusjurandum deferente oneribus actionum se liberabit." Dig. 12. 2. § 3.

The oath might be tendered either in jure or in judicio before the party or before the judge; if each party simultaneously offered the oath to the other, the plaintiff, or, as Voet qualifies it, the party on whom the onus probandi lay, had the preference; as the offer of the oath was perilous "deteriorem faciens conditionem," it could not be tendered by a prodigal, by a minor, without the sanction of his guardian, or an insolvent, without the permission of his creditors. It might be tendered to any one, but the pupil might without injury refuse it (*u*). The Roman law, which in some cases allowed swearing by deputy, allowed the oath to be offered to the representatives of a corporation. It might be framed so as to deny or assert a legal liability as well as a positive fact. For instance, we find

(*u*) Livy, l. 31, Cap. ult.

it employed to ascertain the right of property, the right to usufruct, the status of a citizen, the paternal authority; the utmost liberty was left as to the form of the oath to the party tendering it. He might frame it in any way that he thought would be most binding on the conscience of his adversary; provided only that it was not "improbatæ religionis."

OATH PROPOSED BY JUDGE (*u*).

With regard to the oath proposed by the judge, Gaius, Dig. 12, tit. 2. 32, says, that "solent sæpejudices in dubiis causis exacto jurejurando, secundum eum judicare qui juraverit." "Dubias causas," says Vinnius (*v*), extremely well, "definio non eas in quibus pares utriusque probationes sunt, tunc enim reum absolvi oportet, sed eas in quibus judex dubius est ob minus plenas probationes allatas—justa si actor unum inculpatum testem omnique exceptione majorem proferat poterit ei juramentum suppletorium deferre." He says that the judge may administer the oath "probationum inopiâ et causâ cognitâ." The "semiplena probatio," he adds, justifies the oath.

RES JUDICATA.

The last point of evidence on which I shall remark in this analysis (*w*) of the Roman system of proof, is the *exceptio rei judicatæ*, by no means one of the simplest problems in legal inquiry; on the one hand, "res judicata pro veritate habetur," is a principle essential to the well being of society; on the other, it would be most unjust that a person should be con-

(*u*) "Il y a encore une autre espèce de serment que le juge ordonne d'office, c'est-à-dire de son mouvement, quoiqu'il ne soit pas déféré ni demandé par la partie." Domat. 2, p. 175.

(*v*) Vinnius Quæstiones Juris Selectæ, 1. 44.

(*w*) Dig. 44. 2. "Certi juris est post rem judicatam nihil amplius quæri inter easdem personas quam an judicatum sit." Donellus, p. 692.

cluded by proceedings of which he had no knowledge, and in which he had no participation. In order to take advantage of this exceptio, three things were necessary: "idem corpus, eadem causa petendi, eadem conditio personarum." Such also is the language of the Code Civil, Art. 1351. The exceptio rei judicatæ is admitted "quoties inter easdem personas eadem quæstio revocatur vel alio genere judicii—because, cum quis actionem mutat et experitur, dummodo de eâdem re experiatur etsi diverso genere actionis quam instituit—videtur de eâdem re agere"(*x*); a question was at one time much discussed, whether the Roman law held a decision in a civil conclusive in a criminal case, "an acta, probationes et confessiones factæ et conjectura (*y*) et præsumptiones habitæ in judicio civili probent et fidem faciant in judicio criminali." This was decided in the negative, and to this effect, indeed, is the language of the law, Dig. 5. 3. 47. "Lucius Titius quum in falsi testamenti propinqui accusatione non obtinuerit, quæro an de non jure facto nec signato testamento querela illi competere possit. Respondit non ideo repelli ab intentione non jure facti testamenti, quod in falsi accusatione non obtinuerit." So 1 Code, lib. 3. 28. 14, "Eum qui inofficiosi querelam non tenuit, a falsi accusatione submoveri non placuit. Idem observatur et si e contrario falsi crimine instituto victus postea de inofficioso actionem exercere maluerit." Nor could any man by the Roman law be twice accused of the same offence. "Qui de crimine in accusationem deductus est ab alio super publico eodem crimine defessi non potest." Cod. de Acc. l. 9. "Si ex eâdem causâ sæpius agatur cum idem factum sit exceptio vulgaris rei judicatæ opponitur." Dig. de Poss. Act. l. 3.

(*x*) "Cum quæritur hæc exceptio, noceat necne inspiciendum est an idem corpus sit, quantitas eadem, idem jus an eadem causa petendi et eadem conditio personarum, quæ nisi omnia concurrant alia res est." But the part could not be sued for after the whole, "si quis cum totum petrisset partem petat exceptio rei jud. noret."

(*y*) Mascardus, tom. 1, concl. 34.

In order to make this subject more intelligible, and at the same time to give an example of the manner of the Roman jurists, I shall analyse the celebrated law of the Pandects, l. 2, tit. 2, § 63.

It is established by many laws, that a judgment does not affect strangers. "Sæpe judicatum est res inter alios judicatas aliis non præjudicare." This is a rule, however, not to be taken absolutely, "Quod tamen quandam distinctionem habet:" for there are cases in which even the knowledge that a judgment has been given may injure third parties, and there are cases where, though silent as to them, they are injured by it. "Nam sententia inter alios dicta aliis quibusdam etiam scientibus obest, quibusdam vero etiamsi contra ipsos judicatum sit nihil, nocet." It does not injure those aware of it, for instance, when judgment is given against one of two heirs to a debtor with the knowledge of the other; for the defence of the other remains untouched, though he knew that his co-heir was sued. "Alteri integra defensio est etiam si cum cohærede suo agi scierit" . . . . But the judgment injures the third party who is aware of it, when that third party stands by and allows a person whose title was secondary and subordinate to his own, to sue for or defend a thing to which his claim was paramount. "Scientibus sententia quæ inter alios data est obest cum quis de eâ re cujus actio vel defensio primum sibi competit, sequenti agere patiatur." As if the debtor stands by and allows the creditor to sue as the proprietor of a thing he has pledged with him, or the husband allows his father-in-law or his wife to sue as the proprietors of the wife's dowry, or the purchaser allows the seller to sue as the proprietor of what he has bought. "Veluti si debitor experiri passus sit creditorem de proprietate pignoris, aut maritus socerum, vel uxorem de proprietate rei in dote acceptæ, aut possessor venditorem de proprietate rei emtæ."

But how is it, continues the law, that the knowledge is injurious to one and not to the other? "Cur autem his

scientia nocet, aliis vero non nocet?" This is the reason, that he who knows his co-heir is sued or suing, cannot hinder him from using that defence, or bringing that action which the latter thinks most expedient. "Illa ratio est quod qui scit cohæredem suum agere, prohibere eum quonimus uti velit propriâ actione vel defensione utatur non potest." But if I allow the former owner to defend my cause, I am in consequence of this knowledge barred by the judgment, though given in a suit to which I was not a party, since it was by my consent that the judge pronounced on my right represented in the person of the pleader. "Is vero qui priorem dominum defendere causam patitur ideo propter scientiam præscriptione rei, quamvis inter alios judicatæ, summovetur—quia ex voluntate ejus de jure quod ex personâ habuit, judicatum est."

CHAPTER II.

LAW OF EVIDENCE IN THE DARK AGES (*a*).

The whole law concerning proof in the barbarous codes is involved in great obscurity,—with the exception of the Code of the Visigoths, which contains much taken from the Roman law, little is to be found upon the matter among them. The distinction drawn by Montesquieu (*b*) between the Salic and other codes cannot be supported. There are but two places in which the Salic law treats of proof, tit. 56 and tit. 76, and in both of these the proof in question is negative, which Montesquieu supposes to be unknown to it. It is the peculiarity of the barbarous (*c*) codes that the accused began by proving his innocence,—if he failed the accuser adduced his testimony: this might consist of witnesses or documents, which might always be terminated by a defiance (*d*) to single combat. By the law of the Ripuarian Franks it was provided, that in

(*a*) Pardessus Loi Salique, Dissert. 11, p. 616; Waskönig und Stein Französ Staat und Recht Geschichte; Eichhorn Deutsche Staat und Rechts Geschichte, vol 1, p. 444, § 77; Beugnot Olim; Régistres des Arrêts rendus par la Cour du Roi, A. D. 1254—1273.

(*b*) § 28, c. 14.

(*c*) And yet some learned German writers have been carried by national prejudice to the inconceivable length of admiring so detestable a system, and to draw from it and its attendant absurdities a proof of the innate excellence of the Germans. Such a law proves that those who adopted it were barbarians, and those who were forced to keep it slaves, (as, politically speaking, the Germans were after they ceased to be barbarians till the present century was far advanced, and as too many of them are now,) and nothing more.

(*d*) The first text is the famous Law Burgund. tit. 45, where perjury is stated as the reason. See especially Lex Bajuv. tit. 16, c. 2. The Lex

eases of sale the document attesting it should be publicly written, "testamentum (*e*) publice conscribatur." In trifling cases it was to be subscribed by seven, in important cases by twelve, witnesses. If it was attacked on the ground of forgery and the charge was proved, the chancellor's, *i. e.* the writer's, thumb was cut off, unless he redeemed it by the payment of fifty solidi; "cancellario pollex dexter auferatur aut eum cum 50 sol. redimat;" or he might interrupt the chancellor as he was about to swear to its validity and challenge him to single combat. But if the chancellor was dead, and the writing, compared with three other charters in his writing, appeared to be his, it might be supported "absque pugnâ." The witnesses produced were required to be of free birth, and possessed of land, or, at any rate, able to pay the fine imposed for false testimony; they were all sworn. The

Burgund. is as follows:—"L. Burgund. tit. 45. De his qui objecta sibi negaverint, et praebendum obtulerint jusjurandum. Multos in populo nostro et pervicatione causantium et cupiditatis instinctu, ita cognoscimus depravari, ut de rebus incertis sacramenta plerumque offerre non dubitent, et de cognitis jugiter perjurare. Cujus sceleris consuetudinem submoventes præsenti lege decernimus, ut quotiens inter homines nostros causa surrexerit, et is qui pulsatus fuerit, non deberi a se quod requiritur, aut non factum quod objicitur, sacramentorum obligatione negaverit, hac ratione litigio corum finem oportebit imponi; *ut si pars ejus cui oblatum fuerit jusjurandum, noluerit sacramenta suscipere, sed adversarium suum veritatis fiducia armis dixerit posse convinci*, et pars diversa non cesserit, pugnandi licentia non denegetur. Ita ut unus de eisdem testibus qui ad danda convenerant sacramenta. Deo judicante confligat; quoniam justum est, ut si quis veritatem rei incunctanter scire re dixerit, et obtulerit sacramentum, pugnare non dubitet."

(*e*) "L. Ripuar. tit. 59, cap. 1. Si quis alteri aliquid vendiderit,—testamentum publice conscribatur. Quodsi parva res fuerit 7 testibus firmetur; si autem magna 12 roboretur. Cap. 2. Et si quis in posterum hoc refragare vel falsare voluerit, a testibus convincatur, aut Cancellarius cum sacramenti interpositione cum simili numero quorum roboratum est idoneum confirmet. Cap. 3. Quodsi charta in judicio perforata idonea fuerit, tunc ille, qui causam prosequitur, dupla repetitione culpabilis judicetur, et unicuique de testibus 15 sol. culpabilis judicetur, et ipsum testamentum inviolatum perseveret. Si autem testamentum falsatum fuerit, tum ille, qui causam prosequitur, rem quam repetit cum sexaginta solidis recipiat, et insuper Cancellario pollex dexter auferatur, aut eum

documents were to be drawn up in the presence of witnesses, and the year and day mentioned in them; but among rude nations oral testimony (*f*) has always been the chief instrument of judicial controversy. The Roman system admitted it in almost all cases, and until the sixteenth century it was received among the states of Europe without distrust or hesitation. Among the Franks it was admitted to prove not only fact but law, not only a particular event but the intention of the actor. But the want of a more accurate memorial was supplied by some circumstance, which it was supposed would stamp the transaction connected with it on the memory of the spectator. Even among us, at the present day, when children perambulate the boundaries of a parish, they are sometimes struck on the face violently, in order to fix the matter in their recollection. The 60th chapter of the law of the Ripuarian Franks ordains that the contracting parties shall summon

cum 50 sol. redimat, et unusquisque de testibus 15 sol. muletetur. Cap. 4. Quodsi ille qui causam sequitur, manum Cancellarii de altari traxerit, aut ante ostium Basilicæ manum posuerit, tunc ambo constringantur, ut se super 14 noctes seu super 40 ante Regem repræsentare studeant pugnaturi. Cap. 5. Si autem Cancellarius mortuus fuerit, tunc ei liceat qui rem comparavit, cum tribus chartis quas ipse Cancellarius scripsit, absque pugna chartam suam super altario positam idoneare. Quodsi venditor vel heredes sui supervixerint, ipsi testamentum defendere debent vel mulctam incurrere."

" Si quis homo pratum—alterius contra legem invaserit, et dicit suum esse, propter præsumptionem cum sex solidis componat et exeat. Cap. 2. Si autem suum voluerit vindicari illam agrum—taliter vindicet. Juret cum sex sacramentalibus et dicat: Ego tua opera priora non invasi contra legem, nec cum sex solidis componere debeo, nec exire, quia mea opera et labor prior hic est quam tuus. Tunc dicat ille qui quacrit: Ego habeo testes qui hoc sciunt, quod labores de isto campo semper ego tuli nemine contradicente exartavi, mundavi, possedi usque hodie, et pater meus reliquit mihi in possessione sua. Ille homo qui hoc testificare voluerit, commarchanus ejus debet esse, et debet habere 6 sol. pecuniam et similem agrum. Tunc testes *juret* taliter: Quia ego *hoc meis auribus audivi et oculis meis vidi*, quod istius hominis priora opera fuerunt in isto agro quam tua, et labores fructuum ille tulit. Post sacramentum reddat agrum."

(*f*) Tum ille testis juret taliter quia ego hoc meis auribus audivi, et meis oculis vidi, &c. Lex Bajuv. tit. 16, c. 1.

children to be present at their agreement, and shall pull the ears of these witnesses, and strike them on the face, in order that they may the better recollect what they have seen and heard (*b*). The delivery of a rod or virge of a straw (festuca), the branch of a tree (ramus), a clod of earth (cespes), by one party declaring at the same time his intention to the other, was the most common symbol of consent among the Franks. The symbol mentioned in the book of Ruth will occur to the reader "to confirm all things, a man plucked off his shoe and gave it to his neighbour, and this was a testimony in Israel." The 48th title of the Salic law, which prescribes the manner of instituting an heir, orders that the person instituting shall place "fæstucam in laisu," *i. e.* in the bosom of him whom he intends to make his heir, whether in part or altogether; and Gregory of Tours, lib. 3, c. 7, tells us, that Gontran desiring to ensure the succession of his kingdom to his nephew Childebert, placed a spear in his hand. So in the laws and documents of the barbarous nations, we meet with the expressions "adrhamire per festucam (*c*)," "festucâ intercedente;" adrhamire means to fortify, to corroborate, to confirm.

The use of written documents could not long remain un-

(*b*) Lindenbrog, Form 153; Marculf, Appendix, Form 19, "tradidisse per festucam;" Lind. 154; Marculf, Appendix, 20, "per herbam vel terram." "*Lex Ripuar.* tit. 60, *de Traditionibus et Testibus adhibendis.* Si quis villam aut vineam vel quamlibet possessiunculam ab alio comparaverit, et testamentum accipere non potuerit, si mediocris res est, cum sex testibus, et si parva cum tribus, quod si magna cum duodecim, ad locum traditionis cum totidem numero pueris accedat, et sic præsentibus eis pretium tradat, et possessionem accipiat, et unicuique de parvulis *alapas donet et torqueat auriculas* ut ei in postmodum testimonium præbeant."

(*c*) Grimm Deutsche Rechts alterthumer, p. 124, derives adrhamire from chram, kram, strong, firm, solid. Pardessus approves this. Du Cange, and the authors of the Proleg. to the Diplomata, derive it from "arrha." And see the explanation of the "laiseverpitio," Cauciani Barbarosum leges, Vol. 4, p. 509. But it is clear that the barbarians kept the word adrhamire, because they could find no corresponding word in the phraseology of Roman law;—it means to corroborate by the act of giving evidence. Olim, p. 948.

known to tribes settled in Gaul, and brought into daily collision with Romans. Yet the Salic law, as it was drawn up in the time of Charlemagne, contains no allusion to written proof of any kind. And although every presiding judge of the mâl had his scribe or chancellor to record the judgments given in those assemblies, the 59th title of the Salic law, and the 18th chapter of the capita, extravagantia, shew that the very terms of a judgment might be proved by oral testimony. So the 10th chapter of the Capitulary, A. D. 803, proves, that if a question arose as to the existence of a previous judgment, the fact of its existence was to be proved by witnesses.

So even under the second race, a man claimed as a slave who asserts his freedom, though with the charter of emancipation in his hand, is bound to produce the man by whom he was enfranchised, and to prove his liberation "testimonio bonorum hominum qui tum aderant cum liber admissus fuerit," by the scribe who drew the deed, or, if he could not be produced, by shewing two other charters drawn up by the same scribe, in order, no doubt, to establish the handwriting by comparison.

That the use of writing, nevertheless, was frequent, we have conclusive evidence in the collection of formulæ and of charters which we possess.

Documents of every kind, from the solemn judgment to the most inconsiderable agreement, have been preserved, but the obligation was complete without writing; this is proved by the 19th formula in the second book of Marculfus.

There were, however, certain instruments attesting public acts, which could not be impeached by oral evidence, unless their authenticity was attacked. Such, according to the 63rd title of the Ripuarian law, was a royal grant, which could only be attacked by producing an opposite grant. Such too were the judgments of the placitum palatii, acts of voluntary jurisdiction, and the delivery of immovables before the king.

Private documents were drawn up by the chancellor of the

nâl, the referendary of the king, and other public officers. The person concerned did not always even sign them. They did not supply the place of oral evidence before the tribunals; they served merely as a kind of memorandum for the witnesses whom it was necessary to produce (*c*).

No particular form was required for the validity of private acts, but the 43rd chapter of the Lex Alamannorum requires the insertion of the date, which date consisted in the statement of the day, month, and year of the king's reign in which the instrument was drawn up. Instruments dated from the Christian æra are suspicious. This mode of dating is not to be found in any charter of the first race (*d*).

When a donation was made by letter, as in a multitude of instances we find to have been the case, the presence of witnesses (*e*) was not essential; but they were generally summoned to guard against future litigation (*f*). A gift to the monastery of Priim, A. D. 721, is declared to be "facta publice;" another, A. D. 709, to the church of Verdun, is said to be made "in conventu multorum bonorum hominum." Sometimes, as in the case of the gift to the monastery of Limours by Gaucon and his wife, the king and his nobles attended as witnesses of the transaction.

The Salic (*g*) law frequently mentions the proof per testes; it was employed to shew that property had been properly transmitted; that the defendant had been duly summoned

(*c*) Lex Rip. 58; Lex Al. 2 tit.; Lex Bad. 1—1; Marculi, Form 2. 19.

(*d*) Baluz. J. 2, p. 426; Mabillon De re Dipl. p. 5.

(*e*) 819, cap. 3, c. 11.

(*f*) Pardessus, Diss. 11, proves that the expression "cum stipulatione annexâ," was a vestige of the Roman law, and alluded to the "stipulatio aquiliana," which Paulus, recept. sent. Book 1, tit. 1, § 3, says was usually added to contracts, and which he advises the contracting party to fortify by a penal clause, "Ut resciso quoquo modo pacto, pœna ex stipulatu exigi possit." It was also usual to add a clause, importing, that if the buyer was evicted, the seller should restore double the price. This is taken from Paulus, recept. sent. Lib. 2, tit. 17, § 3.

(*g*) *Vide* Tit. 48, *de falso testimonio*, Lex Sal. Ed. Pardessus; Tit. 49, de testibus, *ib.*; Tit. 16, Lex Bajuv.

(49th title) to the mâl; that a cause brought before a tribunal had already been decided. The 52nd title of the Salic law points out the means by which the attendance of witnesses may be enforced. These witnesses, who must not be confounded with the conjuratores, were summoned "ut ea quæ sciant jurati dicant." By the 42nd chapter of the law of the Alennum, and the 13th chapter of the Capitulary of 801, the evidence of persons convicted of sacrilege, homicide, theft, and perjury, as well as persons of bad reputation, was excluded. Sometimes (*h*) the evidence was limited to a particular class; thus by the formula, Lindenbrog, 159, it appears that the person whose status as a freeman had been attacked, was to defend himself by the testimony of his relations, paternal as well as maternal, or by that of the members of the tribe to which he belonged. So a law of the Ripuarian Franks provided that a summons (*i*) should be proved by a certain number of "rachimburghi." A curious proof of the manners of the age is to be found in the 5th chapter of the 2nd Capitulary, A. D. 803. It provides, that a person who puts to death a hostile witness, shall for that reason alone lose his cause. Penalties were inflicted on perjured witnesses by the 51st title of the Salic law, and to impute to another that he had given false testimony, was a crime. The 10th chapter of the Capitulary, A. D. 819, provides, that if the proofs on each side are equal, a single combat shall take place between two witnesses chosen respectively from those of the contending parties.

To elicit truth from conflicting testimony, was a process too refined and difficult for the barbarians who overthrew the Roman empire. To rely upon the oath of the parties was a more simple proceeding. Hence the system of compurgators, the number of whom was sometimes enormous (*k*). Gregory of Tours tells us, that three hundred persons swore, in support of Fredegonde, that Clotaire was the son of Chilperic.

The distinction of races long preserved was the origin of the

(*h*) Waskönig und Stein Franz. Staat. G. vol. 3, p. 214.

(*i*) Sémonse.

(*k*) Van Espen Jus. Eccl. t. 4, p. 138.

system of compurgators (*k*). It is (*l*) well known that during a considerable period, this distinction was preserved with a tenacity, which appears to us of the present day hardly consistent with the existence of social order in any shape however rude and imperfect. Our ancestors were barbarous in all things, and in nothing more barbarous (*m*) than their law. It was personal—the Latin, the Frank, the Burgundian, though inhabitant of the same district, might claim to be tried each by his own law. In such a state of things it was most natural that in time neighbours, vassals, feudal superiors, kinsmen, should come forward to vouch for each other and to uphold each (*n*) others' claims. Unity of race was the root from which the system sprung. The invasions and conquests that blended together the different hordes who had spread themselves over the surface of Europe, gradually broke down the distinction of race and the usage founded on it. Instead of being distinguished by races, the barbarians were distinguished as lord and vassal, bishop and judge, king and baron, knight and serf, gentleman, and a member of the tiers état taillable et

(*k*) Aristotle, in a work which cannot be studied too much or reflected on too deeply, has preserved a remarkable proof of this practice in Cyme, a town in Asia Minor; he is putting the argument for and against innovation, and observes, "The ancient laws that remain are altogether silly. As in Cyme the law on murders is, that if the accuser produces a quantity of witnesses chosen from his own kinsfolk, the accused is responsible for the murder:" *ἂν πλῆθος τι παράσχηται μαρτορων ὅ διώκων τὸν φόνον τῶν ἀυτοῦ συγγενῶν; ἔνοχον εἶναι τῷ φονῷ, τὸν φεύγοντα.* Arist. Pol. 2. 5. 12.

(*l*) Lezardière, vol. 1, p. 361; Savigny, G. des R. R. 1. 115; Eichorn, 1. 46.

(*m*) The English have too much reason to exclaim,

"Mansêrunt hodieque manent vestigia ruris."

(*n*) They were called "consacramentales, sacramentales conjuratores." Their number varied with the importance of the subject in L. Rep. 11. 12. 17; it amounts to seventy-two. Sometimes it was required that they should be relations of the party. Cum uxore et filiis et propinquis ubi duodecem juret si uxorem et filios non habuerit cum patre aut matre si patrem aut matrem non habuerit cum duodecem proximis. Lex Burgund. tit. 8, c. 1.

corvéable à plaisir. The first indeed generally belonging, and especially in England, to the conquering, and the second to the conquered race. But the old system of compurgators fell into complete confusion, and on the continent (for wager of law continued among us till the year 1830), was at length abolished altogether. By the Salic law, which I select as a fair example of the usages of the barbarous races, the accused person was summoned to appear with his witnesses in seven days, "super septem noctes;" if he did not appear, he received a second summons to appear in fourteen; if the charge was one which, if the accused was found guilty, exposed him to a penalty of twenty-five solidi or less, the prosecutor was bound to affirm the accusation by the evidence of five compurgators, and the accused, to prove his innocence, was obliged to produce twelve. If the penalty was from twenty-five to forty-five, the prosecutor produced nine, and the accused eighteen compurgators; if it was above forty-five, the accuser produced twelve, and the accused twenty-five. But if the accusation was one of murder, it must be affirmed by twelve compurgators, and the accused was summoned to undergo the ordeal of boiling water in forty-days.

The compurgators(*n*) must not be confounded with the

(*n*) It will scarcely be believed, that this proceeding was recognised by the English law in the nineteenth century. Blackstone, Vol. 3, p. 343, 4to ed., gives the whole detail without one syllable of disapprobation.

"With us," he says, (*Ib.* p. 345), "wager of law is never required, but only admitted!" "Therefore it is *only* in actions of debt, simple contract, or of an amercement in actions of detinue and of account .... it is *only* in these actions, I say, that the defendant is admitted to wage his law."

"Wager of law, however, lieth in a real action as well as in mere personal contracts."

"He that has waged his law brings with him into Court eleven of his neighbours, and his eleven neighbours or compurgators shall avow upon their oath that they believe in their consciences he says the truth." Our jury clearly arose from the compurgators, who were not witnesses only but judges,— the Homeric ἴστωρ, (*Ib.* p. 501); and their authority increased, as it was the interest of the people to strengthen it. So where a man refused to appear, the Salic law, 59. 1, requires twelve witnesses to prove they heard him summoned in the public Court.

witnesses, though they are sometimes called "testes." The compurgators did not pretend to give evidence as to the facts in dispute; they merely swore that they believed the cause of the party in behalf of whom they appeared to be just, and his statement true. It was a rude appeal to the moral sense.

Title 50 of the Salic law inflicts a punishment on the person who has produced false conjuratores, as well as on the conjuratores. The 55th title allows a man condemned to clear himself by the ordeal of boiling water, to substitute the proof, by compurgators, "juratores donet," if his adversary will consent. It is, however, most improbable that the evidence of these conjuratores was always admitted, or, if admitted, always decisive. There are many passages, indeed, which repel such a doctrine. In the 5th section of the 39th title of the Salic law, which treats of the case where a freeman had been kidnapped and sold as a slave, are the words, "Si probatio certa non fuerit sicut pro occiso juratores dare." And again, section 5, title 42, "Si tamen probatio certa non fuerit cum 25 juratores medius electis exsolvat." There is a remarkable passage in Gregory of Tours to the same effect. A man had been accused of murder; he denied the charge, and as the accusers "non haberent qualiter eum convincere possent—judicatum est ut se insontem redderet *sacramento*." Greg. Tours, 7. 123. So in the code of the Bavarians, tit. 8, c. 17, § 3, "De his vero causis sacramenta præstentur in quibus nullam probationem discussio judicantis invenerit." There were then cases in which the judge was to decide whether such a mode of proof was admissible, and there were cases in which the proof was not conclusive; in all cases of intention, however, it was admissible. So in the Capitulary 793, c. 5, a man who had sheltered a robber was allowed to prove by the oath of twelve conjuratores that he was ignorant of the real character of his guest. These conjuratores were divided into two classes,—one common, of which a great quantity was usually required; the other selected from a particular class, and of whom, therefore, it was sufficient to produce a smaller

number. The first were called advocati, sometimes consimiles; the second electi. The relations of the party interested might be his "conjuratores;" indeed, the 63rd chapter of the Salic law enumerates the juramentum as one of the obligations of relationship. The 8th chapter of the Lex Burgundionum is still more positive, and admits the father, mother, and wife of an accused person among his compurgators. If the party was called upon to swear in his own behalf, jurare propriâ manu, nothing could be more analogous to the whole spirit of proceeding in the rude ages, than that he should be called upon to establish his own credibility by the oath of compurgators.

While we are considering these subjects, we should recollect that all proceedings, civil as well as criminal, were in fact before a jury, and that the management of the proceeding was entrusted to him who presided over the Court. One consequence of the difference between the conjuratores and the testes was, that the former could not be compelled to attend. The principle of this distinction is obvious. A person who refuses to bear witness to what he has seen, commits an offence against society; but a person who is, or who supposes himself ignorant of another's character, may reasonably refuse to give evidence concerning it.

JUDGMENTS OF GOD (*h*).

This mode of discovering the truth cannot be altogether omitted in an history of evidence; it is the link between the system of compurgators and the duel. The ordeals were called sortes, and as the principle to which they may be traced is

(*h*) The word ordeal is of German origin. See Tacitus de Mor. G. 10. The duel is mentioned in all the barbarous codes, the Salic, Saxon, and Visigothic excepted. It must not be inferred from the omission that it was not common among those nations, as many other customs well known to have prevailed among them are omitted also. It is mentioned L. Burg. tit. 18. 45; L. Angl. et Werin, tit. 1, c. 3; L. Alem. tit. 89; Bajur. tit. 8, c. 2, § 6; Longobard, l. 1, tit. 32; Eichhorn, vol. 1, p. 453.

common to the human race at particular periods of its progress, it has shewn itself almost in every nation. The church found the superstition and encouraged it. It first shews itself after the decay of Roman civilization, about the year 404. The church was then laying the foundations of its temporal power, and disseminating some of those abuses, from which it afterwards derived such enormous profit: one of the most valuable of these was the worship of relics. One of St. Augustine's disciples had been accused of a crime by a priest. St. Augustine, in the 78th Epist., gives the following directions for terminating the dispute: "Elegi aliquid medium ut certo placito se ambo constingerent ad locum sanctum se perrecturos, ubi terribiliora opera Dei non sanam cujuscunque conscientiam multo facilius aperirent . . . . *multis notissima est sanctitas loci ubi Beati Felicis Nolensis corpus conditum est:* quo volui ut pergent quia inde fidelius facilius que scribi potest quidquid in eorum aliquo divinitus fuerit propalatum;" for he adds, "Novimus mediolani apud memoriam sanctorum ubi mirabiliter et terribiliter dæmones confitentur furem quemdam qui ad eum locum venerat ut falsum jurando deciperet, *compulsum fuisse confiteri furtum.*" So Gregory the Great (*i*) writes to Justin the Prætor in justification of Bishop Leo, that to solve all doubt, he had taken Leo "ad Beati Petri sacratissimum corpus," and there administered the oath to him. "Quibus præstites magnâ sumus exultatione gavisi quod ejusmodi experimento innocentia ejus evidenter enituit." It is clear, therefore, that the church of those ages, to which some among us would even now appeal in matters of faith and practice, employed its influence, not only as Gregory the Great did with worse than Vandal barbarity, in destroying the glorious remains of the great writers of antiquity, but in propagating this grovelling superstition among the hordes by whom Europe was overrun. The superior knowledge of the priests enabled them, probably, in a vast majority of instances, to save

(*i*) Lib. 2, Ep. 33; Lib. 7, Ep. 18.

or destroy the accused as they thought proper. At the end of the tenth century we find the ordeal appealed to as an ordinary process by the church; Adalgerus in the council of Rheims exclaims, "If any of you doubt this, and think *me* unworthy of credit, let him believe the fire, the boiling water, the (*k*) glowing iron, "credat igni, ferventi aquæ, candenti ferro." In the same council a priest offers, for the refutation of his antagonists to give up his slave to the bishops, "qui per ignitas vomeres incedens Deum de te judicare manifestis (*l*) declaret indiciis." In another place, we find the church visiting with excommunication the person who refused to submit to the ordeal, "quod excipient se per judicium aquæ frigidæ, quod si facere noluerint excommunicatione subjaceant" (*m*). So we find the expression "secundum legem monachorum," applied to the "calidi ferri judicium," A. D. 1056. Such were the legislators who had succeeded in modern Europe, to the wisdom and humanity of Greece and Rome—legislators whose measures leave us in doubt whether we should wonder most at the impudence of those who imposed, or the supineness of those who submitted to them.

One of the first of these modes of trial was the ordeal of cold water. Muratori has published two services, one entitled "Ordo ad faciendum judicium ad aquam frigidam," the other, "Benedictio aquæ frigidæ ad furtum." We cannot wonder, says that learned writer, that so much faith should have been given to this evidence, as it was supported by Charlemagne, Pope Leo III., and St. Eugenius (*n*). Hincmar, Archbishop of Rheims, recommended it in his work, "de divortio Lotharii."

(*k*) Script. Rerum Franc., p. 516, A. D. 991.

(*l*) Ib. 528. (*m*) Ib. 9. 11. 221.

(*n*) Montesquieu, Liv. 18, c. 31; Muratori Antich. 38 Dissert. "Nomi si riquardevoli accreditavarco di troppo quell inveruzione ne poteva il rozozo popolo cavarne la maschera *e particolarmente per vederla proposta e autorizzata dai sacri ministri* e ne loro Rituali scritta come sicuro mezzoo per iscoprise la verità nelle cose dubiose." A similar offer is made in the "Clouds of Aristophanes."

Another was the "judicium panis et casei." After mass and other ecclesiastical ceremonies, bread and cheese were given to the accused, and if he could swallow them, he was declared innocent. Another, and far more terrible method (*m*), was the "judicium aquæ ferventis." In the Capitularies of Louis the Pious, A. D. 819, are these words: "Si Proprius servus hoc commiserit, judicio ferventis aquæ examinetur, utrum hoc sponte, an se defendendo fecisset, et si manus ejus exusta fuisset interficiatur." Of the same kind was the trial of walking on burning ploughshares (*n*), successfully undertaken by the empress Cunégunde and our queen Emma. To these we may add the judicium crucis, which consisted in obliging the two adversaries to hold out their hands in the form of a cross during Divine Service, when the first who let them fall lost his cause. Charlemagne ordered, that if any disputes arose among his children concerning the division of his empire, they should be determined in this manner: "Nec unquam pro tali causâ cujus libet generis pugna vel campus ad examinandum judicetur." Last came that of passing through the fire, of which Cedrenus has preserved an account, A. D. 506, in the eastern empire, but which was unknown in the west till the eleventh century. It is famous in European annals, because Girolamo Savonarola, one of the most illustrious martyrs of intellectual and civil freedom that modern History can boast of, consented to encounter it in the fifteenth century (*o*).

Well may the reader of such laws say with Muratori, "Qui sia a me lecito di esclamare, quanto e mai misera la condizion

(*m*) Gregory of Tours circumstantially describes the manner in which two orthodox priests contrived to boil an Arian.—De Gloriâ Martyrum, l. 81.

(*n*) This experiment is familiar now in part of France. The lines in Sophocles and Virgil are well known. Pliny, Lib. 7, c. 2, tells of priests of Apollo who "super ambustam liqui struem ambulantes non aduri tradebantur." Servius quotes Vanos' account of people who were able to do the same, "Quod medicamento plantas tingerent."

(*o*) Probably all these ordeals might be fulfilled by deputy (*vide supra*, page 48) in certain cases. Lex Fris. tit. 14, cap. 7.

de mortali e quanto spesso si da a conoscere." Agobard, Archbishop of Lyons, published a treatise against them, and against the famous law of Gundebald, king of Burgundy, establishing single combat as the only means of preventing perjury. Such practices were also at last forbidden by the Canon law, as well as by some of the emperors. It is not, however, to be supposed that the right of appealing to such a mode of decision was universal. If the proof was clear against the accused, he was to pay the fine; if it was doubtful, to produce compurgators, or "ambulare (*m*) ad æneum." It often happened, as Montesquieu has remarked, that the dispute ended in a compromise (*n*). This proceeding is sanctioned by the 55th chapter of the Salic law. The decision by single combat prevailed among the Burgundians towards the close of the fifth century, and a passage in Gregory of Tours (*o*), shews that in the sixth it was common among the Franks. From the 94th chapter of the Lex Alamannorum, and the 16th of the Lex Bajuvariorum, it appears that a party might, before they were heard, defy the witnesses of his adversary to single combat. Trial by battle was adopted as the remedy for perjury. This reason, which is, as has been stated, assigned by the law of the Burgundians, is repeated, after an interval of several centuries, in the assizes of Jerusalem (*p*),—a striking

(*m*) Go to the kettle.

(*n*) Cassiodorus, Lib. 3, Epist. 24, has preserved a remonstrance against the duel by Theodoric king of the Goths, addressed to the inhabitants of Pannonia. "Cur ad monomachiam recurritis, qui venalem judicem non habetis? Imitamini Gothos nostros," &c. Luitprand king of the Lombards allows it, "Quia propter consuetudinem gentis nostræ Langobardorum legem impiam vetare non possumus."

(*o*) Greg. Tur. 7. 15.

(*p*) Cap. 45; Lex Burg. 167, C. Ass. Hierus; Lex Long. 66. "Melius est ut in campo cum fustibus pariter contendant quam perjurium perpetretur." "Però mirabilmente . . . crebbe in Italia quest empio abuso, e quelche è più da compiagnere lungi dall opporvisi i vescovi più torto si del credere che l'attisq assero col loro esempio." Muratori Antich. *Ib.* 39.

proof of the slow progress of mankind. Long after the ordeal had disappeared, trial by battle preserved its importance. The church had her champions in these conflicts, of which Henry cites a very curious instance in the case of the Prior of Tinmouth (*q*), during the reign of Henry the Second.

Muratori (*r*) makes a feeble effort to defend the church against the imputation of having encouraged these superstitious practices. But in Mabillon, p. 47, cap. 1, will be found the title "Probationis per aquam frigidam ab Eugenio Papa institutæ." The whole rite is explained, and the prayer inserted, which was instituted by the church. Afterwards comes this passage, "Hoc autem judicium creavit omnipotens Deus et verum et per Dominum Eugenium apostolicum inventum est ut omnes episcopi, abbates, comites seu omnes Christiani per universum orbem eum observare studeant." A mass was said before the ordeal, called "missa judicii," specially composed, says Van Espen, for the purpose (*s*). The Sacrament was administered in these words: "Corpus hoc et sanguis Domini nostri Jesu Christi sit tibi ad probationem hodie." Such is the obligation mankind owes to the ecclesiastics of the dark ages. The cold (*t*) water ordeal was forbidden by cap. Lud. Pii. c. 12, A. D. 829. Gratian (*u*) forged a rescript of Gregory the Great, prohibiting Brunechild from having recourse to the ordeal. But that this is a forgery is undoubted. Delrio (*v*) says, "verum hoc facinus Gratiani est vel inscitia scriptorum nihil tale Gregorius rescripsit." So

(*q*) Book 3, c. 3, § 1. "De ecclesiarum rebus ut per advocatos pugna fiat similiter jubems." Lex Lergo, 6. 3; Othonis, 2, di.

(*r*) Mabillon Analect. tom. 1, p. 47; Baluz. Cap. Reg. F. Vol. 2.

(*s*) The following collect was used:—"Absolve quæsumus Domine tuorum delicta famulorum, ut a peccatorum nexibus liberentur, et *in hoc judicio* prout menærunt, tuâ justitiâ præveniente ad veritatis censuram pervenire mereantur."

(*t*) "Ut examen aquæ frigidæ quod hactenus faciebant a missis nostris omnibus interdicatur, ne ulterius fiat."

(*u*) Caus. 2, Quæst. 5, Can. 7.

(*v*) Cit. Van Espen, Vol. 4, p. 138.

again, Can. 20, Gratian has also forged a rescript under the name of Stephen 5, to Humbert Bishop of Mayence to the same effect. But after the time of Gratian, the practice, though it long continued, was discouraged, and prohibited by the Canon law.

The practice of compurgators is indeed repeatedly sanctioned by the Canon law (*w*). The presbyter brought seven, the deacon three. So cap. 8, x., a bishop is ordered "ut cum septimâ vel quintâ manu (*x*) *sui ordinis* per purgationem canonicam, innocentiam suam ostendat" (*y*). The compurgators swore, "quod ipsi credunt noscere jurâsse;" it was required that they should be acquainted with the character of the accused. "Usus hujus purgatoris in curiis ecclesiasticis etiamnum, in secularibus vix apparet," says Van Espen, who of course did not allude to the English law, where the abuse derived from the church in the dark ages continued within our own recollection.

Having thus examined a mode of inquiry which may be considered a link between the system of the barbarous nations, and the system of the church, we proceed to the investigation of the principles of evidence inculcated by the Canon law.

(*w*) It probably came from the Canon law to ours; and the notion of being tried by peers is in the words "sui ordinis."

(*x*) When the witnesses swore, they extended their hand, the sign of faith; hence the expression "jurare quintâ manu, septimâ manu," &c.

(*y*) And see cap. 10. x. Cod.

CHAPTER III.

CANON LAW.

THE situation of the church in the dark ages, made a peculiar code perhaps necessary for its existence, but undoubtedly essential for its supremacy. Until the reign of Charlemagne, the struggle had been incessant between the see of Rome and other Catholic bishops; nor had the former always been victorious; but the union of the temporal and spiritual rulers of Christendom, the chief of the German empire, and the head of the Roman Catholic church, in one cause, terminated that conflict. From this time, A. D. 800, the contest was between the power of the state and the power of the church, between the sceptre of the monarch and the crozier of the Vatican. The church became a separate independent community, obeying a chief of its own, pursuing ends of its own, and as a necessary consequence governed by laws of its own. These laws have more or less, for a shorter or longer period, modified the legislatures of the west. In France, the study of the canon, led to the study of the Roman law, and the zeal and success with which the latter was cultivated, enabled it gradually to eclipse the latter, and to deprive it of its power in matters purely secular. But in England, where the study of the Roman law was stifled (*a*), the canon law exercised a great and lasting influence. It undoubtedly so far prevailed even in

(*a*) Probably this may be owing to the fact that in England the law fell into the hands of the Normans, men of noble descent, or at any rate possessing that most exclusive of aristocracies, the aristocracy of race; they would of course employ all their energies to combat everything hostile to the feudal system.

the common law courts as to lay the foundation of the system of special pleading which is still upheld among us. The first judge of the land was for many centuries an ecclesiastic, and at this day the Ecclesiastical Courts and the Court of Chancery, with its system of examination, its frightful expense, and interminable litigation, are its genuine and immediate offspring. These are some of the evils from which the study of the Roman law saved the inhabitants of France (*b*). In that country the influence of the canon law lasted from the ninth to the fourteenth century, when it was superseded in secular matters by the Digest and the Code, under the administration of laymen, wherever the customs and common law did not prevail, and which even where they did prevail, methodized their application.

When, by the denial of the defendant the lis was contestata, there followed the necessity of proof. "Probatio," says Van Espen, "dicitur anima processus." By proof was understood that which satisfied the judge as to the truth, either of the point in question at the trial, or of a fact asserted by one and denied by the other of the litigant parties. The proof was confined to facts. For the judge was bound to take cognizance of the law, whether or not it had been insisted upon by the contending parties; as in the Roman law the maxim prevailed. "Actore non probante reus absolvitur etiam si nihil præstiterit." Where, however, the presumption of law was with the plaintiff, or where the defendant alleged some fact, which if true, destroyed the plaintiff's right of action, the burden of proof fell upon the latter. For although the form of the defendant's statement might be a denial of the plaintiff's right, it did, in fact, imply an assertion of some fact by which the

(*b*) The principles of the Roman law forced their way into the Pays de Coutûmes. Pothier's admirable treatise on the Coutûme d'Orléans. could never have been written by any one ignorant of the Roman law. If they were bound by the customs of the Germans, the Roman law furnished the French lawyers with *principles*, for their application.

presumption of law in favour of the plaintiff was overthrown—"quod factum nisi probet manet jus commune." The "onus probandi" (*z*) was flung upon him who sought to change the possession of the object in dispute. "Commodum possidenti," said Justinian, "in eo est quod etiamsi ejus res sit qui possidet si modo actor non potuerit suam esse probare maneat in suo loco possessor," and this principle was adopted by the canonists. The Canon law divided presumptions into—1, præsumptiones juris; 2, præsumptiones juris et de jure; and 3, præsumptiones hominis. Of the præsumptiones juris, the right of the possessor may be cited as an instance.

2. The præsumptiones juris et de jure is that which the law requires the judge to believe. "Non admissa probatione in contrarium," such is that (*a*), cap. 30, x. de Sponsalibus in the Canon law, "is qui fidem dedit mulieri super matrimonio contrahendo, insuper carnali copula subsecuta, etsi in facie ecclesiæ ducat aliam, et cognoscat, ad primam tenetur redire. Rationem subjungit Pontifex. Quia licet præsumptum primum matrimonum videatur contra præsumptionem tamen hujusmodi non est probatio admittenda. Ex quo sequitur [ait] quod nec verum, nec aliquod censeatur matrimonium quod de facto est postmodum subsecutum."

"Hinc post Glossam docent canonistæ, ex copula carnali subsecuta oriri jure Decretalium præsumptionem juris et de jure, sponsalia de futuro mutuo consensu transiisse in sponsalia de præsenti; sive verum consensum matrimonialem intervenisse,

(*z*) Decretal Greg. 9, Lib. 2, cap. 19, 20, 21, 22, 23, 24; Van Espen, Jus. Ecc. Pass. 3, tit. 7, p. 113, t. 4, cap. 5. "Concludunt communiter Canonistæ quod in pari conditione potior sit conditio possidentis."

(*a*) It certainly is a singular proof of the little attention paid to jurisprudence among us, that Sir William Scott, in his admirable judgment of Dalrymple *v.* Dalrymple, should have laboured to enforce this first elementary principle of Canon law (which he might have found in any writer on the subject), as if it were a disputed and obscure question, and that he should never have cited the plain, explicit, unquestioned and unquestionable text on the subject, though the case he was deciding turned upon it.

et matrimonium esse contractum: atque ab ipso judice ita esse procedendum in judicio, ac si revera matrimonium esset initum: nec partes ad contrariam probationem esse admittendas."

But the canonists allowed the confession of the party to prevail even over a præsumptio juris et de jure, and therefore did not adhere firmly to this principle which later writers insisted upon.

3. The præsumptio judicis (*b*), is the inference not enforced by law, but suggested by any circumstance in the case.

As many facts were stated by both parties, the proof of which could only serve to protract litigation and increase expense, a practice was introduced by the canonists, borrowed from the interrogationes of the Roman law, which was called usus positionum. These "positiones" (*c*) were articles, in which either party stated facts, to which he required an answer, admitting or denying them from his adversary—if they were admitted he was exonerated from the necessity of proving them. If the adverse party, after being called upon by the judge, refused absque rationabili causâ to answer them, his refusal was tantamount to a confession.

The answers were given after an oath, "prævio juramento de calumniâ," that the party assenting believed the fact inquired into to be true—and that the party answering be-

(*b*) "Licet præsumptio juris et de jure sit violentissima tamen vere et proprie non est veritas." Van Espen.

(*c*) Van Espen, 3. 7. § 30. "Positiones sunt articuli quibus actor vel Reus exquirunt facta, quæ in judicio fuerunt allegata eaque scriptis judici exhibet, ut super iis jubeat partem adversam respondere atque hoc pacto a parte adversâ confessionem de veritate factoriam extorquendo Ponens ab onere relevetur."

It was the duty of the judge to examine and re-examine at every stage of the cause, every witness and written instrument that might contribute to the discovery of the truth. He was fettered by no technical rules in the exercise of this sacred duty. "Quum (*d*) judex, qui usque ad probationem sententiæ debet universa rimari, possit interrogare de facto."

(*d*) 2. 22. 10. Decret.

lieved, or did not believe them, as the case might be. Those facts alone were to be proved, to which "Pars adversa respondit per non credit." . . . "quæ enim pars in suis responsis confessa est per verbum," credit "ulterius probari non debent."

WITNESSES.

It was a principle of the Canon law, that was strangely lost sight of by the courts which took it for their model in this country, that oral evidence, that is, the vivâ voce examination of witnesses, was preferable to their written depositions. That in the dark ages a different system should have been introduced, against a better knowledge, must be accounted for by the eagerness with which the hierarchy seized upon every opportunity to augment their power, to perplex the understanding, and load the consciences of the laity, or to obtain the means of perpetuating fraud if it should be necessary without detection, but that a system so absurd, and an abuse of the old law should prevail still among us, and should not have disappeared at the Reformation, must be accounted for by the prejudices and ignorance of our judges, and their declared hostility to all improvement. "Tradunt," says Van Espen (*e*), "communiter canonistæ inter modos facta probandi *eum qui fit per testes multo efficaciorem et digniorem esse quam qui fit per instrumenta*," p. 116. "Testis debet *coram et in præsentiâ Judicis* testimonium ferre neque sufficeret scripto adjudicem misso testari—etenim judicis aspectus vel reverentia sui refrenat audaciam falsi vel id ex vultu et titubatione deferendit judex." Will posterity believe that in the 19th century these principles were held unanswerable on one side of Westminster Hall, and were totally disregarded on the other? Can any terms be strong enough for the condemnation of such a state of things, or for describing the apathy of those who having the power of improvement in their reach, allow

(*e*) P. 117, Van Espen. t. 4. 5. 6.

it to continue? The modes of proof recognised by the Canon law were that by witnesses, by written instruments, by oaths offered to one of the litigant parties either by the judge or by his adversary.

The Canon law resting not on the Roman law only, but on the passage in St. Matthew xviii. 16, required two witnesses for the complete proof of any fact. These witnesses must be "omni exceptione majores," "classici." Like the Roman law (*f*), the Canon law excluded many persons from giving evidence; "alii" were excluded for transient reasons, "generaliter alii in certis causis et contra certas personas." Every one was, however, primâ facie admissible. The Gloss, cap. 1. 10, says, "quilibet admittitur qui non repellitur." The general rule was, that more than ten (*g*) witnesses should not be produced, "super uno eodemque articulo," unless to prove a custom, or in conformity with the direct injunction of the judge. To prove a custom it was usual in Brabant and other countries to produce a multitude of witnesses, this was the proof "per turbas Antonius." Faber thought that a "turba" ought not to consist of more than ten witnesses, and that the number of turbæ should be limited to three. The oath was taken before the evidence; "facilius," says the code, "religio a falso absterruerit quam ad confitendum de falso adegerit." But a different course of proceeding did not vitiate the trial. Before the examination of the witnesses, the party producing them, gave the judge the articles on which the witnesses were to be examined. Interrogatories were also exhibited to the judge by the party against whom the witnesses were called, concerning which the Gloss, cap. 2, de Testibus, 6. 8, interrogatoria, is as follows: "Interrogatoria sunt quæ facit pars testibus productis contra

(*f*) Decret. 2. 19. De Probationibus; 2. 20. De Test. et Attest.

(*g*) A. D. 799. Alcuin, in behalf of the exiled Pope Leo 3, wrote to Amo Archbishop of Salzburg, that he recollected to have read in the *Canons of St. Sylvester*, that a Pope could only be brought to trial on the evidence of seventy-two irreproachable witnesses.

se, et dantur super articulis a parte producente exhibitis. Forma interrogatoriorum hæc est. Si dixerit testis verum esse, quod primo intentionis articulo continetur, quæratur ab eo quomodo scit, et si præsens erat et ad quid ibi erat, et si vidit, aliave his similia, secundum quod facient ad factum." The commentator remarks that "de consuetudine et de jure non datur parti adversæ." Interrogatories, however, were not always exhibited. When the witnesses were produced and sworn in the presence of the adverse party, or if he made default after a proper summons in his absence, they were examined by the judge or by the commissioner separately and privately, "singulatim et secreto." The judge and secretary being the only persons present. The evidence so delivered was taken down in writing. "In conscribendis autem testium depositionibus a commissario adhibenda est magna prudentia diligens cautio ut in scribendo linguam idioma et modum loquendi testium quam proxime imitetur." The deposition was then ordered to be read over word for word to the witness, and it was signed by the deponent, or if he refused, or was unable to sign, by the commissary. Before the sentence the depositions were published, without this publication the sentence was null; until publication they were kept secret, and the witnesses were forbidden to disclose their testimony; after publication the evidence could not be altered or contradicted, or enlarged, unless as matter of extraordinary indulgence. But (*h*) exceptions might be taken to the character of the witnesses, "puta quod sit infamis, perjurus, consanguineus producenti, de

(*h*) So a mother's testimony for her daughter, to prove the betrothment of the latter, was rejected. Dec. 2. 20. 22. The evidence of the mother as to affinity was sufficient to prevent, but not to annul a marriage; but the strongest proof of ecclesiastical arrogance and laical servility is the law, "Laicos in accusationem vel testimonium contra clericum in criminali causâ non esse audiendos sacrorum canonum censura manifestius edocet." This was limited by the interpreters with "nisi in defectum clericorum," but Dumoulin adds, "iste textus ut ambitiosus prorsus repudiatur etiamsi episcopus vel Papa accusetur."

familiâ suâ, aliaque similia." The party producing a witness was not allowed to impeach his testimony after these attacks, "reprobationes," the party bringing forward the witnesses was allowed to defend them "facere salvationes."

The party who produced a witness could not, if the evidence of that witness was employed against him by the adversary, impeach his testimony. By producing him, he was asserted to be "omni exceptione major," unless, however, some new circumstance unknown to the party producing him flung discredit on his testimony. "Nova aliqua circumstantia .... justa quia interea factus est affinis partis adversæ; vel junxit se in causâ," &c. Every witness summoned was obliged to attend, even if he could give no evidence. "Compellendus est saltem ut illa declaret et affirmet sub suo juramento." But the judge might, if from the circumstances it was clear that he could give no evidence, excuse his attendance. If the witnesses were infirm, or if the cause was trifling, the judge might send a commissary to take the evidence.

Every (*i*) witness, according to the practice of thelater Canon law, was to be sworn before he gave his testimony, unless he was excused by the consent of both parties and the approbation of the judge.

The evidence of an accomplice was rejected. "Nulli (*k*) de se confesso adversus alium in eodem crimine sit credendum." A priest might give evidence on behalf of his own church. The evidence of a layman was not admissible in criminal matters against a priest (*l*). "De cetero," says Alexander 3, "laicos in accusationem vel testimonium contra clericum in criminali causâ non esse aliquatenus admittendum censura sacrorum canonum edocet manifestius, nisi forte suam vel suorum injuriam prosequantur, nec tunc etiam ad testimonium

(*i*) "Nullius testimonio quantumcunque religiosus exsistat nisi juratus deponerit, in alterius præjudicium debet credi." Dec. 2. 20. 51.

(*k*) Dec. 2. 20. 10.

(*l*) *Ib.* 14.

sed ad accusationem possunt admitti." This must have ensured impunity to the most atrocious crimes. Such, however, was the purpose to which the hierarchy turned their influence over the submissive and abject laity, and such the consequence of allowing them to usurp that political power which the founder of Christianity expressly disclaimed for his disciples and himself. In appeals, if new matter arose, new evidence might be produced (*m*). So after publication of the evidence on some points, new evidence might be adduced on others. "Judicibus ipsis præcipiendo mandavimus ut partes ipsas ante suam præsentiam convocent, et super aliis capitulis si qua alia fuerint ab his super quibus testes recepti sunt et eorum attestationes publicatæ, rationes diligenter audiant et testes .... recipiant" (*n*). Hearsay was not admissible unless in cases of pedigree, and then under considerable restrictions (*o*).

Dumoulin (*p*) says that, by the French law, the objections to the witnesses could not be taken till after their examination, but that the commentators on the Canon law left this matter to the judge, "arbitrio judicis." Before the quality of the different witnesses was appreciated, it was the duty of the judge to endeavour to reconcile their testimony. "Secundum (*q*) praxin Gallicam recollei."

Witnesses were not compelled to answer questions tending to disgrace them. They could not be attacked after the publication of their testimony. If a witness was prevented from attending, he was considered (*r*) as if produced "contra impedientem."

The judge was not to decide by what he knew himself, but according to the evidence. "Si uni delegatorum revelavi

(*m*) Dec. 17. "Parcissime et Perraro." Van Espen, p. 119, Pars. tit. 7.

(*n*) *Ib.* 19.

(*o*) Decret. 2. 20. 47. licet.

(*p*) Vol. 4, p. 111, Anfiot. in Decretal.

(*q*) Molinæi, *ib.*

(*r*) *Ib.*

secreta causæ meæ non sufficit ad removendum eum quia non debet judicare secundum conscientiam sed secundum allegata et probata."

A witness might alter his testimony before publication.

If the witness died, his deposition was evidence in the same cause on appeal; if their evidence was confused, the judge might examine them anew.

WRITTEN EVIDENCE.

The Canon law divided writings into public and private, into originals and copies. Public writings were those drawn up by a public officer in a prescribed form. It was not sufficient to constitute a public document, that the party who drew it up was a public officer; he must be a public officer instituted *for that particular purpose* (*s*).

The public writing made plena probatio. The private writings sometimes "plena," sometimes "semiplena," sometimes a very feeble proof, or none at all. The original instrument is tantamount to a public document; but a copy may make a complete proof, if compared with the original by the judge or commissary, in the presence of the adverse party, or even in his absence, if that absence be contumacious, and after notice to attend. This task, in order to save expense, might be entrusted to the local judge (judex loci), though not he by whom the cause was to be decided; and it was the duty of such judge, not only carefully to compare the copy with the original, but to observe if there was any cause of suspicion in the original itself, or the custody from which it was produced (*t*). If the authenticity of the original was not disputed, it was,

(*s*) Notarii a notis. Van Espen, 3. 7. Exemplar is improperly used in the Canon law to mean a copy, whereas it does mean an original.

"——— vos exemplaria Græca,
Nocturnâ versate manu, versate diurnâ."

(*t*) Such I take to be the explanation of the Canon, "Quum Joannes," Dec. 2. 22. 10, which Van Espen does not quote.

unless in case of fraud, decisive, according to the rule of the civil law. "Testis cum de fide tabularum nihil dicitur adversus scripturam interrogari non posse." Covarruvias says, that to impeach a document four things were necessary.

First. That the notary was a man of questionable integrity.

Secondly. Unexceptionable witnesses.

Thirdly. That the document impeached was modern.

Fourthly. That all the witnesses by whom it was signed should concur in impeaching its validity. "Unanimi et concordi testimonio."

I subjoin a remarkable edict, which appears to me deeply founded in public policy; it is taken from Dec. 2. 19, de Probationibus.

IDEM IN CONCILIO GENERALI.

"Quoniam contra falsam assertionem iniqui judicis innocens litigator quandoque non potest veram negationem probare, quum negantis factum per rerum naturam nulla sit directa probatio, ne falsitas veritati indicet, aut iniquitas prævaleat æquitati, statuimus, ut tam in ordinario judicio quam extraordinario judex semper adhibeat aut publicam, si potest habere, personam, aut duos viros idoneos, qui fideliter universa judicii acta conscribant videlicet citationes et dilationes, recusationes et exceptiones, petitiones et responsiones, interrogationes et confessiones, testium depositiones et instrumentorum productiones, interlocutiones et appellationes, renunciationes, conclusiones, et cetera, quæ occurrerint, competenti ordine conscribenda, loca designando, tempora et personas. Et omnia sic conscripta partibus tribuantur ita, quod originalia penes scriptores remaneant, ut, si super processu judicis fuerit suborta contentio, per hoc possit veritas declarari, quatenus hoc adhibito moderamine sic honestis et discretis deferatur indicibus quod per improvidos et iniquos innocentium institia non laedatur. Judex autem, qui constitutionem ipsam neglexerit observare, si propter ejus negligentiam quid difficul-

tatis emerserit, per superiorem judicem animadversione debita castigetur, nec pro ipsius præsumatur processu, nisi quatenus in causa legitimis constiterit documentio." Decretal, 2. 19. 11.

There is a canon (*u*) which allows only part of an instrument to be read to the adversary.

PRIVATE WRITINGS.

There are two great divisions of private writings in the Canon law (*v*).

First. Those written by an individual to use for his own purposes.

Secondly. Those written for another person.

"Illa (*w*) scriptura quam quis scribit aut signat vel suo sigillo munit et probat in commodum alterius et ad sui obligationem probat contra scribentem." Cap. 14 De Fide instrumentorum.

"De hac quoque privata scriptura agitur in Cap. 14 x. De Fide instrum. ubi respondit Pontifex, quod, si cautio indeterminate loquatur, adversarius tenеatur ostendere debitum, quod

(*u*) Dec. 2. 22. 5.

(*v*) The first class was rejected altogether. The second and third were received "contra scribentem." Van Espen, 122, xxxviii. "Antiquæ item sive vetustæ scripturæ, antiqua arma, insignia, aut alia signa, aut scuta picta, aut insculpta lapidibus, sepulchris, aut tumbis, vel ad muros, aut ad columnas, ea omnia publicæ quoque sunt probationes, ideoque judicem plurimum movent, aut ex his fidem colligat, potissimum si multum essent vetusta, aut si tam longo stetissent tempore, ut eorum initii vix ulla extaret memoria; ideoque et vehementem probationem procul dubio efficiunt, et tanto majorem fidem faciunt, si cum iis et alia adminicula concurrant. Sic etiam dici potest de illis litterarum, aut scriptorum Probationibus, quæ reperiuntur in antiquis Ecclesiarum libris, Missalibus, Martyrologiis, aut in similibus, quorum initii quoque memoria non existat. Damhouderus, cap. 174; Adde Glossam ad cap. 13. x. De Probationibus." Antiquæ inscriptiones adminiculantur tantum publicæ fidei nec plane faciunt fidem. Molinæi, Vol. 4, p. 111, Annot. in Decretales. Item si reperiatur scriptura in aliquâ columnâ vel lapide aut statuâ.

(*w*) Van Espen, 3. 7.

continetur in ea. Sed si causam, propter quam hujusmodi scriptura processit expresserit, in eadem confessioni ejus stetur, nisi probaverit se indebite promisisse."

From this the canonists drew two inferences,—one that a writing which did not express the causa, or, as we should say, the consideration for the obligation, was of no, or of very trifling value, unless the principle was overruled by some local custom;—the other, that the proof furnished by such a writing, when the consideration was specified, was complete.

The private writing admitted before a competent tribunal was tantamount to a confession, and execution might issue upon it immediately, "confessus habetur quo judicato et judicatum habet executionem." Private writings might be proved by those who saw them written, or by comparison of hands.

Oral evidence was admitted to prove that a document was forged, or to supply the omissions in a deed (*x*).

He who impeached the genuineness of a deed was obliged to swear "quod calumniose id non dicat." This was borrowed from the Roman law (*y*). The Canon law contains some curious instances of forgery by ecclesiastics (*z*).

THE OATH.

"Actor qui plene probavit non compellitur jurare."

We have seen that in the Roman law considerable stress was laid upon the oath of the contending parties, as a means of eliciting the truth from the litigant: it might be employed either at the will of those parties "ex pactione ipsorum litigantium," or at the command of the judge, "ex auctoritate

(*x*) Decret. 2. 22. 10. de fide inst.

(*y*) Cod. de fide instrument lex ultima.

(*z*) *e. g.* "Cum carta vestusissima videretur recentior apparebat scriptura." And again, "Quod sub vetusto sigillo carta fuerit perforata," on which text Dumoulin exclaims, "En artes monachorum ad confingendum sibi titulos vetustos quibus nunquam fece caveat, ego sæpe tales imposturas et falsitates ex historiæ fide detexo."

judicis." This latter kind of oath, though familiar to the Roman jurisprudence, was for some time unknown to the Canon law. There is scarcely, says Van Espen, any trace of such a proceeding in the early letters of the Popes, or in the early canons. Alexander 3 censures the custom which had prevailed, of using the oath where other evidence was sufficient, "ut cum aliquis intentionem suam fundaverit instrumentis aut testibus introductis sacramentum nihilominus deferatur, quod si subire noluerit fides probationibus exhibitis non habetur." This practice, he says, is in manifest opposition to the laws, "quæ tum demum ad hujusmodi suffragium recurrendum esse decreverunt cum alia legitimè non suppetunt." Gregory the Ninth, as Cujacius remarks, transferred the edict of the prætor on this head to the Canon law, and engrafted the Roman principle on ecclesiastical jurisprudence: it was, therefore, the recognised doctrine, that this kind of proof was only subsidiary, and only to be received "deficientibus aliis probationibus." Even thus modified, the system met with resistance. Antonius Faber says, that the suppletory oath prevailed only from inveterate error; "error causidicorum et pragmaticorum ille est;" and in defiance of the well established principle that no one should be a judge in his own cause.

Whatever may be the value of this opinion, it is clear, says Van Espen, that the oath ought to be employed with great caution, and never unless in a very doubtful case. The same principle is inculcated in the laws of the Visigoths, which were the work almost exclusively of ecclesiastics, and in (*a*) the Capitularies. "Judex," says the first of these codes, "ut bene causam cognoscat primum testes interroget ac deinde scripturas inquirat ut veritas possit certius inveniri, ne ad sacramentum facile veniatur." Hoc enim justitiæ potius indagatio

(*a*) Cap. Reg. F. 7. 97. Montesquieu has censured the law of the Visigoths with too much severity, as Guizot has praised it with exaggeration.

vera commendat, ut scripturæ ex omnibus intercurrant et jurandi necessitas sese omnino suspendit."

The canon law did not allow the suppletory oath in criminal cases or in civil cases, where infamy was the consequence of a particular decision, or "in civili causâ arduâ et notabili."

"Dicitur (*b*) causa ardua, magna vel modica juxta condi-tionem personarum litigantium.....certum enim est rem respectu unius personæ posse æstimari arduam et magnam quæ alteri personæ esset modica ita ut respectu illius esset evidens perjurii illecebra et non respectu hujus."

This is the single decretal extant concerning the oath in the decretals of Gregory 9, under the title De Jurejurando, which, as Cujacius and Emanuel Gonzalez have remarked in their notes to that decree, Gregory 9 borrowed entirely from the edict of the prætor, "nec est," says Gonzalez, "in hoc titulo (de Jurejurando) alia quæ ad juramentum deciso-rium litis spectet—nisi quærens—cum in aliis actum esset de juramento extrajudiciali in aliis actibus validis et invalidis præstito."

The canon law in some cases allowed evidence to be taken where there was no suit "lite non contestatâ;" but this was an exception, "lite non contestatâ non est ad receptionem testium procedendum nisi forte de morte testium timeatur vel absentiâ diuturnâ. In quibus casibus quum civiliter est agen-dum ne veritas occultetur et probationis copia fortuitis casibus subtrahetur senes et valetudinarii et alii testes quibus ex aliquâ rationabili causâ timetur, etiam lite non contestatâ sunt quoad dubio admittendi, sive pars conventu sit contumax, sive sit absens absque malitiâ, ut conveniri non possit, sed si actor non convenerit adversarium infra annum ex quo conveniri poterit vel saltem receptionem hujusmodi testium non deman-daverit illi attestationes sic receptæ non valeant." Dec. 2, 6, 5. This practice was forbidden in France by an ordonnance, 1667.

(*b*) 10 De Jurejurando.

CHAPTER IV.

FRENCH LAW.

The peculiar ability of arranging and methodizing the most rebellious and hostile materials, of combining comprehensive and luminous theory with the most exact and minute attention to detail, which distinguishes the French nation, displays itself with unrivalled lustre in their legal history. While the English lawyer buried in details, without one ray of learning or genius to illuminate the dreary and shapeless mass to which every year added some conflicting and unassimilated element, clinging to the errors of the Plantagenets and the pedantry of the Tudors, was content with what Lord Bacon calls the lowest ambition, that of raising himself among his countrymen, without seeking to raise his countrymen among nations, much less aspiring to exalt the condition of mankind;—while the German, the patient slave of petty princes, sometimes stupified by sensuality, sometimes habitually perpetrating crimes which the lowest of their subjects would have expiated on the scaffold (*a*), accumulated materials he durst not employ, or consoled himself by the wildest visions for the total absence of any thing like freedom or independence through the length and breadth of his submissive country;—while the Italian, of all the most highly gifted, and uniting to the penetration, clear-

(*a*) The father of Frederick the Great employed persons to kidnap from all parts of the continent recruits for his guards, men were torn from their families from the confines of France and Holland, and never heard of again; if they attempted to escape they were punished with the most savage cruelty. Voltaire saw at Berlin a French gentleman with his hand cut off, in a convict's dress, condemned to the most degrading toil among the refuse of mankind, for an attempt of this kind. Such was the state of things in Germany before the French revolution.

ness, and logical accuracy of the French, a splendour of imagination and aspirations for the great and beautiful to them but rarely known, languished under the galling yoke of strangers and, worse than all, of priests,—France became, in spite of envy, in spite of hate, in spite of the venal pen of learned hypocrisy, in spite of misplaced national feeling, the legislator of civilized Europe. The Code Napoléon is a monument which no violence can destroy; and he who will calmly examine the difficulties which preceded its execution, the chaos of customs, laws, usages, and traditions which once existed in France, and the constellation of illustrious jurists, beginning with (*a*) De Fontaines and Beaumanoir, culminating to meridian splendour in Cujacius, Dumoulin, and Donellus, shining with reflected lustre in Jousse and Pothier, and continued in Merlin to the present century, to whose uninterrupted labours the Code is owing; he who considers these things, more especially if he contrasts the progress of jurisprudence in France with that of any other modern countries, and reflects that in that country a representative government was unknown, must own, that for such a work so accomplished, under so many disadvantages, and in spite of so many obstacles, no admiration can be violent or exaggerated.

Up to the sixteenth century the Roman law was used in France as an instrument to break down the prejudices and feudal absurdities which incumbered the path of legislation. The more its maxims prevailed, the more barbarous did the German customs, which on the other side the Rhine are not now without their advocates, appear, and the more essential it became that the administration of justice should not (as is the case among us at this day) be placed in the hands of men totally without legal education. Thus the feudal rights were gradually circumscribed, and the abuses which arose from the old local prejudices were gradually exterminated. The necessity of drawing up the coutûmes, or, as we should say, the

(*a*) "Et quasi cursores vitai lampada tradunt."

common law of France, became apparent. The Papinian of this branch of law was Dumoulin. From his time we may trace two schools in France, that of the customary and that of the civil law. But from the form of proceeding, and the method of proof, all traces of the feudal system were obliterated, and in this part of jurisprudence, since the fourteenth century at the latest, all conflict between the discordant elements of Roman and customary law was at an end.

THE ENQUÊTE PAR ÉCRIT.

The appointment of commissioners to receive the testimony of witnesses is a very ancient practice in French Courts of justice,—far more ancient than the practice derived from the canon law of taking their evidence in private. A capitulary of the year A. D. 829 commands the Missi Dominici to select, in every county, the most competent persons to institute these enquêtes, "ut in omne comitatu hiqui meliores et veraciores inveniri possunt eligantur a missis nostris ad inquisitiones faciendas et rei veritatem discendam, et adjutores comitum sint ad justitias faciendas (*b*)." The same direction is to be found in the capitularies of Charles le Chauve (*c*), and in the law of the Lombards (*d*). In affairs which related to the nobles and bishops who attended the royal Court, the "comes Palatii" himself took the examination, and made his report upon it to the council. At a later period Beaumanoir (*e*) tells us, auditors were specially appointed. In the cases of inferior people, "pauperum (*f*) et minus potentium," which the count palatine might decide alone, he appointed delegates to hear and examine the witnesses. While the practice of single

(*b*) Cap. Lud. Pii. tit. 2, c. 3.
(*c*) Tit. 45, c. 11.
(*d*) Tit. 41, c. 4.
(*e*) C. 40.
(*f*) "Nec ullus comes palatii nostri potentiorum causas sive nostrâ jussione præsumat, sed tantum ad pauperum et minus potentium justitias faciendas sibi sciat esse vacandum." Cap. 3, § 77.

combat prevailed these inquisitions were rare, but when the best of kings, St. Louis, had substituted witnesses for it, "eust mis preuve de tesmoins en lieu de bataille," they multiplied prodigiously.

That however in the earliest period the examinations were public we know from the clearest evidence, for otherwise the right of battle would have been lost. After the testimony of one hostile witness, the opposite party, if he did not mean to submit to a decision against him, was obliged to defy the second to single combat as false and perjured. If he waited till the evidence of the second witness was delivered against him he lost his cause. "Par un témoin," Beaumanoir tells us, "n'estoit pas la qucrelle gagnée ni perdue—mais par deux c'estoit été si on laissoit passer le deuxiéme." The fear of renewing such scenes no less than the influence of the canonists, would lead to make the system of taking the depositions apart, familiar and at last universal. The establishment of the feudal system by placing the administration of justice in the hands of the lord, gave a different character to the manners of the Franks, but still a considerable portion of judicial power remained in the body of the people. Completely to abolish the old system was impossible, and as the royal authority in France acquired stability and importance, the method of judicial proceeding became more regular and uniform. If the parties agreed upon the facts, the court proceeded at once to a decision upon the law. If on the contrary there was room to doubt the facts, the judges had recourse to the enquête. That is, one of them travelled to the spot whence the dispute arose and ascertained on the oath of proper witnesses the circumstances in dispute. If a single fact was to be verified, he examined those likely to furnish him with accurate information. If a question of law was to be determined, a question concerning the existence or abrogation of a custom, he took the evidence of the old inhabitants of the neighbourhood, his report was communicated to his colleagues, and then their

decision was pronounced. Such were in the twelfth century in France the forms of the enquête.

The appointment of "Baillis" made this method of proceeding easier; these magistrates themselves conducted the enquêtes ordered by the Cour du Roi, or selected those best capable of doing so. Thus the enquêtes became frequent in the reign of Philip Augustus. Under the reign of St. Louis, with the exceptions of Alfred, and our great deliverer William the Third, that solitary example of a Patriot King in modern history, the reforms introduced by him in the administration of justice gave additional importance to the method of proceeding now under our consideration. While that enlightened legislator abolished the trial by battle, he preserved so much of the old form of proceeding as prevailed till the pledges of battle were interchanged, and then the enquête was substituted for single combat. The rude, selfish, and ignorant nobles, opposed as they always were to everything which could by possibility tend to the improvement and happiness of mankind, clung to this and every other feudal abuse with the utmost tenacity. In the note will be found the lamentations of the nobles over the new system which put reason and justice in the place of brutal violence and strength (*g*). But

(*g*) Warnkönig und Stein, vol. 3, p. 576.

"Wir besitzen ein Lied eines Ritters aus dem 13. Jahrhundert, das den Verlust des alten Rechts und das Eindringen des neuen beklagt, und das aus der Mitte jener Verhältnisse gegriffen, für unsern Gegenstand wirklichen Quellenwerth hat. Der Kampf der edlen gegen das neue Princip gelang an einigen Orten; noch zu Boutcillers Zeit brauchte sich Kein Edler im Artois und in plusieurs lieux der Enquête zu unterwerfen (fol. 62, b.); in anderen Gebieten dagegen ward die Untersuchungsmaxime anerkannt wie in Burgund nach der Charte von 1315." Here is the lamentation:—

Leroux de Liney. Recueil des Chants Hist. de Fr. du XII—XVIII^e^ siècle. T. 1, 1840; Chanson XIII.

"Gens de France, mult estes ebahis,
Je dis a tous ceux qui sont *nez de fiefs*,
Si m'aït Dex, *franc estes vous mes mie.*"

they had to deal with no common antagonist. Although canonized by a corrupt church in a period of darkness and ignorance, Louis was a man of whom Athens might have boasted; he was animated by a holy and irresistible zeal for the welfare of his people. In vain did the haughty Enguerrand de Coucy plead that he was not amenable to such inquiries, "qu'il ne devoit pas ni ne vouloit soumettre soi à enquête en tel cas comme tel enquête touchaît sa personne s'onneur et son heritage et qu'il étoit prest de se défendre par bataille." In vain did the Count of Bretagne reproach Louis with degrading the dignity of his barons, by subjecting them to such humiliation; the royal patriot fulfilled his sacred trust, with inflexible resolution, and the system of trial by battle, though not formally abolished under his reign, received a blow from which it never could afterwards recover. The first volume of the "Olim," as the earliest report of French law proceedings is called, contains 812 precedents of the proceedings par enquête, beginning in the reign of Philip Augustus, generally the form is "de mandato domini Regis inquesta facta est," sometimes we find "de mandato curiæ," sometimes "de mandato ballivi." Beaumanoir (*h*) lays it down that the person who takes the enquête ought not to be alone; before the enquête was taken the parties agreed upon the facts to be ascertained, and until the witnesses were sworn each had the right to object to the witnesses. When once the enquête was open it was too late.

"Mult vous a l'en de franchise esloigniez,
Car vous estes *par enquéte jugiez*
Quant *deffense* ne vous puet faire aïe,
Trop estes cruelment engigniez."

"A touz pri,
Douce France! n'apiaut l'en plus ensi;
Ancois ait non le pais aus sougiez
Une terre acravertie
La raigne as desconseilliez
Qui en maint cas sont forciez."

(*h*) Coutûmes de Beauvoisis, c. 40.

The judge or officer conducting the proceedings took down the depositions, and at the same time made a note as to the manner in which the witness acquired his knowledge, *e. g.*, "jure dixit quia vidit," "nihil dicit nisi ex auditu," &c. When the depositions had been taken they were read over to the witnesses, and if assented to by them sealed up, and transmitted to the Court from which the commission issued. The (*i*) greater part of the enquêtes recorded in the Olim relate to civil matters, and especially to questions of seisin.

Meanwhile the influence of the civilians and canonists was never idle. Even into the feudal jurisprudence (if the words may be combined without a solecism) did the Roman law force its way, in the shape of decisions upon contracts, their names, their effect, their interpretation, and the manner in which they were to be fulfilled,—and when an opening was once made among so acute and intelligent a nation as the French, other principles followed. The mission (to borrow a phrase common to French writers) of the Roman law was to obliterate slowly and gradually on the Continent the traces of feudal barbarity, and to put in their place the principles of natural justice. That mission it accomplished. And when we compare the French Code with the obscure labyrinth of contradictory decisions in which the English suitor is left to find out his way, the difficulty of such a state of things being enhanced by a system of pleading of which a French jurist in the fourteenth century would have been ashamed, we must regret the complete success of the crafty men whom a protecting instinct led to combat the Roman law in this country. The progress of Roman and Canon law in France is testified by Beaumanoir (*k*), who enumerates eight kinds of proofs: confession; documents (lettres); duel; witnesses; record (*l*)

(*i*) See Appendix.

(*k*) Coutûme de Beauvoisis, c. 39; Olim, vol. 2, p. 947.

(*l*) Nulle manière de preuve doît être rechue (*i. e.* admitted) par la preuve du recoit; not even if the parties were willing to receive other evidence. Beaum. Cout. c. 39, § 6.

(recoit); an admission made in Court; notoriety (quand la chose qu'on a à prouver est si clair de soi-même qu'il n'y convient autre témoin); and presumptions. In his remarks on the validity of witnesses, he incorporates the doctrine of the Roman law.

The proceeding which he describes was substantially continued by the ordonnance of 1667, and is explained at length by Pothier (*m*). By the Code 252, *et seq.*, and which furnishes an excellent guide for those who wish to reform our pleading, the party who means to prove certain facts is to state them concisely, and if they are not denied or admitted by his adversary in three days they are to be taken as true.

Before 1667, it was necessary to write "requêtes, repliques, and dupliques" until the parties had agreed upon the facts to be proved. Judge, says a writer on French law (*n*), of the delay and expense of such a system! It was, he continues, to extirpate so detestable a system, that the ordonnance of 1667 (can an Englishman read the date without a blush?) said, and that the Code has repeated, that the facts are to be stated simply, without any argument or detail, the object merely being to state what it is intended to prove;—a tariff is fixed for the fee allowed for drawing up these facts, which can never, whatever the importance of the matter in dispute, be exceeded. Art. 2, 25. The reply contains the admission or denial of these facts, or objections to their relevance and admissibility. It does not follow because facts are denied that the enquête is to take place; they must be admissible, relevant, in the language of the Roman law, "ut intentioni (*o*) præbeant adminiculum."

The judgment ordering the enquête contains,

The facts to be proved,

The name of the judge before whom the proof is to be brought forward.

(*m*) Procédure civile et criminelle, 1. 127.

(*n*) Boucéane Théorie de la Procédure, p. 221, vol. 1.

256. "La preuve contraire sera de droit." But if the defendant means to confess the truth of the plaintiff's statement, and neutralize its effect by some other fact, he must ask for an enquête in his turn.

The Code has made one material improvement on the system established by the ordonnance 1667. It has admitted both parties to be present at the inquiry (261); whereas formerly the witness deposed in the presence of the commissioner alone, who took the depositions,—the parties after the oath had been administered to the witness being obliged to withdraw.

There are two cases in the French law where another proceeding is substituted for the examination of witnesses before a commissioner. These are, first, in certain civil cases where the inquiry is called summary; and again, in criminal investigations. First, let us consider the summary proceeding in civil matters.

Oral evidence was always allowed before the consular tribunal. This jurisdiction was established for the sake of commerce in the year 1563; and, to use the expression of one of Louis 14th's jurists, "God having blest the simplicity of the judges, consuls;" in other words, the advantages derived from the opportunity given to the judge of seeing and examining the witness, by the evidence of whom he was to be guided being so manifest; it was resolved by the framers of the ordonnance of 1667, tit. 7, art. 8, in spite of the remonstrances of Lamoignon, to introduce the oral system before tribunals that decided on summary matters. By the Law of the 6th October, 1790, which organized the method of proceeding en justice de paix, a third application of the summary mode of investigation was introduced. Cod. de Proc. art. 34, 40.

The summary matters which are settled before civil tribunals according to a more simple mode of proceeding, will be found in the 404th article of the Code de Procédure. To these

must be added all those which, by the first article of the Law of the 11th April, 1838, are within the jurisdiction of those tribunals. Thus, all matters judged without appeal are summary; but the converse of the proposition is not true, for in the majority of the instances cited, art. 404, Cod. Proc. civ., the matter is summary from its nature, whatever be the amount of the sum at issue.

In these summary cases it is not necessary that the facts should be "articulated" beforehand. The meaning of this is, that the facts may be "articulated," *i. e.*, stated particularly, when the cause is heard without the formalities and delay required by the law in cases of more importance. In cases before the tribunal of commerce, where an appeal lies, the depositions of the witnesses are to be taken down in writing by the clerk and signed by the witness (art. 432).

EXCLUSION OF PAROL EVIDENCE IN CIVIL CASES.

Weary of the ordeal and of compurgators, and of trial by battle, France returned to the system of vivâ voce evidence. "Sachez," says Bouteillier, who wrote A. D. 1400, "que la vive voix passe vigueur de lettres, si les témoins sont contraires aux lettres, et se doit plus le juge arrêter à la disposition des témoins qui, de saine mémoire, déposent et rendent sentence de leur dépositions, que à la teneur des lettres qui ne rendent cause." If this means that the evidence of a witness delivered vivâ voce, in the presence of a judge, is more satisfactory than his deposition, experience attests its truth. If it means, as it has been supposed by some to mean, that the statement of a stander by, who hears a contract made, is better evidence of the contract than the written instrument which contains its stipulations,—a doctrine more erroneous has been rarely promulgated. Whatever, however, may have been the original sense of the expression "témoins passent lettres," the errors that arose from the fallacious memory or the intentional fraud of witnesses were grievous.

In this, as in most other tracks of modern civilization, Italy took the lead. A statute of Bologna, which bears date A. D. 1453, and was ratified by Pope Nicholas 5, forbids oral proof of payments above 50 lire, and of contracts above the value of 100. And in 1498 the statutes of Milan forbid, in certain cases, the introduction of oral proof. A similar improvement took place in the 16th century in France, under the auspices of the illustrious L'Hôpital; and it was from the South, the "pays de droit écrit," that the suggestion emanated. The Parliament of Toulouse sent deputies to Charles 9 to the States General of Moulins, to solicit the regulation which afterwards became the 54th article of the Ordonnance A. D. 1566, and by which it is ordered, that all contracts for matters above the value of 100 livres shall be in writing. The only reason assigned in the preamble of this edict for its enactment is, the length and intricacy of legal proceedings. Still that the perjury of witnesses had risen to an alarming height we know from Loisel, who cites the legal proverb, "Fol est qui se met en enquête, car qui mieux abreuve, mieux preuve." When this edict was first passed, as it tended to make justice cheaper and more attainable, it encountered the virulent opposition of the great body of legal practitioners in France—men about as well qualified to form an opinion on any legislative measure as the carrier between Versailles and Paris would have been to write a Treatise on Geography. Boiceau, a contemporary writer, says accordingly, "Cum primum nata et promulgata fuit hæc Carol. 9, regia sanctio plerisque visa est, dura et odiosa, et juri contraria." But these clamours were silenced by every day's experience; and the same writer adds, that after a time "nulla toto hoc sæculo constitutio ac lex regia sanctior et probatior visa fuit amplissimo nostro Galliæ senatui."

The 54th article of the Ordonnance de Moulins was in substance transferred to the 2nd article of the 20th title of

the Ordonnance 1667, and is now engrafted in the article 1341 of the Code Civil.

Thus, in France, oral evidence is rejected in all matters of contract exceeding the value of 150 francs.

There are two exceptions to this rule.

One, where it was impossible for the creditor to procure oral evidence of the obligation on which he insists.

This exception comprises (*p*),—1. Obligations arising from "quasi contrats, délits et quasi délits." 2. Deposits made necessarily in cases of fire, ruin, tumults, shipwrecks, by guests at an inn. 3. Unforeseen accidents. 4. Where in consequence of an accident arising from "force majeure," the creditor has lost the instrument which furnished the literal proof.

The second exception is where there exists a "commencement de preuve par écrit." This expression signifies, among other things, any writing which has emanated from him against whom the demand is made, or from him whom he represents, and which makes the fact alleged probable. This principle has been established by a decision of the Court of Colmar, 21st April, 1848, and is acquiesced in by all the French authorities.

The extra judicial confession calls for no particular remark, it must be proved, like any other fact in the cause, and its value when proved is left to the appreciation of the judge; but in the § 1355 of the Code Civil, the legislator reminds us that a verbal confession of a debt, above the value of 150 francs is inadmissible.

It is remarkable that both in the Ordonnance of Louis 14, 1667, and the Code, the deposit is expressly mentioned as not

(*p*) This is borrowed from the Code de Testibus, L. 18. "Sin vero facta quidem per scripturam securitas est fortuito autem casu vel incendii vel naufragii vel alterius infortunii perempta tum liceat his qui hoc perpessi sunt causam peremptionis probantibus, etiam debiti solutionem per testem probare damnumque ex amissione instrumenti effugere."

being an exception to the rule excluding oral testimony, "même pour dépôts volontaires." This express mention of one particular contract is owing to the wish expressed by Cujacius after the Ordonnance de Moulins had appeared. "Velim excipi," said that great man, "sacri arcanique depositi causam." It was to guard against this intimation from such an authority that the deposit was specified.

Toullier is of opinion that the books of tradesmen kept in the manner required by the Code de Commerce, art. 54, are sufficient to furnish a "commencement de preuve par écrit," because it justifies the judge in putting the suppletory oath. He infers this from a comparison of the 1329 art. of the Code with the art. 1367. If then the judge may put the suppletory oath, à fortiori he may hear evidence "in coadjuvationem scripturæ" "non debet cui plus licet quod minus est non licere"—if you can walk ten miles you can walk five. The 1335 art., No. 2, provides, that certain copies of acts made from the original by the notary who drew the original, or his successor, or a public officer, who as such public officer was the person with whom the minute of the original article was deposited, may, if not thirty years old, serve as a "commencement de preuve par écrit," and that if not drawn by one of the people above described, whether of thirty years date or not, they shall only serve as a "commencement de preuve par écrit." The same rule 1336 applies to the copy of an act transcribed from an acte on the registry of the "conservateur des hypothéques."

THE OATH (*q*).

There are three kinds of oaths principally to be considered in the administration of civil justice according to the French law.

1st. The oath administered to the party examined "sur faits et articles."

(*q*) Molinæi Op., vol 3. In 4 lib. Codicis, p. 631.

2ndly. The serment décisoire.

3rdly. The oath administered by the judge.

INTERROGATOIRE SUR FAITS ET ARTICLES.

This is one of the portions of the Code in which the wisdom of its authors is least conspicuous. They have allowed a principle sound in itself, and fraught with important consequences, to be neutralized by formalities.

In all cases, and in every stage of the cause, the parties "peuvent demander de se faire interroger," on matters relevant to the subject of dispute without any delay of the proceedings.

The party examined is to answer in person, without reading any prepared statement, and without the assistance of counsel, the facts contained in the requête of his adversary, as well as to those which the judge may think it advisable to ask about.

If the party does not appear at the proper time, or appears and refuses to reply, the facts are to be taken as admitted.

1st. A copy of the faits and articles, on which the party is to be examined, is to be given to him twenty-four hours before the examination.

2ndly. The examination of the party takes place in private, before a single judge or commissioner, not in public before the judges, who are to decide the cause.

3rdly. The Code, in spite of the authority of Dumoulin, so energetically expressed, forbids the presence of the party requiring the interrogatory (*p*).

The first of these restrictions, the evil of which to a certain degree, however, is neutralized by the power of the judge to put such questions as he may think proper, was formerly censured by Lamoignon (*q*), and takes away the benefit of an unpremeditated answer to a legitimate question.

(*p*) "Et in hoc curiâ *Pessimé* judicavit."

(*q*) Lamoignon remarks:—"On peut dire au contraire que, lorsqu'on communique les faits, c'est donner le moyen de se préparer contre la vérité, laquelle n'a pas besoin de conseil pour se produire; chacun doit

The second deprives the judge of a most important ingredient in forming his opinion.

The third prevents the truth from being elicited, by questions which the cause of inquiry or the answer of the witness might at once suggest to a person conversant with the facts of the case; "et in hoc curia Pessimé judicavit," is Dumoulin's commentary on a decision by which he was excluded from hearing the interrogatory he had prepared for his adversary. Altogether, most people will think that this law justifies the language of Mr. Bellot, of Geneva, who, in his report on the law of practice, thus characterizes it. "If a legislator were to propose to himself the problem of the surest way of not attaining truth, the French code under this title will furnish him with its solution." Toullier says, that in consequence it is almost useless, and that this is one of the pasages where the inferiority of the Code de Procédure to the Code Civil is most remarkable.

savoir ce qui est de son fait, et ne saurait être tenu de répondre sur autre chose. D'ordinaire, ceux qui sont interrogés consultent bien moins leur conscience que le palais sur ce qu'ils ont à dire; ils apportent leurs réponses toutes faites; de sorte que tout l'effet de leur interrogatoire n'est que transcrire des réponses que la partie elle-même a rédigées par écrit. L'on n'a point vu qu'un homme préparé sur ce qu'il doit répondre, ait jamais perdu son procès par la bouche. C'est bien souvent l'occasion d'un parjure prémédité, qu'il serait beaucoup meilleur de retrancher; mais qu'au contraire, lorsqu'une partie vient prêter interrogatoire sans avoir eu communication des faits, il est difficile, quand ils sont bien dressés, qu'elle ne tombe dans quelque contradiction, lorsqu'elle veut déguiser la vérité; que, dans la province de Normandie, on se trouvait bien de cet usage, et qu'il serait peut-être avantageux pour la justice de le rendre général pour tout le royaume."

"M. Pussort, Commissaire du Roi, et redacteur du projet, ne répondit point à ces raisons décisives;" . . . . . .

"M. Pussort proposait même un article qui défendait aux juges *d'interroger d'office sur aucun fait dont il n'aura point été donné copie.* Mais cette fois-ci la raison l'emporta, et sur l'insistance de M. de Lamoignon, on inséra, dans l'art. 7, qu'en recevant les réponses sur chaque fait et article, le juge pourra *même d'office interroger sur aucuns faits, quoiqu'il n'en ait été donné copie.*"

The admissions on the interrogatory, "sur faits et articles," are conclusive against the maker, (art. 1356), and can be recalled only on the ground that they have arisen from an error in fact. This topic will be considered more in detail, under the title "*Confession.*"

THE OATH (*q*) OFFERED BY THE PARTIES.

The oath, "serment décisoire," offered and accepted, amounts to what the Roman lawyers called a "transactio," "speciem transactionis continet." It is a direct appeal to the adverse party himself, whom under the sanction of an oath it makes the judge in his own cause.

It may be offered, at any stage of the cause, in any matter of civil litigation.

If the party to whom it is offered refuses it, without referring it to his adversary he loses his cause, as does the adversary if the oath being referred to him he declines it. When the oath has been taken it is conclusive (*r*), and the party tendering it is not allowed to prove that the party who has taken it is perjured. The oath (*s*) cannot be tendered to a party who has a legal presumption (præsumptio juris et de jure) in his favour. It can only be tendered on a matter (*t*) within the personal knowledge of the party to whom it is offered.

The privilege of tendering this oath (serment décisoire) is that of the party; it cannot be tendered by the judge. It must be tendered in the course of a legal proceeding. Toullier

(*q*) "Quod in judicio pars defert pacte, vel etiam refertur, ut cum dico ad adversarium meum potes jurare rem esse tuam, dabo tibi vel si retulent adversarius meus mihi, imo si jures rem esse tuam, contineas eam." Molinæi Op., vol. 3, p. 637.

(*r*) Code Civil; Pothier Traité des Obligations, 817, *et seq.*; Art. 1357, *et seq.*; so Instit. de Act. 11, "Non illud quæritur an pecunia debeatur ed an juraverit;" and Dig. 21. 4. 3, de dolo.

(*s*) 1352, Cod. Civ.

(*t*) Such was the Roman law. "Hæredi ejus cum quo contractum est jusjurandum deferri non potest quoniam contractum ignorare potest."

calls this oath "le grand moyen de terminer les procès." The Romans called it "maximum remedium (*u*) expediendanum litium." It follows, from what has been said, that the right referred to the oath of the adverse party, must be one of which the party offering it can (*v*) legally dispose. Therefore, the minor cannot tender the oath, nor the married woman without the sanction of her husband; but if the oath be tendered to them, and they are ready to take it, the party tendering it cannot then retract his offer on the ground of their incapacity (art. 1125). It cannot be tendered or accepted by the agent, or the avoué, or procureur ad lites; nor by the guardian for a minor, unless under the forms prescribed (art. 4. 6, 7). The effect of this oath may be summed up in the words of the civilians, "Jusjurandum speciem transactionis continet majoremque habet auctoritatem quam res judicata," because from it there is no appeal.

1. SERMENT SUPPLÉTOIRE,—OATH TENDERED BY THE JUDGE.

This also is one of the parts of the French code in which its admirers would desire an alteration. If a party chooses to make use of the serment décisoire it is his own affair, and he has no right to complain of the consequence he has by his own act brought upon himself. But the case where the matter is referred, not by the party but by the judge to the oath of an adversary, is different, and the rule "iniquum est aliquem suæ rei judicem fieri," a maxim founded on the clearest notions of natural justice, is plainly violated. In speaking of the "interrogatoire sur faits et articles," Lamoignon remarks, that no man with the opportunity of framing a premeditated answer, "ait jamais perdu son procès par la bouche;" and

(*u*) 12. 2. 1. Dig.

(*v*) Boehmer jus. ecc.; Protest, tit. 10, de jurejur. Locum habet hæc delatio tantum in rebus privati arbitiri et de quibus transigi potest liberé. Cod. de reb. cred. 4. 1. Adeoque de quibus transigi nequit in iis nec delatione juramenti locus est. Molinæi Op., vol. 3, p. 635.

Pothier recommends the judge to abstain from exercising the right of offering the serment supplétoire, which, as he says, "ne sert qu'à donner occasion à une infinité de parjures." If a man is honest he will speak the truth without an oath; if he is dishonest, the oath will not restrain him. In forty years, continues Pothier, I have only seen two instances where men hesitated to swear what they had formally asserted.

The two texts (*w*) in the Roman law in which this doctrine, now incorporated with the Code, is founded, have been already quoted. These texts were (*x*) so construed by the gloss, were seized upon by Accursius, and the fullest latitude was given to their interpretation by the Canonists. The authors found the habit inveterate, and followed it without sufficient deliberation. The latitude, however, thus given to the judge has not escaped the notice of French jurists (*y*). Donellus comments upon it, observing that it leaves it absolutely in the power of a wicked or ignorant judge to decide "pro libidine" in favour of either party. The Canonists require a "semiplena probatio" to justify the judge in making use of this power, but what a "semiplena probatio" (*z*) is, has never accurately been ascertained (*a*). It corresponds, however, nearly

(*w*) Dig. 12. 2. 31; Cod. de reb. 4. 1. 3.

(*x*) Causa ex glossâ sententia judicata est, quam pro idolo habebant, says Heineccius. Dissert de lubriet; Jusjur. supplet.

(*y*) Cod. de Jure Civ. Lib. 24, c. 19. "Eâdem sententiâ semel receptâ magna fenestra aperta est malis et imperitis judicibus, pro libidine, pro hoc, aut pro illo pronunciandi. Quidquid enim pro alterutro allatum erit, semper judici color paratus est ad jusjurandum illi deferendum; dum dicit cum semiplené probasse, qui reverà nihil idoneum attulerit. Faciléque erit in spinosâ illâ, et perplexâ quæstione de semiplenâ probatione latebram sententiæ invenire." Donellus.

(*z*) "In criminalibus licet semiplene probatur non potest deferri juramentum." Molinæi, Op. vol. 3, p. 633. "Nec tantum in criminali causâ verum etiam in aliis causis, arduis et pecuniariis." Ibid.

(*a*) Dumoulin gives this description of the semiplena probatio:—Quot autem sunt species semiplenæ probationis gl. enumerat quatuor. Prima fit per unum testem. Secunda per scripturam privatam. Tertia per comparationem literarum. Quarta per fugam. 1. Primo omnium de

with the "commencement de preuve" of the French jurists. Nothing can be more vague than the passage in the Code which allows the oath when the case is not "totalement dennée de preuves," it makes success upon an appeal impossible.

The Code does not say whether the oath is to be offered to the plaintiff or defendant. The text writers have laid down certain principles deduced from a decretal (*z*) of Gregory 9th. It says, that unless the plaintiff makes out his case, the defendant ought to succeed, "etsi nihil præstiterit." But if the presumption is in the plaintiff's favour, the oath should be offered to the defendant "reo deferri potest juramentum." The same doctrine is stated by Pothier (*a*). In Pothier's time, the evidence of the witness, however irreproachable, would not have been sufficient to establish the claim of the plaintiff. The suppletory oath added to the evidence of that witness would complete the requisite proof. But as two witnesses are not required by the French code, the reason for keeping

teste dicamus unicus testis facit semiplenam probationem et sic probanti defertur juramentum . . . . . intelligite vero si est testis omni exceptione major—nam alias . . . . non semiplene probaret. An extra-judicial confession was a semiplena probatio. So a confession under torture and afterwards recalled. 2. Vox mortua, scriptura privata—vel domestica. There are, says Dumoulin, three sorts: 1. Apocha. 2. Libri rationum mercatorum. 3. Epistola. It is remarkable that Dumoulin here insists that the judge should see the face of the witness, "inspicere vultum testis," a principle considered essential to justice in some of our Courts, and inconsistent with it in others. I conclude, says Dumoulin, the whole topic, "privatæ scripturæ," by saying that they prove nothing unless supported testium subscriptione, or sigillo authentico; or if disputed, nisi per comparationem litterarum constet scripturam esse alicujus. The fourth species of the semiplena probatio is the fuga rei. Here, he says, we are to take the conclusion, quæ est humanior et mitior nec nisi coacti præsumere. So if a student leaves a town in which a murder has been committed, this furnishes no cause to believe him guilty of the murder. "Multa indicia requiruntur ad torturam." Flight alone is not sufficient. Vol. 3, p. 637, Lib. 4, Cod. tit. 1.

(*z*) Cap. ult. § 1. x. de jurejurando.

(*a*) 831, Traité des Oblig.

the old practice is at an end. In matters of great importance, causes of status and of marriage, the suppletory oath cannot be offered; neither can it be offered as to any facts not within the present knowledge of the party. He must have "notitiam sensualem."

One great difference between the oath décisoire and the suppletory oath is, that the latter cannot be transferred from and by the party to whom the judge has offered it, to his adversary; "aut jura, aut solve," swear or pay, is the language of the law. Neither can the judge retract or change his original offer. Another difference is, that when the serment décisoire has been tendered and taken, the perjury of him who has taken it cannot be proved, unless at the instance of the public prosecutor, nor even if it were proved, could the decision on that account be altered. But with the suppletory oath the case is different, because it is the act not of the party, but of the judge; and if any document has come to light clearly shewing the perjury of the opposite party, the judgment may be cancelled on appeal. This, the law from which this system is borrowed, de Jurejurando, 12. 2. 21, expressly permits, "Admonendi sumus etiam post jusjurandum exactum permitti constitutionibus principum, ex integra causam agere, si quis se nova instrumenta invenisse dicat, quibus nunc solis usurius sit. Sed hæc constitutio tunc videtur locum habere, cum à judice aliquis absolutus fuerit; solent enim sæpè judices, in causis dubiis, exacto jurejurando, secundum eum judicare qui juraverit. Quod si alias inter ipsos jurejurando transactum sit negotium, non conceditur eamdem causam retractare."

2. SERMENT "IN LITEM" SUR LA VALEUR DE LA CHOSE DEMANDÉE.

The second oath which the law allows the judge officially to tender, is that which is employed in certain cases to fix the value of the property in dispute; the Romans called it "in litem," the old authors "en plaids." There is a manifest

analogy between this oath and the suppletory oath, inasmuch as both are employed "inopiâ probationum," from the want of better testimony. The principle on which it rests, is that when the plaintiff has proved that the property in question is his own, and the value of that property alone remains to be decided, which value owing to the obstinacy or fraud, legal or moral, (dolus), of the defendant cannot otherwise be ascertained, the only remaining alternative, namely, the declaration on oath of its value from the party who has been deprived of it must be adopted. Sometimes the oath "in litem" was called the oath of affection, because the law to punish the bad faith of the adverse party, which made such a proceeding necessary, allowed the party swearing to make not the mercantile price, but his own affection for the article in question the standard of his estimation. This law found its way into the ancient customs of France, especially in that of Bretagne, drawn up A. D. 1330, c. 70.

The Code, article 1369, provides,

"Le serment sur la valeur de la chose demandée ne peut être déféré par le juge au demandeur, que lorsqu'il est d'ailleurs impossible de constater autrement cette valeur."

"Le juge doit même en ce cas déterminer la somme jusqu'à la concurrence de laquelle le demandeur en sera sur à son serment."

The great principle of this oath is, that it is "in odium spoliatoris," a class as much hated by the civil and canon law, as favoured by the feudal law, and till a late period, of which too many traces are still visible, by our own.

Besides this the oath in litem may be tendered, and it appears that in such it may be most eminently beneficial to the proprietors of public conveyances, voituriers, roulages publics, as well as to innkeepers. But the principle of the oath is extended still farther by the article 1781 of the code, which provides, that the oath of the master shall be taken (*b*),

(*b*) "Elle est a bien prier exacte au dernier point;
Mais elle bat ses gens et ne les paie point."
MISANTHROPE.

As to the sum agreed upon for wages.
As to the payment of the past year.
As to the à comptes given for the current year.

CONFESSION.

Confession is, by the French law, either judicial or extra judicial.

The judicial confession (aveu judiciaire), Code Civil 1356, is the declaration made to a tribunal by the party to a suit or his delegate.

It is conclusive against him who makes it.

It cannot be divided against him.

It cannot be recalled unless it be shewn that it is the consequence of an error in fact.

It is clear that the confession must be precise and complete, otherwise it could amount to no more than a "commencement de preuve par écrit," "certum confessus pro judicato *erit*; incertum *non* erit."

The principle of the indivisibility of a confession is to be adopted with certain limitations. It is not to be understood as meaning (*c*), that if the party making the confession chooses to couple with the confession the statement of an entirely collateral fact, the adversary is bound by the latter. So the Roman law allowed a confession to be divided, as Voet has explained very clearly (*d*); and the Court of Cassation has

(*c*) l. 26, § 2, ff., depos. "Titius Semproniis salutem: habere me a vobis auri pondo plus minus decem, et discos duos, saccum signatum: ex quibus debetis mihi decem quos apud Titium deposuistis, item quos Trophimati decem: item ex ratione patris vestri decem et quod excurrit. Quæro an ex hujusmodi scriptura aliqua obligatio nata sit, scilicet quod ad solam pecuniæ causam attinet? Respondit, ex epistola, de qua quæritur, obligationem quidem nullam natam videri, sed probationem depositarum rerum impleri posse. An autem is quoque, qui deberi sibi cavit in eadem epistola decem, probare possit hoc quod scripsit, judicem æstimaturum."

(*d*) "Equidem si plura sint capita confessionis separata, quorum unum haud dependet ab altero, nihil vetat quominus divisio confessionis admittatur, et accipiatur pars altera, altera rejiciatur: sicut unam partem senten-

several times acted upon the same principle. It has held a confession indivisible when the person stated that a sum had been paid to him, and at the same time the reason why the sum had been paid. So it has held a confession indivisible where the defendant admitted that he had received the sum, and then accounted for it. But it has held a confession divisible, or rather it has held that the principle of indivisibility did not apply where the debtor admitted the debt, and added to this confession a statement that he had advanced, on another occasion, a larger sum to the creditor.

In order to make a confession irrevocable, it must be accepted by the adversary. Till this has been done it may be withdrawn. Pothier, from whom this portion of the Code Civil is almost literally transcribed, defines a judicial confession, "l'aveu qu'une partie fait devant le juge d'un fait sur lequel elle est interrogée et dont *le juge donne acte*" (*f*).

PUBLIC WRITINGS.—WRITTEN EVIDENCE (*g*).—DE LA PREUVE LITTÉRALE. 1317, SEQ. COD. CIV.

The authentic act (*h*), says the Code, is that which has been received by public officers having the right to receive and draw up an instrument (instrumenter) in the place where the act has been drawn up, and with the requisite solemnities.

tiæ, quæ confessioni similis, admittere potest qui succumbit, et ei acquiescere, ab altera vero appellare. Sin omnia confessione comprehensa inter se connexa, et unius quasi actus continui factum contineant, non videtur circa eundem actum admittenda separatio, et proinde vel tota confessio acceptando est, vel tota rejicienda, cùm iniquum sit commoda quidem admittere, repudiare vero onera eidem cohærentia."

(*f*) Traité des Obligations, § 797. The edition of Dumoulin, from which I quote throughout, is that of Paris, 1681, printed by Guignard.

(*g*) Bonnier Traité des Preuves; Toullier, vol. 8, 9; Molinæi Op. tom. 1; Merlin Répertoire; Pothier, Ed. 1774, 8vo., Traité des Obligations, Procédure Civile et Criminelle; Domat Loix Civiles, Preuve par Témoins, Boiceau par Danty, 6 Ed. Paris, 1759.

(*h*) "1317. L'acte authentique est celui qui a été reçu par officiers publics ayant le droit d'instrumenter dans le lieu où l'acte a été redigé, et avec les solennités requises. (c. 1835; Pr. 545)."

There are four sorts of authentic acts (*h*).

1st. Legislative acts, such as treaties, &c.

2ndly. Judicial acts, comprising judgments and different sorts of instruments drawn up by officers of justice, and generally all the acts of the procédure.

3rdly. Administrative acts, emanating from the heads of different departments; *e. g.*, acts consigned in the public registers, such as those of the état civil, those preserved by the conservator of hypothecations, &c.

4thly. Actes notariés,—acts received by public officers, whom the French call notaries, and who were formerly called Tabelliones.

The effect of the authentic act is, that it is conclusive evidence, if genuine, of the contract it contains between the contracting parties, their heirs and representatives.

If the act is formally attacked as a forgery, execution under it is suspended, if incidentally the tribunals before whom it is attacked may suspend it provisionally.

"1318. L'acte qui n'est point authentique par l'incompétence ou l'incapacité de l'officier, ou par un défaut de forme, vaut comme écriture privée, s'il a été signé des parties. (1322 s.; Pr. copie de cet acte, 841 s.)."

"1319. L'acte authentique fait pleine foi de la convention qu'il renferme entre les parties contractantes et leurs héritiers ou ayant cause."

"Néanmoins, en cas de plaintes en faux principal, l'exécution de l'acte argué de faux sera suspendue par la mise en accusation; et, en cas d'inscription de faux faite incidemment, les tribunaux pourront, suivant les circonstances, suspendre provisoirement l'exécution de l'acte. (c. 1320 s., 1341; Pr. 214 s., 239 s., 250, 448; 1 Cr. 448 s., 460)."

"1320. L'acte, soit authentique, soit sous seing privé, fait foi entre les parties, même de ce qui n'y est exprimé qu'en termes énonciatifs, pourvu que l'énonciation ait un rapport directe à la disposition. Les énonciations étrangères à la disposition ne peuvent servir que d'un commencement de preuve. (c. 1325, 1341, 1347)."

"1321. Les contre-lettres ne peuvent avoir leur effet qu'entre les parties contractantes: elles n'ont point d'effet contre les tiers. (C. Convent. Matrim. 1396, 1397)."

(*h*) I use act for instrument, "id ἀυθεντικῶς nuntiabatur." Cic. Ep. ad Att. Lib. 10, § 9.

Under Louis 7 (*i*), all signatures were abolished; the mere enumeration of witnesses was used instead. This practice was common in the eleventh, and continued to the twelfth century. It was considered certain that some would survive the making of the deed,—thirty years; and by the law thirty years' possession gave a title by prescription.

Before the year 1560, the actes notariés were seldom signed by the contracting parties, at any rate their signature was immaterial to the validity of the act. The notary affixed the seal of the monarch, or of the feudal superior, to the act, and this was its attestation.

But the Ordonnance d'Orléans, under Charles 9th, 1560, enjoined all notaries to make the parties sign, s'ils savent (*k*) signer, and the witnesses, all acts, contracts, and testaments, under pain of nullity, and if the parties could not write, the notary was enjoined to mention that they had been required to sign. Nineteen years afterwards this law, which had been neglected, was renewed in the Ordonnance de Blois, 1579, under Henry 3rd. This law, with regard to wills, is upheld art. 973 of the Code Civil.

Even between the parties to a deed, the enunciativa, termes énonciatifs, are not conclusive as to points not relating to the purpose of the act, in such a case Dumoulin, whose opinion has been adopted by the authors of the Code, held that they amount only to a semiplena probatio. "If," says Pothier, "in the contract of sale of an inheritance which I have bought from Peter, it is stated (énoncé), that this inheritance comes to him as heir of James; a third party claiming to be a coheir of James, and bringing an action against me for the inheritance I purchased, cannot rest his demand on this declaration in the contract, that the property belonged to James at the time of

(*i*) Dict. Diplom. tit. Souscription; Mabillon de re Dipl. 168.

(*k*) This will not appear an insignificant exception to those who recollect the speech of Henry 4th: "With my constable who can't read, and my chancellor who knows no Latin, I am fit to encounter any king in Europe."

his (James's) death, though I was a party to the act containing this declaration, because it is absolutely foreign to the purpose of the act, and I had then no motive for opposing such a declaration." See art. 1320, Code Civil.

Suppose, says Dumoulin, a public instrument regularly authenticated, (an acte authentique), produced against Titius, not a party to it, nor standing in the place of one who is(*l*). What does such a document prove? *e. g.*, if Roland, a feudal baron, by such an instrument acknowledges the king as his feudal lord, regem patronum agnoscat, what is the effect of such a deed against Hugh? The effect of it is simply to prove, "rem ipsam," that Roland did make such a deed, containing such a statement, at such a time;—these facts are established. The genuineness of his signature and the cession cannot, in the ordinary course of justice, be impeached. That he stated such and such facts at such a time, and in such a place, is not to be questioned. But whether those facts be true or not, is a matter open to discussion, "non faciet fidem de contentis in eo, nisi contra ipsum et successores suos, non autem contra alios." If he states that some one else holds under any particular tenure, is that evidence against the other so described? Undoubtedly not,—"certe non."

An acte authentique then only proves against a third party the physical fact that such a document has been received by a legal officer. If the contract of sale of your estate declares that it has certain rights over mine, and that mine is in consequence liable to certain servitudes, you cannot avail yourself of such a declaration against me, inasmuch as I was no party to the deed containing these statements.

But there is an exception to this rule in the case of ancient deeds: "in antiquis," says Dumoulin, "enuntiativa probant."

Supposing the "acte" incomplete, from the incompetence of the notary, or some technical irregularity, still, if signed by the parties, it is conclusive between them. So the Roman

(*l*) Molinæi Op., tom. 1.

lawyers answered the question, an *in*utilis *acceptilatio utile* habeat *pactum*, in the affirmative; and Boiceau, Preuve par Témoins, liv. 2, c. 4, tells us the same principle was adopted in the sixteenth century. The principle is thus expressed by Dumoulin, ad Leg. 1, § 2, ff. de verb. Oblig. 234, "si actus non valet ut agitur, valeat ut valere potest, concurrente voluntate." But if the act expressing an unilateral contract, such as a loan, be signed by the party to be bound, subscriptio, as Boiceau says, facta per debitorem, it is sufficient.

Supposing that a person obtains a regular nomination as notary, who is an alien, and therefore by the French law incapable of acting as notary, would the acts drawn by him be valid? A parallel case arose in Rome, where a slave became prætor, and Ulpian decided that all he did was as valid as if he had been a lawful prætor, "verum facto nihil eorum reprobari." The same principle would be adopted in France; but the incapacity which vitiates the act is that which the parties employing the notary might have discovered,—as if the notary had been suspended or dismissed.

Besides the provisions mentioned, the Code ordains that the "actc," whether authentic or private, proves, as between the parties, what is expressed therein, even in "termes énonciatifs," provided that what is so enunciated bears directly on the subject-matter of the document. If it be foreign to it, it serves only as a "commencement de preuve."

CONTRE-LETTRES.

The word "contre-lettres," in its primitive acceptation, denotes every "acte" the purpose of which was to modify a former one. In this sense it is used by Domat, when he employs the word "contre-lettre" to denote the subsequent convention by which the buyer releases the seller from his guarantee. In its present meaning, however, the word usually means an "acte" intended to remain secret, by which a former and ostensible act is modified or annulled. By the 1321st

article of the Code Civil it is provided, that contre-lettres shall have no effect except between the contracting parties, and, with regard to third parties, shall be invalid.

PRIVATE WRITING (*m*).

The only way of getting rid of an authentic public document, acte authentique, is by an "inscription en faux." The French

(*m*) § ii. De l'acte sous seing privé.

"1322. L'Acte sous seing privé, reconnu par celui auquel on l'oppose, ou légalement tenu pour reconnu, a, entre ceux qui l'ont souscrit et entre leurs héritiers et ayant-cause, la même foi que l'acte authentique. (c. Titre. auth., 1317 s.; Contre les tiers, 1328; Preuve, 1341; Pr. Pr. verb. de conciliation, 54)."

"1323. Celui auquel on oppose un acte sous seing privé, est obligé d'avouer ou de désavouer formellement son écriture ou sa signature."

"Ses héritiers ou ayant-cause peuvent se contenter de déclarer qu'ils ne connaissent point l'écriture ou la signature de leur auteur. (Pr. 193 s.)."

"1324. Dans le cas où la partie désavoue son écriture ou sa signature, et dans le cas où ses héritiers ou ayant-cause déclarent ne les point connaître, la vérification en est ordonnée en justice. (Pr. 193 s.)."

"1325. Les actes sous seing privé qui contiennent des conventions synallagmatiques, ne sont valables qu'autant qu'ils ont été faits en autant d'originaux qu'il y a de parties ayant un intérêt distinct."

"Il suffit d'un original pour toutes les personnes ayant le même intérêt."

"Chaque original doit contenir la mention du nombre des originaux qui en ont été faits."

"Néanmoins le défaut de mention que les originaux ont été faits doubles, triples, etc., ne peut être opposé par celui qui a exécuté de sa part la convention portée dans l'acte. (c. 1102; Excep., 1318, 1320, 1322; Co. 39)."

"1326. Le billet ou la promesse sous seing privé par lequel une seule partie s'engage envers l'autre à lui payer une somme d'argent ou une chose appréciable, doit être écrit en entier de la main de celui qui le souscrit, ou du moins il faut qu'outre sa signature il ait écrit de sa main un bon ou un approuvé, portant en toutes lettres la somme ou la quantité de la chose;

"Excepté dans le cas où l'acte émane de marchands, artisans, laboureurs, vignerons, gens de journée et de service. (Co. 1 s.)."

"1327. Lorsque la somme exprimée au corps de l'acte est differente de celle exprimée au bon, l'obligation est presumée n'être que de la somme moindre, lors même que l'acte ainsi que le bon sont écrit en entier de la

law, as has been seen, recognises the validity of private acts: they amount to legal proof. But the proof is of two kinds,—as between the contracting parties certain conditions are sufficient to establish its validity; but with regard to third parties other conditions are requisite. The form is essential to the act.

1. As between the parties.

The only condition usually requisite is the signature of the party bound. In order to guard against the frauds which arose from the signatures annexed to blank paper, the 1326th article of the Code Civil provides, that the whole document by which a person binds himself to pay another a sum of money, or a thing which can be valued in money, shall be written by the hand of the subscriber, or at any rate there shall be written by his hand "bon," or "approuvé," stating

main de celui qui s'est obligé, à moins qu'il ne soit prouvé de quel côté est l'erreur. (c. 1162)."

"1328. Les actes sous seing privé n'ont de date contre les tiers que du jour où ils ont été enregistrés, du jour de la mort de celui ou de l'un de ceux qui les ont souscrits, ou du jour où leur substance est constatée dans des actes dressés par des officiers publics, tels que procès-verbaux, de scellé, ou d'inventaire."

"1329. Les registres des marchands ne font point, contre les personnes non marchandes, preuve des fournitures qui y sont portées, sauf ce qui sera dit à l'égard du serment. (c. 1366 s., 2101, No. 5, 2272; Co. 13)."

"1330. Les livres des marchands font preuve contre eux; mais celui qui en veut tirer avantage, ne peut les diviser en ce qu'ils contiennent de contraire à sa prétention. (c. 1350 s.; Co. 12 s., 84)."

"1331. Les registres et papiers domestiques ne font point un titre pour celui qui les a écrits. Ils font foi contre lui, 1, dans tous les cas où ils énoncent formellement un paiement reçu; 2, lorsqu'ils contiennent la mention expresse que la note a été faite pour suppléer le défaut du titre en faveur de celui au profit duquel ils énoncent une obligation. (c. 1350 s.; Co. 12 s., 84)."

"1332. L'écriture mise par le créancier à la suite, en marge ou au dos d'un titre qui est toujours resté en sa possession, fait foi, quoique non signée ni datée par lui, lorsqu'elle tend à établir la libération du débiteur."

"Il en est de même de l'écriture mise par le créancier au dos, ou en marge, ou à la suite du double d'un titre ou d'une quittance, pourvu que ce double soit entre les mains du débiteur. (c. 1350 s.)."

in full letters the sum or quantity of the thing. This rule is applicable only to unilateral acts. It does not apply to bills of exchange, though drawn by a person not a merchant; but it *does* apply to a mere "billet à ordre," which does not carry with it the "contrainte par corps." The bon or approuvé is necessary in such a billet à ordre, but not for the indorsement. Two decrees of the Court of Cassation have established, that the billet is, and the indorsement on the billet is not, subject to that necessity. If the sums in the body of the instrument and that mentioned in the bon differ, the instrument is not therefore null, but the Code, following the authority of Pothier, holds that it shall be good for the smaller amount only, unless, from other facts in the cause, the sum becomes a mere matter of arithmetical calculation.

COPY (*n*).

The transcription of a document, literally corresponding with the original, is called "a copy."

(*n*) § iv. Des copies des titres.

"1334. Les copies, lorsque le titre original subsiste, ne font foi que de ce qui est contenu au titre, dont la représentation peut toujours être exigée. (Pr. Compulsoire, 839 s., 852 s.)."

"1335. Lorsque le titre original n'existe plus, les copies font foi d'après les distinctions suivantes :"

"1. Les grosses ou premières expéditions font la même foi que l'original: il en est de même des copies qui ont été tirées par l'autorité du magistrat, parties présentes ou dûment appelées, ou de celles qui ont été tirées en présence des parties et de leur consentement reciproque."

"2. Les copies qui, sans l'autorité du magistrat, ou sans le consentement des parties, et depuis la délivrance des grosses ou premières expéditions, auront été tirées sur la minute de l'acte par le notaire qui l'a reçu, ou par l'un de ses successeurs, ou par officiers publics qui, en cette qualité, sont dépositaires des minutes, peuvent, au cas de perte de l'original, faire foi quand elles sont anciennes.

"Elles sont considerées comme anciennes quand elles ont plus de trente ans."

"Si elles ont moins de trente ans, elles ne peuvent servir que de commencement de preuve par écrit."

"3. Lorsque las copies tirées sur la minute d'un acte ne l'auront pas

The original of an "acte sous seing privé," is the writing signed by the parties who bind themselves to fulfil the obligations it contains.

If the act be unilateral there is usually but one original, signed by the party bound. This act is given to him in favour of whom the obligation is contracted,—as we say the obligee.

If the act contains synallagmatic stipulations, or mutual covenants, the Code requires that there shall be as many originals as there are parties interested.

The original of an "acte notarié" is the writing drawn up in the presence of the parties, "notaries," and witnesses, signed by such of them as can sign, or containing such a declaration as an excuse for their not signing as the Code requires. This original is called the "minute" (*o*) of the act.

Formerly (*p*) originals, for the sake of speed, were written in small characters,—hence the word "minute" (minuta scriptura). Copies written in larger characters, and without abbreviation, were afterwards delivered to the parties; these

été par le notaire qui l'a reçu, ou par l'un de ses successeurs, ou par officiers publics qui, en cette qualité, sont dépositaires des minutes, elles ne pourront servir, qu'elle que soit leur ancienneté, que de commencement de preuve par écrit."

"4. Les copies de copies pourront, suivant les circonstances, être considerées comme simple renseignemens. (c. 1283; Pr. 852 s.)."

"1336. La transcription d'un acte sur les registres publics ne pourra servir que de commencement de preuve par écrit, et il faudra même pour cela,

"1. Qu'il soit constant que toutes les minutes du notaire, de l'année dans laquelle l'acte parait avoir été fait, soient perdues, ou que l'on prouve que la perte de la minute de cet acte a été faite par un accident particulier."

"2. Qu'il existe un répertoire en règle du notaire, qui constate que l'acte a été fait à la même date."

"Lorsqu'au moyen du concours de ces deux circonstances la preuve par témoins sera admise, il sera necessaire que ceux qui ont été témoins de l'acte, s'ils existent encore, soient entendus. (c. 1347, 1348)."

(*o*) Minutes. (*p*) Dicte Dipl.

from the character, were called "grosses." The minutes or originals were also called briefs, brevs, or brevets.

By an Ordonnance of the 1st September, 1437, Charles 7 ordered the notaries to keep registers, in which the briefs of contracts and other acts by them received, even the receipts, should be written and enrolled, that if either party lost his brief he might have recourse to them. He also ordered a memorandum to be made on the register of the number of "grosses" delivered.

Subsequent Ordonnances,—that of A. D. 1539, art. 174, 175, that of Orléans, art. 83, 84, and that of Blois, art. 165,—required, that the minute should be inserted at full length on the register or protocol, and that the name of the notary with whom it was deposited should be written on the copy.

It has long ceased to be the custom for minutes to be made on a register. But the notaries who have drawn them up are bound to keep them, except in certain cases, such as certificates of life, receipts for rent, when the law authorizes them to part with the originals.

It is the original alone which forms the regular proof of the contract. There are, however, certain copies which, guaranteed by certain formalities and under certain circumstances, constitute sometimes a complete proof, sometimes a "commencement de preuve."

The copies spoken of by the Code are copies made by public officers.

The general rule, subject to these exceptions, remains to be considered. A copy is produced of an authentic document, —either it has been made under the sanction of the judge, and after the adversary has been summoned to witness the transcript, "judice authore et vocatâ parte," or not. In the first case it is, between the parties, the same as the original from which it is taken, "secus contra alium quia non faceret fidem."

Again, either it is a judicial act, in which case it extends

only to the parties in the suit wherein it was made, "non extenditur ad eos qui non in judicio fuerunt nec eis nocet;" or it is an extra-judicial act made solo consensu partium: in this case, says Dumoulin, it has at most "vim pacti" between the consenting parties.

It cannot, however, be withdrawn as against a person interested in the subject-matter equally with the consenting parties, as a co-heir or a surety, nor against an entire stranger if he would be indirectly prejudiced by such a proceeding.

Again, let us suppose, where the original would be evidence, a copy, solemnly attested and formally made as the law requires by a notary, produced against a third party. How far is it evidence? Either the party producing it has the original, and, though required, does not produce it, or he has not. If he has, the copy is of no effect, "propter suspicionem fraudis contra producentem;" and when the original is kept back, it is presumed that it contains something hostile to the purposes of him who is called upon to produce it, "ex quo occultatur originale præsumitur in aliquo contra intentionem occultantis laborare."

If, however, the original is not extant, not called for, or not within reach of the producer of the copy, I think, says Dumoulin, with due deference to better opinions, that it is not enough to constitute a proof, but a semi-proof. That is, at the time he wrote, enough, with the evidence of a single witness, to justify a decision in favour of the party producing it, because it has the testimony of a public officer, who asserts that he has compared it with the original; and this testimony is public and original, and conclusive against all, namely, that the tabellio or notary has given such an attestation. "Igitur saltem semiplene probat." There is, continues Dumoulin, a case where a mere private writing makes a complete proof, and that is when it is preserved in the public archives. This is another exception to the rule, "si illa scriptura sumpta esset ex archivio publico: tunc enim plene probat etiam si

carcat subscriptione notarii, testibus et aliis solemnibus instrumenti publici." Dumoulin explains public archives to be those of the "chambres des comptes," or of nobles who have the right of creating notaries.

In order to determine the authority of a copy, the first question is, is the document produced a copy of a private act, or of a public recognised instrument, "acte authentique?"

If the copy is taken from an authentic original, either it is itself authentic, that is, invested with the formalities which make an act authentic, or it is not. Dumoulin lays it down (*q*) that an authentic copy, when ancient, constitutes a complete proof against all persons, even against those by whom it has not been examined. Its antiquity is its guarantee. "Et tunc ratione antiquitatis puto quod plene probaret contra omnes quantum ipsum originale probaret. Ratio quia habet authenticum testimonium de authoritate et tenore originalis quondam solemniter confecti cui antiquitas loco cæterarum probationum quarum copiam justulit authoritatem plene fidei et probationis supplet." Again, if the copy be in fact a counterpart, drawn up ab eodem tabellione, with the same date, the same witnesses, and the same subscription; because, as Dumoulin says, "in effectu est verum originale" . . . "ut pote quum in primo originali non sit aliud nec plus (*r*) authoritatis quam in isto novissimo."

COPY OF A COPY.

That a copy of a copy is not evidence, may be known to the general reader from Locke's illustration, but long before Locke wrote, and, indeed, before our law of evidence existed, this was a maxim of French law: "exemplum exempli quod videlicet non est sumptum de originali authentico, sed de mero exemplo originalis authentici nullo modo probat," says

(*q*) Dumoulin, vol. 1, p. 264, tit. 1, De Fiefs. Ed. Paris, 1681.

(*r*) "Adverte," says Dumoulin, "doctores hic sibimet ipsis valde contrariari."

Dumoulin, and he adds, such evidence is on the footing of hearsay, "sicut testimonium de auditu auditus vel de auditu alieno," not even, says he, though it be taken from a copy most carefully compared with the original, in the presence and with the consent of the party whom it is sought to affect by it. But, he says, a copy of a copy may be evidence where the parties are the same, as when the first copy was taken against him in whose behalf the copy was taken from which the second copy has been made, unless he shews some reason to the contrary, in such a case he says "æque faciet istud exemplum exempli plenam fidem contra eos atque primum exemplum, vel originale ipsum." "What," he says, "if the original, the 'prototypon,' carefully copied, is destroyed, shall not that copy so carefully examined and collated with the original, be copied, lest the proof should by a similar accident be destroyed altogether, 'ne simili casu probatio funditus intereat'?" To deny this would be mere wanton injustice, "quod tam clarum puto, quam est æquum et non nisi ex protervia et iniquitate posset controverti." The case is different, he continues, if between the time when the first copy was made and the destruction of the original, something has occurred which furnishes a reasonable cause of dispute and contradiction. Suppose, he says, a relation, of whom I am the heir, leaves in his will a hundred crowns to Peter, one of his servants. The will is deposited with a notary. Peter, under a judge's order, has a copy taken of it in presence of my attorney. Afterwards, by paying the legacy, I admit the copy to be authentic. After this Thomas asks for a legacy of ten thousand crowns, which the copy of Peter's equally contains, and which he asserts is in the original;—meanwhile the original has perished. Thomas requires me to attend while he takes a copy from the copy of Peter, and of which he does in fact procure a transcript. Am I bound to admit this second copy? No, says Dumoulin, you are not, "quia nova contradicendi causa subest." The inconsiderable amount of

the first legacy, as well as other reasons, may have rendered you indifferent to the objections to which the authenticity of the will was liable then, and which if the original still existed you might now allege against it.

TRADESMEN'S BOOKS.

The principle, "nemo sibi propriâ manu debitorem ascribit," has been modified in France, by allowing the books of tradesmen to make evidence for the writers, or those in whose behalf they were kept. Though at first in the 16th century jurists on the Continent were divided on this point, the opinion of Dumoulin, that a book of a tradesman, properly kept, is evidence in his favour, has been embodied in the French Code. The law is,

"That the books, properly kept, of a tradesman, are evidence for him in an action against another tradesman. That against a person not a tradesman, the books of a tradesman furnish the commencement de preuve, which entitles the judge to offer the suppletory oath."

It must be understood, that the books are offered to prove the sale of the articles in which the tradesman deals. If, for instance, a haberdasher were to produce his books to shew that he had lent money to a customer, the evidence would not be received.

The books of tradesmen are, of course, evidence against those by whom they are kept. But they must not be taken in part by him who insists upon them.

This evidence is to a certain degree guaranteed, by the provisions of the Code de Commerce, which, among other things, requires every man engaged in trade to keep a livre journal, the contents of which the Code prescribes in considerable detail, to copy in a register the letters he sends, and to preserve en liasse those relating to his business, which he receives.

He is likewise required to make an inventory of his property

every year; these books are to be viséd by a public officer,—the livre journal and the inventory once a year. These books are to be kept for ten years; and unless they are kept, in the manner prescribed by the Code, they are inadmissible in Courts of justice.

If no books are kept, or if the books do not give a true account of his affairs, the tradesman is liable to be punished as a fraudulent bankrupt.

If the books enjoined by the Code are not kept, or if they are kept irregularly, the tradesman is not allowed to produce others.

EXCLUSION OF WITNESSES IN CIVIL CASES.

Under the old law, the power of assigning "reproches" to witnesses was almost unlimited. The Ordonnance of 1667, required only that they should be pertinent and circumstantial; such was the extent of the power of rejection, that the question seemed rather to be who should be admitted, than who should be rejected. By the article 283 of the Code de Procédure, the "reproches" fall under three heads; 1. Relationship; 2. Presumptions of partiality arising from certain facts; 3. Infamy.

The deposition of the témoin against whom the "reproche" is assigned is taken; but if the "reproche" is upheld it is not read.

The right of assigning a reproche belongs to the party, and cannot emanate from the judge.

The evidence of a single witness may be sufficient; but if more than five are brought to establish the same fact, the costs are borne by the party producing them. The Ordonnance of 1667, tit. 22, art. 21, allowed ten.

PRESUMPTIONS (*s*).

Presumptions are consequences, drawn from a known fact, to assist in the discovery of one that is unknown. They are drawn by the judge. In one class the proof they furnish varies in degree,—from almost certainty to insignificance; but the law does not interfere to decide upon the effect they are to produce. Such are the "præsumptiones hominis," "ex eo quod plerumque fit," and others which the magistrate must appreciate.

(*s*) Des Présomptions.

"1349. Les présomptions sont des conséquences que la loi ou le magistrat tire d'un fait connu à un fait inconnu."

§ i. Des présomptions établies par la loi.

"1350. La présomption légale est celle qui est attachée par une loi spéciale à certains actes ou à certains faits; tels sont,

"1. Les actes que la loi déclare nuls, comme présumés faits en fraude de ses dispositions, d'après leur seule qualité;

"2. Les cas dans lequels la loi déclare la propriété ou la libération résulter de certaines circonstances déterminées;

"3. L'autorité que la loi attribue à la chose jugée;

"4. La force que la loi attache à l'aveu de la partie ou à son serment. (c. Div. Présompt., 553, 653 s., 720 s., 911, 1099, 1330 s., 1333 s., 1365 s., 1525, 1569, 1908)."

"1351. L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité. (c. 2052, 2056; Pr. 478)."

"1352. La présomption légale dispense de toute preuve celui au profit duquel elle existe."

"Nulle preuve n'est admise contre la présomption de la loi, lorsque, sur le fondement de cette présomption, elle annulle certains actes ou dénie l'action en justice, à moins qu'elle n'ait réservé la preuve contraire, et sauf ce qui sera dit sur le serment et l'aveu judiciaires. (c. Exemp., 1354 s., 1357)."

§ ii. Des présomptions qui ne sont point établies par la loi.

"1353. Les présomptions qui ne sont point établies par la loi, sont abandonnées aux lumières et à la prudence du magistrat, qui ne doit admettre que des présomptions graves, précises, et concordantes, et dans les cas seulement où la loi admet les preuves testimoniales, à moins que

As to another class of presumptions the law does interfere, and requires the magistrates to give them a certain weight;—in other words, if the fact A. be proved, it obliges the judge to pronounce that fact B. has also taken place. This class of presumptions were called, in the barbarous language of the writers on the Roman law in the dark ages, "præsumptiones juris et de jure," against which no proof was admissible. Such, in the Roman law, was the maxim "in pari causâ possessor potior haberi debet." Such in the French law are the rules, that a receipt for the capital, without mention of the interest, imports payment of the interest (1908, Code Civil), and that the giving up of the deed proving a debt to the debtor, imports payment of the debt. The French Code enumerates four such presumptions.

THE PRESUMPTION DE LA CHOSE JUGÉE.

The doctrine of the French Code is taken from the Digest 42, 13. 14, de exceptione rei judicatæ, "modo idem corpus sit, idem jus, eadem qualitas, eadem causa petendi, eadem conditio personarum, quæ nisi omnia concurrant, alia res est."

That is a "chose jugée," the judgment on which is definitive, final, and from which, at the time of the dispute, there is no appeal, So the Roman law, "res judicata dicitur quæ finem controversiarum, pronuntiatione judicis accipit quod vel condemnatione vel absolutione contingit." Therefore a provisional or interlocutory sentence is not a "chose jugée;" "non omnis vox judicis, judicati continet auctoritatem." Cod. 7. 45. 1.

The Code does not indeed anywhere define the "chose jugée," but this was done by the Ordonnance of 1667, tit. 27, art. 5; and this is the rule which fixes the present law:

"Pour qu'un jugement ait l'autorité de la chose jugée, il faut qu'il soit définitif et contienne ou une condamnation ou un congé de demande." Favard v. Présomption.

The identity of the subject-matter of the dispute is of course an important element in this part of our inquiry.

A change in the body of the subject does not destroy the identity; for instance, if I sue for a flock of sheep and am defeated, the increase or diminution of the numbers will not enable me to recover after the previous judgment, "si petiero gregem et victus fuero et vel aucto vel minuto numero gregis iterum eundem gregem petam; obstabit mihi exceptio;" or if I demand any one of the sheep of which the flock consisted, my demand may still be met by the previous decision, "et si speciale corpus ex grege petam, si adfuit in eo grege, obstaturam mihi puto exceptionem." So if, after claiming land, I claim the trees growing on the land,—if, after claiming a house, I claim the materials of which it consists,—"si quis petierit fundum, mox arbores excisas ex eo fundo petat—aut insulam petierit deinde aream vel tigna vel lapides, item si navem petiero postea singulas tabulas vindicem,"—in all these cases the exceptio rei judicatæ is fatal to my demand. The principle "in toto et pars continetur," was followed out by the Roman jurists, (who were not fettered by our detestable system of methodized absurdity called special pleading), whether the object in dispute was material or immaterial, "nec interest utrum hoc in corpore quæratur; an in quantitate vel in jure." If, for instance, I have claimed a right over a particular farm, with cattle and horses (actus), or one still more extensive, a "via," and, after judgment has been given against my claim, demand a right more limited, a right to pass over it on foot, iter, the former judgment is conclusive, for "via, iter et actum in se continet." Dig. 8. 3. 1. But if, after the judgment, the "insula" (*t*) has been destroyed, I may sue neyertheless for some of the materials, for it does not follow that they, when the fabric is destroyed, belonged to the proprietor of the insula, "etenim cujus insula est non utique et cæmenta sunt, denique ea quæ fructa sunt ædibus alienis, separata dominus vindicare potest."

Among all the requisites for making the defence of the

(*t*) Insula "ædificium circuitum publicum vel privatum habens." Dirksen Manuale Latinitatis fontium juris civilis.

"chose jugée" conclusive, one of the most essential is undoubtedly the identity of the parties, "que la demande soit entre les mêmes parties." That no one should be condemned without being heard is a principle of natural justice, which can admit, in its strict and most limited sense, of no exception, and to which there is but one class of exceptions even if it be taken in a wider signification. Nothing illustrates more completely the rude and shapeless condition of our law, than the subject I am now about to consider. I have reserved the examination of it to the present time, though it involves an account of the Roman law, because the principle of the Roman law is embodied in French jurisprudence, and because the two systems corroborate and explain each other.

In the Roman law, then, there is no exception to the rule, that the thing required must be the same, before the exceptio rei judicatæ can be employed; but there is one exception to the rule that the parties must be the same, and this exception prevails equally in the French law.

This exception rests on very important motives, and it relates to causes of status ("causes d'état" in the French, "præjudicia, actiones præjudiciales," in the Roman law), questions affecting the condition of persons in the commonwealth, whether they are legitimate or spurious, whether they are citizens or aliens. These actions were called "præjudiciales," not because they were to precede or to determine other judgments, but because they determined beforehand all questions that depended on them, and all questions that might afterwards arise on the same subject-matter, though the parties to them were entirely different.

In the Institutes, de actionibus, § 13, these questions are enumerated; they are three:—

1st. Is a man free or slave?

2nd. Is he born free, or is he a libertinus?

3rd. Is he legitimate or spurious, born of such a father and such a mother? Was there a valid marriage between such persons?

To these questions another must be added,

Is he a citizen or a stranger?

The two first questions, thanks to the efforts of the great men of the last century, can no longer form any subject of inquiry in French jurisprudence. The others are of frequent occurrence.

Questions which concern the status of citizens are of such importance in civil society that they cannot remain uncertain. The judgment by which they are decided must be irrevocable, if (and on this condition I would fix particularly the attention of my readers as a most important element of jurisprudence) if there be a lawful opponent, that is, if the judgment pronounced be pronounced after an opposition instituted by the person whom the law considers the party properly and directly interested in opposing it,—a "contradicteur légitime:" in the words of D'Argentré, "le premier et principal intérêt;" in the words of Ulpian, "cum justo contradictore;" for, says the latter, "cum non justo contradictore perinde inefficax est decretum atque si nulla res intervenisset." For instance, in the Roman law, the "justus contradictor" of a man, whose free birth was in dispute, would have been the supposed patron. So in a case which I the rather mention, because ignorance of this rule had nearly confirmed an act of frightful injustice in our own country, in a case where the question turns upon the validity of a marriage, if there is a child born of the marriage, he is a "justus contradictor" (*u*), a person who must be represented, if the decision cancelling the marriage is to be binding upon him; if the children, says D'Argentré, were not parties to this decision, "ils resteraient sur leurs pieds pour se défendre de nouveau."

It is only in England, among civilized countries, that a court of justice would hold, that the son of a marriage has no right to impeach a decision by which, before he could speak,

(*u*) "Cum non justo contradictore quis ingenuus pronuntiatus est," etc. Dig. 43. 16, de collusione detegendâ.

he was declared illegitimate: such a proceeding could only take place where technical subtilty and jargon had stifled the plain dictates of reason and humanity (*t*).

It is not, says the Roman law, the want or collusion of an

(*t*) "Si ea persona desit cognitioni, quæ alicui status controversiam faciebat, in eadem causâ est, qui de libertate suâ litigat, quâ fuit, priùsquàm de libertate controversiam patiatur. Sané hoc lucratur, quod is qui eam status controversiam faciebat, amittit suam causam. Nec ea res ingenuum facit eum, qui non fuit; nec enim penuria adversarii ingenuitatem solet tribuere." Loi 27, § 1, ff. de liberali caus., 40. 12.

Dr. Phillimore has sent me the following note on this case of Meddowcroft *v.* Gregory :—

The case of Meddowcroft *v.* Gregory was originally a marriage question, in which the husband and wife were the only parties litigant. It was decided by Sir W. Scott in 1816, and the marriage was pronounced to be null and void. (See 2 Phill., p. 365, and 2 Hagg. 207.) It turned solely on the publication of banns under the surname of "Widdowcroft," instead of "Meddowcroft."

After the decision Meddowcroft contracted marriage with a person of the name of Hugonin, and died intestate. The widow by the second marriage took out administration to the effects of her husband.

In the meantime Meddowcroft's son by the first marriage came of age, and entertaining suspicions that his mother's marriage had been annulled by collusion, sought to obtain a revision of the sentence.

The difficulty was, how to raise any question on this subject in any Court. A marriage cause being only *inter vivos* could not by any possibility be revived, as one of the parties was dead.

Under my advice, and as the only means of raising the question of collusion, the first wife called in the administration which had been granted to the second wife, and set forth that the sentence of 1816 had been obtained by fraud and collusion. (See 3 Curt. p. 402.)

The allegation on the part of the first wife underwent much discussion, and the judge ultimately decided, that our averments were not, on our own shewing, capable of proof.

The case was appealed to the Judicial Committee of the Privy Council, who affirmed the sentence of Sir H. J. Fust. (See 4 Moore P. C. C. 399.)

It happened however that there was a large sum in the Court of Chancery to be distributed, under the will of an uncle of Meddowcroft, amongst relations in a certain degree of consanguinity.

If the marriage of 1816 had not been annulled, the young Meddowcroft would have been entitled to this property.

Accordingly, he endeavoured to establish his claim before the Master in Chancery, who rejected it; and then the question was raised by a bill of exceptions, tendered against the Master's report, before the Master of the Rolls.

The Master of the Rolls decided against the exceptions, but an appeal being interposed to the Lord High Chancellor, he directed an issue; but before the issue was brought to trial, the suit was compromised.

adversary that can confer a privilege or right on a party to a suit against others, "non enim penuria adversarii, ingenuitatem solet tribure."

Another requisite, to make decisions in cases of status binding upon third parties, is that it shall be the point immediately in question, and decided upon; if the status is incidentally decided, and is merely to be inferred from the decision this is not sufficient; there is a striking illustration in the law of the Digest, which refuses to allow the consequence, that Titius is the father of the child because he has been obliged to contribute to its support. "Meminisse oportet, etsi pronunciaverint ali oportere attamen eam rem præjudicium non facere veritati; nec enim pronunciatur filium esse, sed ali debere, et ita divus Marcus rescripsit." Loi 5, § 9, ff. de agnosc. lib. 25. 3. The rigour of this principle will be better understood, when it is recollected that before the judge could grant the means of support, the paternity or filiation of the person adjudged to provide them must have been proved to his satisfaction, "si constiterit filium vel parentem esse tunc ali jubebant si non constiterint, nec decernent alimenta" (*u*).

No doubt the result of this doctrine is, that the same cause will sometimes be decided differently by different tribunals; as D'Argentré says, "de deux frères fondés en mêmes droits, l'un perd sa cause, l'autre la gagne," and as the case in the Digest illustrates (*v*). But private interests must give way to the important principles, that a man is not to be condemned

(*u*) D'Aguesseau, vol. 2, Plaid 23.

(*v*) "Filius qui de inofficiosi actione adversus duos hæredes expertus, diversas sententias judicum tulit: et unum vicit, ab altero superatus est, et debitores convenire, et ipse à creditoribus conveniri, pro parte potest, et corpora vindicare, et hæreditatem dividere. Verum enim est, familiæ erciscundæ judicium competere, quia credimus eum legitimum hæredem pro parte esse factum, et ideo pars hæreditatis in testamento remansit. Nec absurdum videtur pro parte intestatum videri. Loi 15, ff. de inoffic. test. 5. 2; Papin., lib. 14, Quæst."

"Sæpe constitutum est res inter alios judicatas aliis non præjudicare. Veluti si ex duobus hæredibus debitoris alter condemnatur; nam alteri integra defensio est .... Item si ex duobus petitoribus, alter victus adquieverit, alterius portioni non præjudicatur. Idque ita rescriptum

unheard, and that a judgment not appealed against, between the same parties and for the same object, is conclusive.

Another question on which two of the great luminaries of French law were for a time divided, is that of the effect of a criminal sentence in a Court of civil justice; and here it has been settled that the parties in a criminal, cannot be considered the same as those in a civil action, and that the object of these investigations is different, the one being the redress of a private wrong, the other the display of a public example. The principle, therefore, "res inter alios judicata aliis nec nocet, nec prodest," must here also be considered to apply. Such too is the opinion of Clarus (*w*), "Talia acta, neque etiam sententia super ipso crimine lata, non faciunt fidem in judicio criminali."

With regard to the parties it may be observed, that the judgment against Titius is binding on his representative, "sont bien considérés," says Duranton, t. 13, n. 500, "comme une seule et même personne un défunt et son héritier, tellement que ce qui a été jugé en sa faveur est censé jugé contre le second ou à son profit," so the judgment in favour of the debtor against the creditor is conclusive in favour of the surety, the creditor cannot maintain that it is "res inter alios judicata;" so, in questions of real property, the "ayant-cause" is bound by the judgment given for or against the proprietor to whom he has succeeded. "Exceptio rei judicatæ nocebit ei qui in dominium successit ejus qui judicio expertus est." Dig. 44. 2. 28. I ought not, says the Roman lawyer, to stand in a better situation than he did whose rights have passed to me (*x*).

(*w*) Book 5, Question 64, p. 608, Ed. Lyons, 1672; Cit. Ap. Toullier, vol. 8, p. 36.

(*x*) Non debeo melioris conditionis esse quam auctor meus a quo jus in me transiit. Dig. 50. 17. 75, § 1.

PROOF IN COURTS OF CRIMINAL JUSTICE.

Under the old French law, by which I mean the law as it existed before the Revolution, the witnesses in criminal matters were heard in secret. This proceeding was called information, and not merely did it take place in the absence of the accuser and the accused, but the result was never published. The practice of confronting the accuser with the accused had been gradually introduced, but it was not universal, and was dispensed with for reasons altogether frivolous. It was, however, the general rule, that the deposition of a witness against a prisoner was of no effect, until they had been confronted. This secrecy could not escape the inquirers of the nineteenth century, to whom, in spite of ignorant calumniators, France and mankind owe so deep a debt of gratitude. "Est-ce à la justice à être secrète?" asked Voltaire; and the answer was given by the "assemblée constituante," 29th of September, 1791, when it was resolved that the examination of witnesses in criminal matters should be public. In the discussion which arose upon the manner in which the proceeding should be conducted, it was proposed by Tronchet that the statement of each witness should be read to him at the trial, after he had uttered it. But this scheme, which was not without plausibility, was successfully resisted by Thouret, on the ground of the length to which such a course would drag out every trial, and the little probability of fixing the attention of a jury during its continuance. It was also urged, that the consequence would be that the jury relying upon what was to be read would pay less regard to the demeanour of the witnesses. The Code (Inst. Crim. Act, 315) requires that the list of witnesses on both sides should be read by the greffier; their names, residence, and possessions, are to be given by the accused to the procureur général, and by the procureur général or partie civile to the

321, Code Civil, provides, that the summoning of witnesses by the accused, and the costs of those witnesses, shall be at his expense. But this is modified by the provision, that the procureur général may summon at the public cost any witnesses suggested to him by the accused, if in his opinion their evidence will contribute to the elucidation of truth; and in practice, the request of the accused is invariably complied with. Nothing certainly is more painful than to hear, in English Courts of justice, persons in the most abject poverty, complain that they cannot afford to bring their witnesses, or to maintain them during the trial. How can a labourer, flung into prison, bring his neighbours thirty or forty miles to give evidence in his behalf? This anomaly in our criminal proceedings will, perhaps, be set right when the responsibility of instituting criminal proceedings is at length taken from thief catchers and private caprice, and reposed in persons of education and professional experience. The witnesses are not allowed to depose in each others' presence. This appears to me a very salutary precaution, and one which we should do well to imitate.

The procureur général, the judge, and the jury, have alone the right of directly addressing the witnesses. The partie civile, the accused, or his counsel, must put their question through the president. In practice the question is seldom repeated by the president, who only adds, to the witness, "Répondez à la question qui vous est faite." If we criticize the system of examination in France, the French lawyers are equally shocked by the latitude given to counsel among us in cross-examination, which, says M. Rey, degenerates into a gross and common abuse: "Souvent ils font subir une véritable torture morale aux témoins par des questions captieuses ou inconvénantes, par des plaisanteries déplacées par des insinuations malignes et souvent insultantes. Ceux qui assistent aux débats des tribunaux Anglais sont à chaque instant

révoltés de la position cruelle dans laquelle se trouve placé un témoin timide, par la licence des avocats à cet égard."

If the president refuse to put a legitimate question, this vitiates the proceedings. After the witness has been heard, the witness is asked, if the accused is the person to whom his evidence applies, and the president asks the accused if he wishes to reply to what has been said.

EXCLUSION OF WITNESSES IN CRIMINAL TRIALS (*y*).

The Ordonnance of 1667, excluded relations to the eighth degree inclusively.

The Ordonnance of 1670 was silent on the matter.

The Code (322) (*z*) allows the accused the procureur général to object to the admission of certain persons as witnesses, and if objected to they cannot be sworn.

But the 269th article of the Code enables the president to summon and hear any person who can elucidate the facts in dispute, whether they are comprised in article 322 or not.

(*y*) "Pourront être reproches, les parens ou alliés de l'une ou de l'autre des parties jusqu'au degré de cousin issu de germain inclusivement; les parens et alliés des conjoints au degré ci-dessus, si le conjoint est vivant, ou si la partie ou le témoin en a des enfans vivans: en cas que le conjoint soit décédé, et qu'il n'ait pas laissé de descendans, pourront être reproches les parens et alliés en ligne directe, les frères, beaux-frères, sœurs, et belles-sœurs.

"Pourront aussi être reproches, le témoin héritier présomptif ou donataire; celui qui aura bu ou mangé avec la partie, et à ses frais, depuis la prononciation du jugement qui a ordonné l'enquête; celui qui aura donné des certificats sur les faits relatifs au procès; les serviteurs et domestiques; le témoin en état d'accusation; celui qui aura été condamné à une peine afflictive ou infamante, ou même à une peine correctionelle pour cause de vol."

"284. Le témoin reproche sera entendu dans sa déposition."

(*z*) "322. Ne pourront être reçues les dépositions,

"1. Du père de la mère, de l'aïcul, de l'aïeule, ou de tout autre ascendant de l'accusé ou de l'un des accusés présens et soumis au même débat."

These witnesses are not sworn. But for this article, the father who murdered one of his children in the presence of the mother might escape unpunished.

The law requiring the evidence of two witnesses for a conviction exists no longer. The maxim "testis unus testis nullus" had led to the torture, and to a maxim still more barbarous, that the evidence of two irreproachable witnesses who agreed in their statements ensured condemnation.

But this abuse was put an end to by the assemblée constituante, 1791, which laid down the principle of the "conviction intime," as that on which a jury was to act. This is almost literally transcribed in the Code, article 342, which substitutes moral appreciation for a technical standard, always fallacious, and often false; after the witness has given his evidence, the deposition he originally made may be read. (Cod. Inst. Crim. 317).

TORTURE (*a*).

It may, perhaps, be thought, that a history of the law of evidence ought to comprise some details concerning torture, a manner of obtaining evidence, which continued till the close of the last century to be the blot and scandal of continental

"2. Du fils, fille, petit-fils, petite-fille, ou de tout autre descendant."
"3. Des frères et sœurs."
"4. Des alliés aux mêmes degrés."
"5. Du mari ou de la femme, même après le divorce prononcé."
"6. Des dénonciateurs dont la dénonciation est récompensée pécuniairement par la loi."

"Sans néanmoins que l'audition des personnes ci-dessus désignées puisse opérer une nullité, lorsque, soit le procureur-général, soit la partie civile, soit les accusés, ne se sont pas opposés à ce qu'elles soient entendues. (1 Cr. 77, 82, 156, 408, 510 s.; P. 28, 42, 43, 378)."

(*a*) Poullain du Parc, l. 6, c. 23, vol. 12, p. 585, § 27. "Il y a une entière différence, entre l'interrogatoire de la question préparatoire, et celui de la question préalable ordonnée par le jugement de mort. Celle-ci n'a pour objet que la découverte des complices; et l'on n'a pas besoin de l'aveu du condamné, puisque son sort est décidé."

jurisprudence. Happily this is a subject which has ceased to be of any practical importance in civilized Europe.

The history (*a*) of this ecclesiastical addition to modern jurisprudence, (for such it was, that being the manner in which the mild doctrines of Christianity were exemplified by the church from the dark ages, down to a very recent period), ceased in France on the 1st of June, 1788, when the question préalable was abolished. This was the torture inflicted on a criminal condemned to death, in order to extort the names of his accomplices. Jousse (1770) defended it, on the ground that it was très utile, and that society could take no interest "a l'égard d'un corps confisqué et qui va être exécuté." The other torture, still more shocking to justice, was the "question préparatoire," and was inflicted after a certain amount of evidence had been obtained, in order to extort the confession of the accused. This was abolished in the year 1780, (August 24). Another division of torture, was, into the ordinaire and extraordinaire. Here, again, we may trace the beneficial effect of the great French writers (*b*) of the eighteenth century. Whatever may be *practised* in Austrian prisons, in the Piombi of Venice, or the caverns of Spielberg, where the flower of Italy has for centuries been doomed to perish, under the wholesome restraint of a paternal and protecting government, the use of torture is not *avowed*, now, even by the most brutal and stupid of all civilized despotisms,—for Russia, inhabited

(*a*) I translate the words of a very learned writer: "Diese *Kirchliche* erfindung." Warnkönig und Stein, vol. 3, p. 689.

(*b*) Voltaire, Dict. Phil. Torture. Long before this Montaigne raised the voice of philosophy against this infernal cruelty. Essais, l. 2, c. 5. "C'est une dangereuse invention que celle des gehennes et semble que ce soit plutôt un essai de patience que de vérité," &c. So did Grotius, Ep. 693, Ed. Amsterdam; Charron, l. 1, c. 4, No. 7; Mémoires de Tavannes, p. 223; Toureil, Essais de Jurisprudence, qu. 9; and La Bruyère, de quelques usages. Every body has read Beccaria. "Tant d'habiles gens et tant de beaux génies ont écrit contre cette pratique, que je n'ose parler après eux. J'allais dire . . . . . mais j'entends la voix de la nature qui crie contre moi." Montesquieu, l. 6, c. 17.

by a horde of corrupt and licentious slaves, belongs to the category of barbarous nations. Unless, therefore, the use of torture in the Papal States is revived under the tyranny of priests, by restoring which a republican government has earned the scorn and execration of the most remote posterity, all questions connected with a practice so degrading to human nature may be considered as obsolete. Whatever may be the case if Europe continues to retrace the path of improvement, as swiftly as she has done for the last year, it is not yet necessary to argue against the use of torture, as an instrument of discovering truth, sanctioned as it is by the practice of past ages and the full authority of the church. Those of our judges (*c*) who consider the wisdom (which means in matters of jurisprudence the ignorance) of our ancestors with most respect, are, fortunately for us, satisfied, as indeed they may be, with special pleading and the Court of Chancery. Some remarks that are immediately connected with the subject will find their place in the succeeding chapter.

(*c*) Poullain du Parc, vol. 12, loc. sup. cit., says, "Rien n'est plus juste que la question préalable."

CHAPTER IV.

LAW OF EVIDENCE IN ENGLAND, TO THE ACCESSION OF THE STUARTS.

SLOWLY, indeed, and with great difficulty have the principles on which English trial by jury now rests, as to the examination of witnesses, established themselves among us. Whatever the bigotry, and servility, and utter want of principle of lawyers on and off the Bench,—whatever the opposition of the servants of the Crown,—whatever the long apathy and childish veneration of the people could do, was done to prevent and arrest their progress; and if wiser and more humane principles have at last prevailed, we owe it not to the wisdom of our legislators, still less to the humanity of our judges, but to the fortunate and singular accidents, that obliged the English aristocracy to court the English people, and enlisting religious ardour on the side of civil freedom, gave to the maxims of truth and justice, an impulse without which their triumph would have been impossible; even as it is, that triumph in civil cases is far from complete, and in criminal cases was delayed to a period much later than is commonly supposed.

By far the majority of those lawyers who rose to eminence among us, from the days of the Plantagenets to those of Lord Eldon, have owed their elevation to servility, narrowness of mind, and ignorance, of all that statesmen and jurists ought to know. Rich, who told the Cambyses of English history, the destroyer of Sir Thomas More, while he was dripping with the blood of the wives whom he had employed his Parliaments to murder, 'that he resembled Samson in strength, Absalom in beauty, and 'Solomon in wisdom, was but the too faithful prototype of a series

of successors, men of grovelling views and sordid instincts, ready for the favour of a court to mangle the liberties of their fellow citizens, making the gratification of their vanity or, baser still of their avarice, the object of their aspirations, and the standard of ther happiness; but to all nobler aims, to all exalted sentiments, to the good of their country and their species, palsied, callous, and insensible. Sir Thomas More perished on the scaffold,—Clarendon in exile,—Lord Bacon could hardly atone for his genius by the most abject and unprincipled obedience to the most contemptible of mankind,—Lord Mansfield redeemed his great knowledge of jurisprudence, his fine accomplishments, and thorough contempt of English law, by upholding on all occasions the theory of the Divine right of kings, and endeavouring to stifle all free discussion,—Lord Somers, indeed, combined genius and success, and is the great exception to the rule, that mediocrity alone could command honour, and rivet its continuance.

The law of evidence as applied in the administration of justice in this country, is almost entirely the work of the judges. Although their interference in the other branches of the law (of which (*a*) that with regard to the Statute of Uses may be quoted as a striking and most mischievous instance) is sufficiently visible,—in no department have they assumed the task of legislation, a task for which generally they are unfit, and from which, except

(*a*) 27 Hen. 8, c. 10. "There seems little doubt," says Mr. Butler, Co. Litt. vol. 2, p. 272, d., "that the intention of the Legislature in passing this act was utterly to annihilate the existence of uses considered as distinct from the possession. BUT THEY HAVE BEEN PRESERVED UNDER THE APPELLATION OF 'TRUSTS.' The Court hesitated much before they allowed them under this new name." In other words, before they overruled by a wretched quibble the plain words of an act of Parliament. This is a thorough specimen of English jurisprudence, and of the way in which we allow ourselves to be imposed upon. An act of Parliament is passed for a great national object—to abolish uses. The judges gravely restore the very identical evil under the name of trusts. Everybody acquiesces, and every thing goes on as smoothly as possible, without one syllable of contradiction or remonstrance,—till the law of landed property has reached its present disgraceful condition.

as to matters of practice, they ought most rigidly to be excluded, so openly and undeniably as in this. This part of our law, therefore, in addition to its other claims upon the interest of a philosophical inquirer, deserves particular notice, both as it illustrates some of the evils peculiar to the way in which justice is administered among us, and as, by the changes it has undergone without any syllable of legislative interference, it exemplifies the progress of opinion in those raised to high judicial stations from the days of the Tudors to our own. Perhaps it may suggest some feelings of surprise at the passive submission of our legislators to the barefaced encroachments and usurpations of the judges, and some doubts as to the wisdom of that implicit acquiescence in their opinion on matters of legislation, by means of which wager of law and trial by battle existed in the year 1820, and to which so many other absurdities, hardly less shocking, and daily depriving individuals of their clearest rights, are still indebted for their preservation.

It is difficult to read with patience the history of those judicial murders which, under the name of State Trials, disfigure, even in the reign of George the Second, the pages of English history. That amid the gloom of despotism, crimes should be committed in Courts of law under the name of justice, is what every one can understand; but that in the light of day, under the name of freedom, and in public, Courts of justice should be the scene of abominations as foul as those by which the dens of tyranny were ever polluted,—that the most recent and positive laws should be treated as dead letters, and the blood of the innocent be poured out like water by hired murderers, in the garb of an educated class, with the cant of legal phraseology on their lips, and amid the superstitious veneration for forms which seems to be indelibly stamped on the English nature, as it proves that power in bad hands can never be at a loss for instruments, so it also proves that without the most incessant vigilance, without the suspicious spirit of constitutional freedom, all the guarantees of

public right and private safety are unavailing and even mischievous.

Much as it may astonish those who, led away by the commonplace topics of trial by jury and English justice, have never examined the relative condition of England and other countries as to the administration of law,—France and Spain can each boast of one more memorable example of judicial respect for constitutional right and judicial purity than England can exhibit, during the sixteenth and seventeenth centuries. We shall look in vain, during the times of the Cokes, the Scroggs, the Jeffreys, and the Saunders, for any instance of firmness and integrity to be placed in comparison either with the spirit which tore Antonio Perez from the iron grasp of Philip 2, and kindled the dying embers of Aragonese liberty into a flame, or with the noble independence of the French magistrates, who obstinately refused to sacrifice Fouquet, guilty as he most undoubtedly was, and deserving of a punishment less severe, to the rage of an offended master, and on whom, in order to extort a severer sentence, all the influence of Colbert and of Louis 14th, all the blandishments of insinuation, and all the frowns of power, were employed, and, to the immortal honour of these ministers be it spoken, were employed in vain. And these were men, not like the juries who allowed themselves to be the passive instruments of Jeffreys and of Sawyer one day, and of Titus Oates and Shaftesbury the next, men taken for a particular purpose from the mass of their fellow citizens, and as soon as that purpose was accomplished, restored to it again, unnoticed and unseen, —but men known and prominent, filling situations which made them the mark and lasting object of royal resentment and revenge (*a*).

(*a*) And bitterly did Louis cherish the recollection of his defeat. He had received from one of the judges to whom he applied to pronounce a capital sentence, the noble answer, that he would do what his honour and conscience dictated. Twenty years afterwards, when the son of this

If we examine the law of evidence minutely, we shall find little reason to doubt that the canonists were its first authors. The 4th cap. of the 6 Rich. 2, enacting that an exemplification of the deeds destroyed in the rebellion, under the Great Seal, shall be evidence, is evidently drawn by a canonist, and proves that the principles of evidence were not unknown at that period. The canonists borrowed largely from the civil law, but as every consideration was with them subordinate to that of establishing the authority and increasing the usurpations of the church, they perverted and warped the doctrines of the civilians, in England as elsewhere, to that particular purpose. The English system, which seems to have possessed a sort of magnetic attraction for all that was most hostile to substantial justice in the Norman and ecclesiastical code, was moulded at a period when the knowledge of jurisprudence among us was every day decreasing, and participates largely, as under such circumstances it was natural to expect that it would, in the evils of that gloomy and inauspicious æra.

But this is not all. The implicit admirers of English jurisprudence have more to learn. Not only were the judges corrupt, the jury slavish, and the law cruel and absurd,—not only were extracts of the prisoner's statements, and the hearsay statements of others, so garbled as to give a totally different impression from that which they were intended to convey, read against him,—not only were all the principles which we now consider most important, many of which had been recognised by continental jurists, utterly disregarded in state and indeed in most criminal prosecutions, but in order to extort evidence, torture, and torture of the most excruciating kind,

magistrate applied to him for promotion, he that he would do what his honour and conscience dictated

The conduct of Madame de Sevigné, La Fontaine, and Pellisson, was most noble. The Mémoires of the latter in defence of Fouquet are models of eloquence. Œuvres, vol. 3.

was inflicted, sometimes (*b*) upon the prisoner himself, sometimes upon those who, it was supposed, might give evidence against him. Anne Askew (*c*) was tortured by no less a person than the Chancellor Wriothesly himself, who, when the Lieutenant of the Tower refused, in spite of menaces, any longer to be the instrument of such ferocity, applied his own hand to the rack, and almost tore asunder the body of his victim. Lord Bacon tells James 1, that he examined Peacham before the tortures, between the tortures, *during* the torture, and after the tortures.

Sir E. Coke, who tells us that the infliction of torture is contrary to law and wholly unjustifiable, repeatedly directed and witnessed its infliction. And when the wonted tortures failed, when there were spirits whom nerves goaded into agony, whom rending limbs and bursting veins, the hoop, the gauntlet, and the rack could not overcome, other means were employed, and the state prisons of England were the theatre of tragic scenes that might rival those which the pen of Dante alone could adequately describe. Famine was employed where violence was ineffectual (*d*); and we have an account of a state prisoner, in the agony of his sufferings, eating the clay out of the walls of his prison, and striving to catch the droppings from the roof. It is remarkable, that on the last occasion that it was publicly proposed to employ torture in England,

(*b*) "Campion the Jesuit," says Lord Burleigh's apologist, or rather Lord Burleigh, "was never so racked as not to be able to write."

(*c*) To extort evidence against some Court ladies.

(*d*) The account of the tortures inflicted on Garnet and Fawkes are horrible. Owen killed himself in James's time to avoid a second infliction of torture. Raleigh expresses the greatest dread of it. 27 Hen. 8, c. 4, against pirates, says, they will not confess "without torture or pains." Hatton, on one trial, asks a witness, "was not all this willingly confessed—without menacing, without torture, or fear of torture?" "In England," says Selden, "they take a man and rack him, I do not know why, when somebody bids."

the menace came from Laud (*d*). It was natural that such a proposal should come from a cruel hypocrite, "too bloody," as one of Charles's supporters called him, "for his coat," the persecutor of his benefactor (*e*) and of his countrymen, the enemy of all that was free, generous, and humane,—combining all that was most narrow and most odious in the character of the lawyer and the priest. The judges, however, declared that torture was illegal, and refused to sanction its employment. Nevertheless, a warrant exists, of the year 1640, which shews that Charles the First continued to indulge himself and Laud with its occasional infliction.

The reign of Henry 8 is an everlasting stain on the character of the English nation. A tyrant more horrible, stained with fouler crimes and redeemed by fewer virtues, does not sully the page of modern history; and he found willing accomplices for his worst actions, in the prelates, nobles, and commonalty of the realm,—in Howard, in Cranmer, and in his parliaments.

The reign of his son is marked by two beneficial acts on the law of high treason; two (*f*) witnesses are required in support of such a charge, and that they be brought face to face with the accused. These acts became in one very important particular

(*d*) "When Felton, upon his examination at the council board, declared, as he had always done, that no man living had instigated him to the murder of the Duke of Buckingham, or knew of his intention, the Bishop of London (Laud) said to him, 'If you will not confess you must go to the rack.' The man replied, 'If it must be so, I know not whom I may accuse in the extremity of the torture,—Bishop Laud, perhaps, or any lord at this board.'"

"Sound sense in the mouth of an enthusiast and a ruffian."

"*Laud having proposed the rack*, the matter was shortly debated at the board, and it ended in a reference to the judges, who unanimously resolved, that the rack cannot be legally used." Crown Law, p. 244. I quote from Mr. Justice Foster; a most redeeming name, a judge remarkable in a period of almost unmixed corruption, coarseness, and ignorance, for masculine sense, deep knowledge, and spotless purity,—the Patteson (what higher praise can be given?) of a former age.

a dead letter, in consequence of the wickedness of those entrusted with the administration of the law.

Here, again, in the clause requiring two witnesses to establish an act of treason, we may trace the influence of the Canon law.

These provisions are repeated 2 & 3 Ph. and M. c. 10, s. 11, whereby it is provided, "that all and every such person as shall write, declare, confess, or depose any thing or things against the person to be arraigned, shall, if living and within the realm, be brought forth in person before the party accused, if he require the same, and say openly in his hearing what they or any of them can say against him." I add my Lord Coke's commentary on this provision, as it clearly shews that the iniquity of the man was deliberate and intentional. "Two lawful accusers" (Institutes, vol. 3, p. 25), "in the act of 5 Edw. 6, are taken for two lawful witnesses, for by two lawful accusers, and accused by two lawful witnesses, is all one, which word (accusers) was used because two witnesses ought directly to accuse, that is charge, the prisoner, for other accusers have we none in the common law, and therefore such accusers must be such accusers as the law allows. And so was it resolved in Lumley's case by the justices, for if accusers should not be so taken, there must be two accusers by 5 Edw. 6, and two witnesses by 1 Edw. 6."

Again, in his 2nd Institute, vol. 4, p. 278, Lord Coke lays down the rules to be observed by commissioners in taking interrogatories, which are extremely just and proper, and directly at variance with the conduct he himself found it expedient to pursue. "Interrogatories ought to be single and plain, pertinent to the matter in question, and in no sort captious, leading, or directory." But a passage follows which clearly shews how thoroughly conscious the judges and crown lawyers of those days must have been of the enormous injustice that they hired themselves to perpetrate. "In some cases the Courts of the common law do judge upon witnesses, but they must *ever* give their evidence *vivâ voce*. Witness is derived

from the Saxon word weten scire." "Quia," the shameless pedant proceeds, quoting the Year Book, 8 Hen. 6, c. 13, "de quibus *sciunt testari debent* et omne sacramentum debet esse certæ scientiæ." And the writer of this is the man who shed the best blood of England on hearsay, repeated at second or third hand by witnesses whom, though within the reach of his voice, he refused to bring before the prisoner.

The first trial (*c*) to which I would particularly call the reader's attention is that of Thomas Duke of Norfolk for high treason, in the reign of Queen Elizabeth, in the year 1571. He was beyond all doubt her noblest subject. And Hume has completely misrepresented the character of the proceedings at his trial. His words are extremely characteristic:—

"The trial was quite regular, even according to the strict rules observed at present in these matters, except that the witnesses gave not their evidence in Court, and were not confronted with the prisoner, a laudable practice *which was not at that time observed in trials for high treason.*"

Now, in the first place, is it credible that Hume should put aside altogether, either from ignorance or, as is more probable, from utter indifference to truth, the statute 5 & 6 Edw. 6, c. 11, passed therefore in the year 1552, not more than twenty years before this very trial—1571, in which it is carefully provided, that no person shall be convicted of treason but upon the oath of two witnesses, "which two accusers, at the time of the arraignment of the party accused, shall be brought in person before the party so accused, and avow and maintain that that they have to say against the said party to prove him guilty of the treasons or offences contained in the bill of indictment

(*c*) Phillipps's State Trials Reviewed, vol. 1. In the vindication of Lord Burleigh to which I have before referred, (Somers' Tracts, vol. 1, p. 216), and which was certainly written under his eye, it is said, "that the warders, whose office and act it was to handle the rack, were ever specially charged to use it in as charitable a manner as such a thing might be."

laid against the party arraigned, unless the said party arraigned shall willingly and without violence (*i. e.* torture) confess the same;" and its express corroboration by the 1 & 2 Ph. and M., c. 10, s. 2, in the year 1554? The Crown lawyers and judges indeed destroyed the effect of this beneficial statute, and obstinately refused its benefit to state prisoners. But Throckmorton, in Mary's time, had insisted upon it, and demanded that, instead of reading examinations, the witnesses should be brought against him face to face (*d*).

Secondly, so far is it from being true that the proceedings were regular in other respects, "according to the strict rules held at present in these matters," that at the very outset of the trial the Queen's Serjeant urges the Duke to confess his knowledge of a circumstance material to the prosecution. To which the Duke answered, "I pray you not to teach me how to answer and confess." "We pray your grace," says the Queen's Serjeant, in reply, "that he may directly answer." The Duke, being overruled by the High Steward, does make a qualified answer. The Serjeant, however, requires him to "say plainly." The noble victim answered, "You handle me hardly; you would so trap me by circumstance and infer upon me that she was the Queen's enemy, and so make me a traitor. I will answer directly to the whole matter of my dealing with her."

Serjt.—"Answer to the parts as they fall out. Did you know that she claimed the present possession of the Crown? that she usurped the arms and royal style of this realm? and that she made no renunciation of that usurped pretence? If you say you knew it not, we will prove every part of it."

Duke.—"I did not know it in such sort as is alleged. I know that renunciation of that claim was offered, and upon certain causes respited."

(*d*) The judges decided that 1 & 2 Ph. and M., c. 10, repealed the provision of the statutes of Edw. 6, requiring two witnesses. But it is clear, from the passage cited, that Sir E. Coke knew it to be otherwise.

Serjt.—"It is well known, and yourself then knew it, that the Scottish Queen claimed the present possession of the Crown of England, quartered the arms of England with the arms of Scotland, and usurped the style of this realm; and that there was a French power sent to prosecute it by invading this land by the way of Scotland."

The Queen's Serjeant then enters into a detail of the Queen of Scotland's proceeding, on which the Duke makes the obvious remark, "What is this to me? I need not defend her doings, I like them not. . . . . Answer it who will for me." The case proceeds; and the Queen's Serjeant, having asserted that the Duke of Norfolk had been at Lyth, Lord Burleigh, one of the judges, interposed, "You were best proceed with your evidence; you may mistake: my Lord Norfolk had not then been at Lyth, otherwise than he and I were there once secretly in a morning." The Serjeant, it seems, had mistaken "at Lyth," which, in the dialect of the barbarous Scotch, meant "at length," for a place. Then was produced the examination of the Bishop of Ross, in which what Mary had stated to him was stated. A great deal more hearsay evidence is insisted on by the Queen's counsel, to which the Duke again replies, "What if all this be true? What is this to the matter? Any dealing of mine with the Scottish Queen, by my sister Scroope's means, I utterly deny. As for Ledington, and the Bishop of Ross, what their speeches were to me, I care not; I am to answer but for mine own speeches."

Serjt.—"The Bishop of Ross accuseth you of your own speeches, and this he doth, being examined freely and without any compulsion."

Duke.—"He is a Scot."

Serjt.—"A Scot is a Christian man."

An extract of a letter was read, from the Earl of Murray. Another copy of a letter from the Bishop of Ross to the Queen. The Duke says, "Here be many things and many parts very hard for me to remember."

Murray's letter is introduced in this manner: (and the trial, it should be recollected, was printed by authority, and is evidently garbled to serve the purpose of those in power):—

"Here was alleged how a letter had been written to the Earl of Murray, requiring to be advertised by him of so much as he knew concerning the doings of the Duke of Norfolk, both for the matter of the commission and the practice of his marriage with the Scottish Queen; and the Earl Murray's answer to the same letter was read and produced as followeth: . . . . ."

"Note: that the *beginning and ending of this letter was not read;* but so much only as pertained to the matter."

After a speech of the Duke's, the Serjeant said, "Your answer is only but a denial. Ledington and the rest write otherwise . . . . And besides Ledington's conference with you, both the Bishop of Ross and the Earl Murray affirm your practising with them to the same intent, which is sufficient proof against your own bare denial."

Duke.—"The Earl Murray sought my life; the others are not of credit: yet all these prove not I dealt not in the matter of the marriage with the Scottish Queen, in any respect of her claim to the Crown of England. If the Bishop of Ross, or any other, can say otherwise, *let them be brought before me face to face.* I have often so desired it, but I could not obtain it. The Bishop of Ross confesses this was his own hand."

A copy, under the Regent Murray's hand, of the Duke's letter to the Regent, was then put in. The Duke insisted that the objectionable passages had never been written by him. The counsel then quoted Elizabeth's own statement.

Duke.—"I may not nor will not stand against her Majesty's testimony."

A letter of the Duke is then put in, stating much adverse to Mary; on which the Duke remarks, "This maketh for me." This just observation is met by one of those remarks

so truly characteristic of the bloodhounds of the Crown. "There were others joined with you in the letter, so that you could not otherwise write, however you otherwise dealt . . . . . Now you shall hear your own report against her to Bannister."

Duke.—"*Bannister was shrewdly cramped when he told that tale.* I beseech you let me have him brought face to face."

Serjt.—"No more tortured than you were (*d*)."

Then was read Bannister's confession in October, 12 Eliz.

The Duke again repeated his desire to see the witnesses against him face to face. "I pray you let them be brought face to face to me; I have often required it, and the law I trust is so." To answer this, the counsel for the Crown have recourse to a deliberate falsehood. "The law *was so for a time, in some cases* for treason; but *since, the law hath been found too hard*, and dangerous for the Prince, and it *hath been repealed.*" Again the Duke, on hearing the confession of the Bishop of Ross read against him, says, "It is of good ground that I have prayed to have the Bishop of Ross brought to me in private examination *face to face* (*e*), whereby I might have put him in remembrance of truth; but I have not had him

(*d*) N.B. This was a deliberate falsehood. The letter of Sir T. Smith to Lord Burleigh, giving an account of the torture, is extant;—"of Bannister with the rack—of Barker with extreme fear of it, we have gotten all." Sir Thomas Smith, who had printed his opinion "that it is against the law of England to torture," was the very person to whom the warrant to torture Bannister was directed, and by whom it was executed. In spite of Mr. Jardine's remarks, Crim. Trials, vol. 1, p. 14, I cannot think Smith's expressions of disgust, in a letter to Lord Burleigh, any sort of palliation for his conduct. Ellis's Original Letters, vol. 2, p. 260.

(*e*) Such was the Roman law, though perverted by the ecclesiastics for their own purposes. "In causis criminalibus testibus non testimoniis creditur quoniam testes *αὐτοπροσώπως* interrogandi sunt." Cujacius, vol. 7, p. 882. So Shakespeare's Buckingham,—

"The King's attorney on the contrary
Urged on the examinations, proofs, confessions,
Of many witnesses which the Duke desired
To have brought viva voce to his face."

face to face, nor have been suffered to bring forth witnesses, proofs, and arguments as might have made for my purgation." The Serjeant. "You shall have proof that the Bishop of Ross has said it." Then follows the charge of a totally distinct offence, to which the Duke most properly answers, "I excuse it not, herein I confess my error. I beseech you call not these my inferior faults, which I have confessed, among the greater wherewith I am charged."

A witness called Cavendish was then confronted with the prisoner, when Burleigh again interposed in a manner hostile to the prisoner. The Duke, in his defence, says, "It is said there are two or three witnesses against me; all this two or three are but one witness, for Rodolph said it to the Bishop of Ross, and of his mouth the Bishop told it to Barker, and so from mouth to mouth; they are all but one witness." "If," said the Duke, "by any way, by any overt fact, you can prove that I have directly touched the Prince's person, or done any of the said things that the statute extendeth to, I will yield myself guilty. If any thing be doubtful, the statute referreth it to the judgment of the Parliament."

Catlin.—"Usage is the best expounder of the law, that is the common use how the statute hath been taken and expounded; and the same statute is but the declaration of the common law."

Duke.—"The preamble of the statute is to bring the laws of treason to a certainty, that men may certainly know what is treason."

Attorney General.—"You complained of your close keeping, that you had no books to provide for your answer; it seemeth you have had books and counsel. You allege books, statutes, and Bracton; I am sure the study of such books is not your profession."

To shew how completely the judges and lawyers of this day eluded most express and positive laws for the protection of

innocence, I will quote a case in Dyer, the existence of which, but for the formal and ceremonious gravity with which those raised to power, secular or ecclesiastical, were in the habit of prefacing, the basest as well as the most cruel actions would appear incredible. This is Thomas's case, Dyer, p. 996. "One witness of his own knowledge, and another of hearsay from him, though at the third or fourth hand, are two sufficient witnesses in high treason." So that if the statute had required fifty or a hundred witnesses, nothing more would have been necessary than for the first witness to have repeated his story to fifty or a hundred people, who would then have been sufficient witnesses! What signified salutary laws with such interpreters?

The trial of Campion also deserves attention. He was a man of uncommon ability, and defended himself with temper, eloquence and courage. The Queen's counsel made several speeches full of matter that was irrelevant and inflammatory. Take as an example,—"Campion," says the reporter (*e*), "demanded of the counsel, whether he came as an orator to accuse or as a pleader to give evidence? It had been," he said with great eloquence, "very unequally provided, that upon the descanting and flourishes of affected speeches a man's life should be brought into danger and extremity, or that upon the persuasion of any orator or vehement pleader, without witness *vivâ voce* testifying the same, a man's offence should be judged or reputed mortal. If so, I see not to what end Mr. Serjeant's oration tended, or if I see an end, I see it but frustrate; for be the crime but in trifles, the law hath his passage; be the theft but of an halfpenny, witnesses are produced, so that probabilities, aggravations, invectives, are not the balance wherein justice must be weighed, but witnesses, oaths, &c. Whereto then appertaineth these objections of

(*e*) The Report was revised and sanctioned by authority. St. Tri., vol. 1.

treason? He barely affirmeth, we flatly deny them. But let us examine them; how will they urge us? We fled our country,—what of that? The Pope gave us entertainment,—how then? We are Catholics,—what is that to the purpose? We persuaded the people,—what followeth? We are therefore traitors. We deny the sequel. This is no more necessary than if a sheep had been stolen, and to accuse me you should frame this reason, my parents are thieves, my companions suspected persons, myself an evil liver, and therefore I stole the sheep. Who seeth not but these be *odious circumstances to bring a man in hatred with the jury, and no necessary matter to conclude him guilty?*" Papers were produced against Campion, because they were found in houses which he had visited; no other proof to make them admissible was offered. Campion asks, "What necessity importeth that reason, that neither being set down by my handwriting, nor otherwise derived by any proof from myself, but only found in places where I resorted, therefore I should be he by whom they were ministered? This is but a naked presumption, (who seeth it not?) and nothing vehement nor of force against me." The Queen's counsel's vindication, the crushing answer of Campion (*f*), and the brutality which the lawyer substitutes for a reply, are curious and characteristic:—

Anderson.—"It could not otherwise be intended but that you ministered those oaths, and that being found behind you it was you that left them. For if a poor and a rich man come both to one house, and that after their departure a bag of gold be found hidden, forasmuch as the poor man had no such plenty, and therefore could leave no such bag behind him, by common presumption it is to be intended that the rich man only, and no other, did hide it. So you, a professed

(*f*) Campion's whole demeanour, his calm, collected resolution, his generosity in attacking the counsel in behalf of his fellow prisoner, who was utterly bewildered and confused, and the care he took to compromise no one who could be injured, are worthy of antiquity.

papist, coming to a house, and there such reliques found after your departure, how can it otherwise be implied than that you did both bring them and leave them there; so it is flat they came there by means of a papist, *ergo* by your means."

Campion.—"Your conclusion had been necessary if you had also shewed that none came into the house, of my profession, but I; but here you urge your conclusion before you frame your minor, *ergo* it proveth not."

Anderson.—"If here, as you do in schools, you bring in your minor and conclusion, you will prove a fool; but, minor or conclusion, I will bring it to purpose anon."

Campion's explanation of his refusal to take the oath of supremacy deserves notice, not only on account of its vigour and clearness, but because it clearly confutes the doctrine so long upheld by the Eldons and the Southeys, that the Catholics suffered not for their faith, but for their rebellion:—"Not long since it pleased her Majesty to demand of me whether I did acknowledge her to be my Queen, or no. I answered, that I did acknowledge her Highness, not only as my Queen, but as my most lawful Governess; and being further required of her Majesty, whether I thought the Pope might lawfully excommunicate her, or no, I confessed myself an insufficient umpire between her Majesty and the Pope for so high a controversy, whereof neither the certainty is as yet known, nor the best Divines in Christendom stand fully resolved. Albeit I thought that if the Pope should do it, yet it might be insufficient, for it is agreed *quivis errare potest.* . . . . . The selfsame articles were required of me by the Commissioners, but much more urged to the point of supremacy, and to further supposals than I could think of. I said, indeed, they were bloody questions, and very pharisaical, undermining of my life; whereunto I answered, as Christ did to the dilemma, 'Give unto Cæsar that is due to Cæsar, and to God that to God belongeth!' I acknowledge her Highness as my Governess and Sovereign. I acknowledged her Majesty

both *facto et jure* to be Queen. I confessed an obedience due to the Crown, as to my temporal head and private. This I said then; this I say now. If, then, I failed in ought, I am now ready to supply it. What would you more?" At last, the ability of Campion extorted from the Attorney General the exclamation, "There is no cloth so coarse but Campion can cast a colour on it." Objection was taken to one of the witnesses that he was an atheist, to another that he was a murderer. At last (after a most eloquent and logical defence by Campion) the case was put to the jury, one of the judges making the following inhuman and characteristic remark, "All the matter resteth in this, whether to believe the prisoners that speak for their lives, or the witnesses that come freely to depose as they are demanded; the witnesses affirm sufficient proof against them,—they deny whatsoever is alleged."

During all this trial, as in most of the other state trials of this and the succeeding reigns, the prisoners were repeatedly questioned by the prosecuting counsel, in defiance of the law, at that time perfectly well known and established, that no one was bound to accuse himself (*f*). So entirely did the Crown lawyers of that day, in pursuit of their sordid ends, stifle the provisions of positive law, as well as corrupt the principles of natural justice. Perhaps the most thoroughly corrupt and iniquitous of all these trials is that of Philip Earl of Arundel, against whom no evidence of any kind was adduced of treason or of any other offence. It was gravely brought in evidence against this unfortunate nobleman, that a picture was found in his cabinet of a fangless lion, with "*Tamen Leo*" written under it, and another of a man shaking from his hand a serpent into the fire, with the motto "Quis contra nos."

(*f*) A prohibition shall go to Court Christian, if they compel a man to be a witness against himself. E. 201. It was in a case of incontinency, and the spiritual judge would have examined the parties upon oath, whether they did the fact or not; and prohibition was granted. 4 Le. 194, Pl. 307, 32 Eliz. In C. B. the S. C. the Court would advise.

Serjeant Puckering was not ashamed to argue that all papists were traitors,—that Lord Arundel associated with papists,—therefore that Lord Arundel was a traitor; and this before men who, a few years ago, professed the Roman Catholic faith. Yet did the peers, among whom was Lord Burleigh, on such evidence as this, find this unhappy man guilty of high treason, and the sentence of the law was pronounced against him; but the sentence was too abominable for execution, and the victim was allowed to die in prison. Ten years after his first confinement, four of which were allowed to elapse before he was brought to trial, Bennett, one of the witnesses, wrote a letter to the Earl, declaring that his confession was false, had been wrung from him for fear of the rack, and imploring forgiveness. In short, any one who reads these trials, or indeed most of the state trials to the time of Lord Holt, will imagine, not only that everything simple, great, or magnanimous was, as now, among us the object of suspicion, dislike, and clumsy ridicule, but that every notion of justice and humanity, of plain sense and common probity, was exterminated from the minds of Englishmen. In the case of Udall, who was tried for a capital offence, evidence was admitted of a deposition upon oath made by Thomkins, a living witness, before the Court of High Commission. The judge says (*g*), "You see this is clear and a sufficient testimony." In vain did Udall protest, that nothing but paper was brought against him, that the witness had given to him a different statement, and entreat that he might be produced. The judge actually asked the prisoner to assert on his oath, the question on which his life depended, whether or not he wrote the book in question.

It would (*h*) be waste of time to discuss the murder of

(*g*) Neale's History of the Puritans, vol. 1, p. 509. Howell's State Trials, vol. 1. Anderson's (the Chief Justice) attempts to ensnare the prisoner, by mis-stating the law, are very persevering.

(*h*) The barbarous ignorance of our lawyers was even then notorious; Mary, with her women's wit, alluded to it. "If my cause is to be tried by

Mary Queen of Scots. From beginning to end the proceeding was one of those solemn mockeries of justice which satisfy the minds of the people of this country, but which, in reality, aggravate the deformity of crime. Compared with the sacrifice of this helpless woman by the relation to whom she fled for succour, in defiance of every motive that the ties of blood, the dictates of honour, and the maxims of justice could suggest, —the slaying of her cousins, the Guises, at Blois, by Henry the Third of France, was innocent and almost magnanimous.

In (*i*) Essex and Southampton's trial, A. D. 1600, where Sir E. Coke prosecuted as Attorney General, and in which he exhibited all that disposition to insult, crush, and by any means to ruin the unfortunate, which has consigned his name to everlasting infamy,—the written deposition of Witherington was read, the witness having been sent into the country. So were the depositions of other witnesses, and the confessions of Sir Ferdinando Gorges and of Sir Charles Davers, on which Sir E. Coke remarks, in one of those sentences pregnant with so many horrors, which fall from the lips of judges and Crown lawyers in our state trials, "I must needs think it the judgment of God, in his mercy towards our Sovereign, to have

the civil or canon law, I must send abroad for advocates, as here such studies are unknown."

(*i*) A resolution of the judges, in this case, is reported by Chief Justice Kelyng in the following terms :—"It was resolved by all the judges, that the gathering of men together to compel the Queen to yield to certain demands, or to remove evil counsellors, was an overt act to prove the compassing of the Queen's death." The report of their decision is fuller in Moore's Reports. "The judges resolved, that the going into the city by the Earl of Essex with a troop of captains and others, and there praying aid of the citizens to assist him in defence of his life, and to go with him to the Queen's Court into her presence, 'with strong hand,' in order to enable him to remove some of his enemies, who were in attendance on the Queen, was high treason, because it tended to the exercise of force and restraint upon the Queen in her palace; and the fact, so done in London, was actual rebellion, although he might not intend any personal injury to the Queen."

the truth so marvellously revealed, coming from them of their own accord, without rack or torture to any of them."

In this case a question, fraught with the fate of many a noble victim, was settled in favour of the Crown, and against the plainest principles of justice. Essex (seeing probably (*i*) an array of his capital enemies summoned to pass judgment on his life) desired to know whether he might challenge any of the peers, or no? Whereunto the Lord Chief Justice answered no. And Mr. Attorney General alleged a case in Henry the Eighth's time—of Lord Darcy. Such was the law of England. If a commoner was tried, he had a right to challenge a certain number of his jury. But if a peer were to be tried, the Crown packed a body of its most unfeeling, corrupt, and servile dependants, and he was not allowed to challenge one of them. In other words his life, as history shews, was held at the pleasure of the Crown.

Coke's brutal and indecent conduct extorted a rebuke from the high spirited prisoner, "Well, Mr. Attorney, I thank God you are not my judge this day—you are so uncharitable;" to which Coke answered, "Well, my Lord, we shall prove you and what you are, which your pride of heart and aspiring mind has brought you unto." Essex then made the touching and dignified reply, "Ah! Mr. Attorney, lay your hand upon your heart and pray to God to forgive us both."

Raleigh then repeated what Sir Ferdinando Gorges had said to him. Essex comments on the evidence, and Coke then says, "Well, what can you devise to say for Sir John Davis, another of your adherents, that papist!" Essex says, "Whereas you say we have committed treason, first prove that true."

(*i*) Lord Grey, for instance, who was, moreover, a type of baseness, as was Cobham, then employed as a judge to destroy Essex, and afterwards as a witness to murder Raleigh. It is some comfort to think that this wretch died, like the accusers of Socrates, under the ban of all society, in the most abject penury.

After the examinations were read (*k*), Coke makes again a remark full of guile and wickedness, which is again exposed by Essex:—

Mr. Attorney.—"Now, my Lord, I beseech your grace, and you, my Lords, that be the peers, let the due consideration of these several examinations and depositions enter into your hearts; and do but note, they have all agreed and jumped together in each particular point, notwithstanding they were all severally examined; but I must needs think it the just judgment of God, in his mercy towards our Sovereign, to have the truth so marvellously revealed; coming from them of their own accords, without rack or torture to any of them."

Essex.—"Mr. Attorney, I answer, then, this for that point: *the selfsame fear and the selfsame examiner may make these several examinations agree all in one*, were they never so far distant; but, good my Lord, let me intreat your Lordship to consider who they be that testify this against me. My Lord, they are men within the danger of the law, and such as speak with a desire to live; but I think they have much to answer God and their souls and me."

Gorges was again asked some question, to which he replied that he had already stated all he knew, when Essex thus appealed to him, "Yes, Ferdinando! if ever you knew any other matter which contained any thought of treason or disloyalty in it, speak it—for they are things not to be forgotten."

Gorges.—"By the oath I have taken, I did never know or hear any thought or purpose of hurt or disloyalty to her Majesty's person, intended to her Majesty's person by my Lord of Essex." Another character, not inferior to Coke in

(*k*) Coke's introductory speech is of a piece with the rest of his conduct. "Now, of God's most just judgment, he of his earldom shall be Robert the last, who thought to be of his kingdom Robert the First." The oracle of law then proceeded to inform that august tribunal that, by the law of England, a consultation to whip the Lord Mayor was an overt act of compassing the Queen's death! State Trials, p. 339. Essex complained, with much sense and dignity, of this mode of address.

consummate meanness, cruelty, and wickedness, but far superior to him in dexterity and capacity, and more anxious to avoid shocking the feelings and sentiments of social creatures, Sir Robert Cecil (*l*), who, boasting of an English heart, betrayed his aged mistress, the glorious Elizabeth, to gain the favour of the abject James,—now appeared upon the scene. Even his habitual dissimulation could not enable him to conceal his petty spite and overflowing rancour. "I can prove," said Essex, "from Sir Robert Cecil's own mouth, that he, speaking to one of his fellow counsellors, should say, that none but the Infanta of Spain had a right to the Crown of England." *Sir R. Cecil.*—"The difference between you and me is great; for I speak in the person of an honest man, and you, my Lord, in the person of a traitor; so well I know that you have wit at will. *The pre-eminence has been yours*, but I have innocence, &c. . . . . Had I not seen your ambitious affections, I could have gone on my knees to her Majesty to have done you good; but you have a sheep's garment,—in show and in appearance are humble and religious. But God be thanked we know, and indeed your religion appears by Blunt, Davis, and Tresham, your chiefest counsellors—for the present, and your *promising liberty of conscience*—hereafter.

(*l*) The following letter from Cecil to Sir E. Coke, (from Blifil to Black George, if the reader will forgive the allusion), in order to garble the evidence of a witness, paints the man. It is directed to "Mr. Edward Coke, Esq., her Majesty's Attorney General," and is amongst the papers relating to the Earl of Essex at the State Paper Office:—

"Sir. I pray you, if possibly you can, *let not Blunt's words be read*, wherein he saith, that if he were committed any farther than to the Lord of Canterbury's house, the Lord Keeper's, or Mr. Comptroller's, he would do, &c. My reason is this,—it will show a spirit of prophecy, and now confessed, *seems a little to savour as if he did coin it.* These words only I would have left out, for indeed the rest is very necessary; but that divination is too suspicious. Your's assuredly, Robert Cecyll."

"Methinks it might be in these words, 'that if he were not committed to any prison,' or in some such like; or else wholly that portion left out; but in any wise, let not these places be named, because it proved so *ex*

I stand for loyalty, you for treachery, wherewith your heart is possessed . . . I have said the King of Spain is a competitor, and you are a competitor; you would depose the Queen,—you would be King of England,—you would call a Parliament." Then comes the expression which may remind us of more recent times, the "vow to God I wish my soul was in Heaven and my body at rest."

Essex.—"Ah! Mr. Secretary, I thank God for my humiliation, that you, in the ruff of your bravery, come to make your answer against me here this day."

Cecil.—"My Lord, I humbly thank God that you did not take me for a companion of you and your humours, for you would have drawn me to betray my Sovereign as you have done."

Essex's assertion was then corroborated by Southampton, his fellow prisoner indeed, but a nobleman of most unblemished honour. The person referred to of course denies the statement,—"Whereupon Mr. Secretary thanked God, that though the Earl stood there as a traitor, he was found an honest man; without saying I beseech God to forgive you for this open wrong done unto me, I forgive you with all my heart."

Essex.—"And I, Mr. Secretary, do clearly and freely forgive you with all my soul, because I mean to die in charity."

So fell, in the flower of his age, before his great qualities had been fully matured by experience, and before time had been given for the flush and intoxication of youth, buoyed up and inflamed by an almost fabulous prosperity, to subside,—Robert Devereux Earl of Essex,—

> "The courtiers, soldiers, scholars, eye, tongue, swor
> The expectancy and rose of the fair state,"

by a sentence which, though perhaps conformable to strict law, was certainly at variance with natural sentiment; which plunged a nation in tears, a reign of surpassing glory in

gloom, from which it never emerged, and his sovereign in the thick shadow of anticipated death (*k*).

Essex's trial, indeed, awakens a host of melancholy reflections, not in every English mind only, but in the mind of every one who can feel for the desecration of genius. The lowest and most stupid of mankind would have shrunk from the task that Bacon seemed to perform with exultation and delight. Compared with his infamy, the brutality of Coke and the cowardly malevolence and loathsome hypocrisy of Cecil are as nothing. They followed but the bent of their own sordid natures; they could not profane God's most precious gifts; they could not hurl themselves from such a pinnacle; they could not exhibit the deplorable contrast by which Plato, if he had beheld it, might have exemplified his splendid illustration of the struggle between the appetite and the reason, of the majestic intellect and the creeping instinct,—the one soaring with an eagle pinion in the skies, the other wallowing in the dust.

What is the downfall of a hundred monarchs, raised by the accident of birth to power, compared with the voluntary degradation of one whom God raised up to teach and to illuminate his species? What is the abdication of an earthly throne when placed in the balance with the surrender of intellectual supremacy,—of that really Divine right to the veneration and gratitude of mankind, which Bacon forfeited for ever?

But if Essex had committed, in a technical sense, the crime

(*k*) "She of ladies most deject and wretched,
Who sucked the honey of his music vows."

A French writer says, that the peers gave their judgment when they were stupified with ale and tobacco, "bien saoux de biére et ivres de tabac." Winwood, vol. 2, p. 296. Biron, little suspecting his own fate, affected to ridicule Essex's demeanour at his death as more becoming a priest than a soldier; but who would not rather die as Essex did, than with the pusillanimous violence of Biron?

of treason, the trial of Captain Lee was utterly preposterous. The Attorney General said he would prove him guilty of many foul treasons. What he did in reality prove him guilty of was,—first, Lee said, "It would be a brave thing for six resolute men to kneel before the Queen, and not rise till they had obtained the pardon of Essex: secondly, that he was seen standing near the door of the Privy Council, with a stern countenance and sweat on his brow. Yet did the jury find him guilty; and he was executed, protesting his innocence. What need had an English Sovereign of assassins at his command? After a few phrases of unintelligible barbarity had been uttered by men in a particular dress,—noblemen, gentlemen, and tradesmen were ready to send to the scaffold or the gibbet any one who had provoked his jealousy, or incurred for any reason, however insignificant, his indignation.

Hume has exhausted all his exquisite art, as a writer and an advocate, in his history of the reign of Elizabeth, his aim being to justify the mean, tyrannical, and contemptible race of Scotch rulers who succeeded her; he has laid hold of every incident of her reign, which could assist his purpose, by shewing that precedents were to be found for their acts of low and detestable oppression in the conduct of that arbitrary, but magnanimous and justly venerated princess. And as many of the facts were favourable to that purpose, he has generally contented himself with putting what actually happened in a false light, instead of setting truth openly at defiance, as he has done from the beginning to the end of his history of the Stuarts; misrepresentation being sufficient, he has abstained from direct falsehood. Undoubtedly the reader of history will find in the reign of Elizabeth much that was violent, much that was insincere, much that was unconstitutional. He will find some proofs of womanish weakness, and more of despotic violence; he will find some mean and many cruel actions: but he will find also that grand redeeming quality, which he will look for in vain through every igno-

minious page which tells how the Stuarts polluted the English throne, that identification of herself with the people she was called upon to govern, that consciousness that their honour was her honour, and their disgrace her infamy, which, in spite of faults, in spite of errors, in spite of crimes, has made her memory precious and dear even to the present generation. Nor is it surprising that much unconstitutional language, and even many acts of an arbitrary cast, were overlooked by the English nation from a just sense of the awful crisis of their affairs, and from the conviction, that to strengthen the power of the Sovereign was in reality to support the cause of freedom. For Elizabeth, with the sure glance of genius, saw the danger to which she was exposed, and the manner in which it was to be encountered. She placed herself and her people where England ought always to be, but where, except in her days, in the days of Cromwell, and in the days of William the Third, she never has been,—in the van of the noble army of freedom. She was the informing soul, the tutelary guardian of Protestant Europe. Surrounded by valiant captains and sagacious statesmen, whom she had herself promoted, she bade defiance to the greatest power that the world had seen since the downfall of the Roman empire, and she came, not unscathed only, but triumphant, from the contest. Since the days of Marathon and Salamis, since the days when a handful of free Greeks scattered the slavish myriads of the East, the intellectual liberties of mankind were never in greater danger, and never were they more completely vindicated. And in the days of humiliation and disgrace which followed, when James and his minions, prostrate before the throne of Philip the Third, had degraded the name of England till it became a byword and a jest, when Charles and Laud were corresponding with the see of Rome, and sending ships to assist the triumph of Richelieu over civil and religious freedom at Rochelle, persecuting our most illustrious patriots at home, and abetting our most implacable enemies abroad, it is not

surprising that systematic encroachments on repeatedly acknowledged rights, and reiterated violations of the most solemn promises, should be scrutinized with more jealousy than the occasional intemperance of her, who told her people "of the foul scorn" that Spain or Parma should dare to meddle with her dominions. The great Englishmen of that day (and in those days England had great men) clearly saw and thoroughly appreciated the purpose of their enemies, and the real character of their Sovereign. They knew that she would never stoop to be the tool or pensioner of any foreign power; they knew that in her hands the honour of England was safe; and if, as the Senate of France did in Napoleon's closing struggle, when the soil of their country was threatened with invasion, instead of combining all their energies to repel a common enemy, they had been extreme to mark what was done amiss, had acted in the spirit of litigating pleaders, had scrutinized forms, examined precedents, and embarrassed the measures of government, the triumph of a foreign invader would have been the just reward of their criminal pedantry. To argue, even if the cases were parallel, which they are very far from being, from the forbearance of the English people in the time of Elizabeth, to whom they were bound by the most touching recollections of common dangers and of common glories, to their conduct in the time of the Stuarts, a name interwoven with all that was most disgraceful and most odious (*l*), is simply

(*l*) Sir Robert Cotton died of a broken heart, because his papers were seized by Charles. Elliott, the most eloquent Englishman of his day, perished in the Tower the victim of Charles's unrelenting malice. The only charge against him was a speech in parliament, where Charles had solemnly pledged himself to allow full liberty of speech. His physicians said, that if his illegal imprisonment was continued he must die. Charles was inflexible. If he had committed no other crime, that alone would have justified his execution,—poor as such an expiation was, or as the death of an island full of Charles's would have been, for the loss of a man like Elliott. I know these doctrines are out of fashion, and that he who avows them will be calumniated; so be it.

"Examinem dum te complectar Roma! tuumque
Nomen Libertas, et inanem prosequar umbram."

ludicrous. To the latter we owe more than half a century of ignominy and of crime. But whoever rejoices that the English race was preserved from slavery, and that the Protestant religion exists in Europe, will think with tenderness, and speak with gratitude, of our renowned Elizabeth (*m*).

(*m*) I subjoin the grand speech, well befitting the close of her glorious reign, which she made, A.D. 1601, to her Parliament, when they thronged around her to thank her for giving up the monopolies, into granting which she had been misled. How the blood must have tingled in the veins of those who heard this speech when they listened to the unmanly, hypocritical, and insolent pedantry of her despised and despicable successor.

These monopolies were revived, and others ten times more ruinous created, for the benefit of the panders, sycophants, Scotch pages (such Somerset was), and criminals not to be described, whom he made knights of the garter, earls, dukes, and first ministers. Hume, of course, omits all mention of the speech, and of the occasion on which it was delivered. But a more perfect specimen of the manner in which the ruler of a free people ought to address them is nowhere to be found :—

"MR. SPEAKER,

"We perceive your coming here is to give thanks to us; know I accept them with no less joy than your loves can desire to offer such a present, and do more esteem it than any treasure or riches, for those I know how to prize, but loyalty, love, and thanks, I count them invaluable; and though God has raised me high, yet this I account the glory of my Crown, that I have reigned with your love. This makes me rejoice that God has made me Queen . . . to be the means, under God, to conserve you in safety, and preserve you from danger; to be the instrument to deliver you from dishonour, from shame, from infamy.

"I never was a greedy, scraping grasper, nor a strict, fast-holding prince, nor yet a waster. *That my grants should be made grievances to my people, and oppressions to be privileged under colour of my patents, our princely dignity shall not suffer it.*

"WHEN I HEARD THESE THINGS, I COULD GIVE NO REST TO MY THOUGHTS TILL I HAD REFORMED IT; and those varlets, abusers of my bounty, shall know I will not suffer it. And, Mr. Speaker, tell the House from me, that *I take it exceeding grateful* that the knowledge of these things is come to me *from them*." Somer's Tracts, vol. 1, p. 244.

CHAPTER V.

LAW OF EVIDENCE, FROM THE ACCESSION OF THE STUARTS TO THE REVOLUTION.

"A quels maîtres Bon Dieu livrez-vous l'univers!"

King James, though altogether without the caution, parsimony, and long suffering, which have always been reckoned among the best and most prominent qualities of his countrymen, possessed in a superlative degree the intense and inveterate conceit, pedantry, prejudice, and coarseness, by which they are sometimes and less fortunately distinguished.

If there might have been cause to doubt the country of his birth from his hatred of Presbyterians in the Church, all questions on the subject were set at rest by his partiality to Scotchmen in the State. The treasures amassed with so much frugality by Elizabeth were lavished with the most reckless dissipation on the adventurers, poured from the frozen loins of Caledonia, who exchanged with delight their native wilderness for a promised land. The Court bore the genuine stamp of upstart insolence and profusion; the Council Chamber of weakness and corruption; the private life of the new monarch was not profligate only, but infamous; and, as the first of a long train of dreadful consequences which followed the change of dynasty, the revenues of England were dilapidated by courtiers, minions, and Scotchmen. One thing more was wanting to exhaust the patience of a people not yet disheartened and undeceived by venal patriots, nor broken down by servitude and superstition,—and in the next reign the law was controlled, and the highest offices of the State were ingrossed by bishops.

Then, indeed, did the waters of bitterness overflow.

Before I proceed to illustrate the rules of the Law of Evidence, as exemplified in the practice of this age, I will

endeavour to point out what they were in theory. Whatever may be our opinion as to the merits of the latter, there can be no doubt that it was far superior to the former, which was indeed, almost beyond belief, irrational. The Treatises of Sir E. Coke contain, on this and all other matters connected with English law, the most copious and authentic information which we possess;—of that law he was a consummate master, and his intense and ingrossing study of it, joined to great natural hardness of heart and malevolence of temper, will account for the savage brutality of his conduct, the grotesque absurdities and complete barbarity of his speeches and writings, and the extraordinary veneration in which his name has been always held by the great majority of English lawyers.

In the Countess of Rutland's case (*b*), it is laid down, "that it would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth between the parties, should be controuled by averment of parties, to be proved by the uncertain testimony of slippery memory, and it would be dangerous in such cases if such crude averments against matter in writing should be admitted;" while in Cheyney's case (*c*), the same rule was laid down. And the rule, explained by Lord Bacon, was insisted upon, *viz.*, that an ambiguity, apparent on the face of the deed or written instrument, could not be explained by oral evidence, because, says Lord Bacon, the law will not couple matter of specialty, which is of the higher account, with matter of averment, which is of inferior note in law, for that were to make all deeds hollow, and subject to averments, and to pass that *without* deed, which the law appoints shall not pass but *by* deed; and that an ambiguity latent, *i. e.*, an ambiguity not apparent on the face of the deed or instrument, but created by oral evidence, may be removed by oral evidence,—as, if the testator bequeath his manor of S. to N., and it is proved that he has two manors so called, oral evidence is admissible to shew which of the two he intended to bequeath.

The law of demurring to evidence as it is called, that is, of admitting the facts stated by the opposite party, and denying that they constitute legally the claim he asserts, will be found in Baker's case, in the same volume with the foregoing cases (*d*). The doctrine was afterwards elaborately explained by Mr. Justice Eyre in Gibson *v.* Hunter (*e*).

In Leyfield's case it was ruled, that if he who is party or privy in estate or interest, or he who justifies in right of him who is party or privy, pleads a deed, he ought to shew the original deed in Court, that the Court may judge if it be razed or interlined, and whether it be with condition or limitation. Lord C. B. Gilbert observes upon this, that a razed or interlined deed was anciently adjudged void, "because it did not certainly appear to the Court whether the mind of the party was contained in such mangled contract or not; but as the manner of conveyancing swelled from the short title deeds to large and voluminous ones, so vast room was left to the misprisions of the clerks, that must be altered or amended, or with great labour and expense of time written over again, that they thought it necessary not to discharge the deed upon the demurrer, but referred it to the jury."

Lord Coke lays it down clearly (*f*), "that no exemplification ought to be of any *part* of a letters patent or of any other record, or of the inrolment thereof, (*g*) but the *whole* record or

(*d*) Coke, Rep. vol. 3, p. 221.

(*e*) 2 H. Blackstone. (*f*) Institute, vol. 3, p. 173.

(*g*) "But by the 3 & 4 Edw. 6, c. 4, explained by stat. 13 Eliz. c. 6, all patentees, and every other person having from them any estate or interest in any lands, hereditaments, or other thing whatsoever, granted by letters patent, since the 4th of February, 27 Hen. 8, may convey to themselves title to such lands, hereditaments, or other thing, in any pleading whatsoever, by showing forth an *exemplification*, or *constat* under the Great Seal, of the inrolment of the letters patent, or of so much thereof as may serve for such title, the letters patent then being in force as fully as if the letters patent themselves were pleaded and showed forth. 1 Saund. 189 [2]. So profert of exemplifications under the seal of the Court of a county palatine, or of Courts established by act of Parliament, is sufficient, by stat. 27 Eliz. c. 9.".

inrolment ought to be exemplified, so that the whole truth may appear, and not of such part as makes for one party and nothing that makes against him." Yet such was the consummate wickedness of the man, that he who lays down this principle in civil cases, actually, when prosecuting men for their lives, scored particular passages in depositions to be read against the prisoner, and suppressed those passages which would have proved his innocence. I subjoin, in a note (*h*),

(*h*) "*I have remembered some things which, because they were long before my knowledge of the Powder acts, I had forgotten.*

"*About Michaelmas, after the King came in, Mr. Catesby told me that there would be some stirring, seeing the King kept not promise.*

"And I greatly misliked it, saying it was against the Pope's express commandment; for I had a letter from our General thereof, dated in July before, wherein was earnestly, by Clement, commanded the very same, which this Pope commanded the last summer. Therefore I earnestly desired him that he and Mr. Thomas Winter would not join with any in such tumults; for in respect of their often conversation with us, we should be thought accessory. He assured me he would not. But neither he told, nor I asked any particulars.

"*Long after this, about Midsummer was twelve months, either Mr. Catesby alone, or he and Thomas Winter together, insinuated that they had somewhat in hand, and they would sure prevail.*

"I still reproved them; but they entered into no particulars.

"*Soon after came Mr. Greenwell* [*Greenaway*] *to me, and told me as much.*

"I greatly misliked any stirring, and said, 'Good Lord! how is it possible that God work any good effect by these men? These are not God's knights, but the Devil's knights.' Mr. Greenwell told this to Thomas Winter, who, about a month after Michaelmas, came to me and expostulated that I had so hard a conceit of him, and would never tell him of it. As for their intermeddling in matters of tumults, since I misliked it, he promised they would give over; and I never heard more of it until the question propounded by Mr. Catesby. As for his asking me of the lawfulness of killing the King, I am sure it never was asked me in my life; and I was always resolute that it was not lawful; but he was so resolved in conscience that it was lawful in itself to take arms for religion, that no man could dissuade it, but the Pope's prohibition, which afterwards I inculcated, as I have said before. The ground of this his resolute opinion I will think of.

"HENRY GARNET."

The passages in *italics* only were read—the others suppressed. Jardine,

an instance of this proceeding in Garnet's trial, and I would to any reader whether the Crown judges or lawyers Tudors and Stuarts, who hired out their voices and understandings to slay the innocent, were in any moral sense superior to the assassins who hired out their daggers to gratify the revenge of an Italian potentate. Indeed, the evil was so much the greater in England, as in that country those crimes were perpetrated by men of rank, and education, and character,—of which, in Italy, the lowest ruffians only were the instruments.

A law was passed, in the fourth year of King James's reign, which Lord Coke calls a good precedent, enacting, that in cases of felony committed in Scotland by Englishmen, the witnesses for the prisoner may be examined upon oath. Lord Coke adds (*i*), "*to say the truth*, we never read in any act of Parliament, ancient author, book, case, or record, that in criminal cases the party accused should not have witnesses sworn for him, and therefore there is not *so much* as 'scintilla juris' against it." A more deliberate confession of depravity was never transmitted to posterity; and yet in spite of this solemn declaration, the judges and Crown lawyers, who virtually repealed the act requiring witnesses to be examined face to face with the prisoner, of their own authority contrived to deprive the subject, in cases of treason, of this right till the time of Anne.

Such are the consequences of allowing judges to make the law.

It is not necessary, for the purpose of this Work, to examine the trials of the conspirators of the Gunpowder Plot. Like

vol. 2, p. 357. So Antony Copley, a Catholic gentleman, describes being "plied for the King" till he was completely misled. In the papers of Sir E. Coke, the depositions which he read against the prisoners are scored with marginal annotations; such as these,—"Read not this;" "Cave;" "Hue usque;" "Read A. and B. only;"—notes that an inquisitor might admire. Jardine's Criminal Trials, vol. 1, p. 351.

(*i*) 2 Inst. vol. 3, p. 79. Pity he did not say it sooner.

many of the transactions of this reign, the manner in which this plot was really discovered is involved in mystery. It seems certain that the common story of the letter to Lord Monteagle was a mere pretence to conceal the true author of the communication. The conspirators who were first tried were guilty beyond all doubt; yet the same practice was followed in the trial of these men which had been adopted to obtain convictions against the innocent. No single witness was confronted with the prisoners, or examined in their presence; the evidence consisted of their written declarations, and of the statement of a servant of Sir Everard Digby. The subsequent trial of Garnet for the same offence bears a different character, as, after the most dishonest artifices had been employed by Cecil and Coke to entrap the prisoner into a confession of his guilt, after tortures so horrible had been inflicted on his servant Owen that he killed himself to avoid a repetition of such frightful agonies, taking all that was admitted by himself, and extracted from others, and reported by others, to be true, it is clear that he was not guilty of the crime of which he was convicted, that is, of high treason,—but of misprision of treason only. He did not reveal what had been communicated to him under the seal of confession. But Sir Edward Coke, in this trial, had recourse to those abominable artifices between which and assassination there is no moral difference. He read extracts of the prisoner's statements, garbled in such a manner as to convey a meaning altogether different from that which in reality belonged to them; and he prepared these statements, as the foregoing extract shews, for that express purpose. To suppose that a man, capable of perpetrating so foul a crime, could perform faithfully the sacred duties (*k*) of a judge, or that, whatever might

(*k*) Which, I own, appear to me as important and dignified as can devolve on man, in or out of a collar of SS. Indeed I do not find that Ulpian mentions that ornament, where he describes the priest in the Temple of Justice, "Jus est ars æqui et boni, cujus merito quis nos

be the effect of personal antipathy or of a perverse disposition, he would resist, from conscientious motives, the perpetration of any crime which those in power might find it convenient for him to commit, is to suppose what is contrary to all the maxims of probability, as well as to all the principles of human nature. There is no charm in names: a base and wicked advocate will, if it suits his purpose, be a base and wicked judge, whatever be the dress he wears, or the title by which he is distinguished.

To dilate upon Sir Walter Raleigh's murder is almost superfluous. No one, without reading it, can form a complete notion of what then went by the name of a trial in an English Court of justice, or of the unspeakable malignity of Cecil (*l*). The antipathy of this man to everything great and intellectual seems to have been inveterate and innate. He was the enemy of Bacon, of Essex, and of Raleigh. The two last were enemies, and divided men into factions; he contrived to be the persecutor and slanderer of both, slandered both on their trials, aggravated, by his insults, the bitterness of their lot, and shared largely in the guilt and infamy of their condemnation. The passages which have already been quoted shew the opinion of Lord Coke as to the common law and the right of every subject. How this law was enforced, and how these rights were protected by English judges in a criminal trial, where the life of perhaps the most illustrious man England ever has produced was at stake, the following extracts may serve to shew:—

Raleigh.—"But it is strange to see how you press me still with my Lord Cobham, and yet will not produce him; it is

sacerdotes appellet justitiam namque colimus, et boni et æqui notitiam profimetur, æquum ab iniquo separantes; Licitum ab illicito discernentes, bonos non solum metu pœnarum, verum etiam præmiorum quoque exhortatione efficere cupientes, veram nisi fallor, philosophiam non simulatam affectantes."

(*l*) M. de Beaumont, the French minister, was shocked by it. Carte, vol. 3, p. 721. Jardine, p. 396.

not for gaining of time or prolonging my life that I urge this; HE IS IN THE HOUSE HARD BY, and may soon be brought hither; let him be produced, and if he will yet accuse me or avow this confession of his, it shall convict me and ease you of further proof."

Lord Cecil.—"Sir Walter Raleigh presseth often that my Lord Cobham should be brought face to face; if he ask a thing of grace and favour, they must come from him only who can give them; but if he ask a matter of law, then, in order that we, who sit here as commissioners, may be satisfied, I desire to hear the opinions of my Lords, the judges, whether it may be done by law." The judges all answered, "that in respect it might be a mean to cover many with treasons, and might be prejudicial to the King, therefore, by the law, it was not sufferable."

Popham, C. J.—"There must not such a gap be opened for the destruction of the King as would be if we should grant this; you plead hard for yourself, but the laws plead as hard for the King. Where no circumstances do concur to make a matter probable, then an accuser may be heard; but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced; for, having first confessed against himself voluntarily, and so charged another person, if we shall now hear him again in person, he may, for favour or fear, retract what formerly he hath said, and the jury may, by that means, be inveigled."

Lord Chief Justice.—"This thing cannot be granted, for then a number of treasons should flourish: the accuser may be drawn by practice, whilst he is in person."

Justice Gawdy (*m*).—"The statute you speak of, concerning

(*m*) Even this earth worm (still occasionally quoted to gratify our pleading judges), was tormented on his death bed by the recollection of his share in the guilt of this transaction. He told his physician (Dr. Turner) "that the justice of England had never been so degraded and injured as by the trial of Sir W. Raleigh;" and this from an English

two witnesses in case of treason, *is found to be inconvenient; therefore, by another law, it was taken away*" (*n*).

Raleigh.—"The common trial of England is by jury and witnesses."

Lord Chief Justice.—"No, by examination; if three conspire a treason, and they all confess it, here is never a witness, yet they are condemned."

Justice Warburton.—"I marvel, Sir Walter, that you, being of such experience and wit, should stand on this point; for so many horse stealers may escape, if they may not be condemned without witnesses. If one should rush into the King's privy chamber, whilst he is alone, and kill the King (which God forbid!), and this man be met coming with his sword drawn all bloody, shall not he be condemned to death? My Lord Cobham hath, perhaps, been laboured withal; and to save you, his old friend, it may be that he will deny all that which he hath said."

Raleigh.—"I know not how you conceive the law."

Attorney.—"His accusation, being testified by the Lords, is

hot iron," by the cruelties and crimes of which he was *ex officio*, and necessarily an accomplice. "The judges," says Lord Bacon, "peruse every prisoner. Those that are indicted by the grand jury, and found not guilty by the special jury, they judge to be quitted, and so deliver them out of gaol. Those that are found guilty by both juries, they *judge to death*. *Some*, whose offences are pilfering under *twelve pence*, they judge to be whipped. *Those that refuse trial by the country, or stand mute upon the indictment, they judge to be pressed to death.*" Use of the Law, Bacon's Works, vol. 4, p. 93, ed. 1803. "Nulli gentium mitiores placuisse pœnas," was Livy's boast of his country. The reverse is true of England. James himself said, "he would not wish to be tried by a Middlesex jury." But those who peruse the proceedings which sometimes take place on our court martials, in the absence of any legal control, the absurd conclusions they draw, and the ruin they inflict, of which the case of Captain Douglas is a memorable instance, will be more and more astonished at the way abuses are tolerated in this country, till it becomes the interest of some party to point them out.

of as great force as if he had subscribed. Raleigh saith again, if the accuser be alive, he must be brought face to face to speak; and alledges 25 Edw. 3, that there must be two sufficient witnesses that must be brought face to face before the accused; and alledgeth 10 and 13 Elizabeth."

Raleigh.—"You try me by the Spanish Inquisition, if you proceed only by the circumstances, without two witnesses."

Attorney.—"This is a treasonable speech."

Raleigh.—"If truth be constant, and constancy be in truth, why hath he forsworn that that he hath said? You have not proved any one thing against me by direct proofs, but all by circumstances."

Attorney.—"Have you done? The King must have the last."

Raleigh.—"Nay, Mr. Attorney, he which speaketh for his life must speak last. False repetitions and mistakings must not mar my cause. You should speak *secundum allegata et probata*, I appeal to God and the King in this point, whether Cobham's accusation be sufficient to condemn me."

Attorney.—"The King's safety and your clearing cannot agree. I protest, before God, I never knew a clearer treason."

Raleigh.—"I never had intelligence with Cobham since I came to the Tower."

Attorney.—"Go to; I will lay thee upon thy back for the confidentest traitor that ever came at a bar. Why should you take eight thousand crowns for a peace?"

Lord Cecil.—"Be not so impatient, good Mr. Attorney; give him leave to speak."

Attorney.—"If I may not be patiently heard, you will encourage traitors, and discourage us. I am the King's sworn servant, and must speak. If he be guilty, he is a traitor; if not, deliver him." ["Note. Here Mr. Attorney sat down in a chafe, and would speak no more, until the Commissioners urged and entreated him. After much ado, he went on, and

made a long repetition of all the evidence for the direction of the jury (*n*); and at the repeating of some things, Sir Walter Raleigh interrupted him, and said he did him wrong."]

Attorney.—"Thou art the most vile and execrable traitor that ever lived."

Raleigh.—"You speak indiscreetly, barbarously, and uncivilly."

Attorney.—"I want words sufficient to express thy viperous treasons."

Raleigh.—"*I think you want words indeed,* for you have spoken one thing *half a dozen times.*"

Attorney.—"Thou art an odious fellow; thy name is hateful to all the realm of England for thy pride."

Raleigh.—"It will go near to prove a measuring cast between you and me, Mr. Attorney."

Attorney.—"Well, I will now make it appear to the world that there never lived a viler viper upon the face of the earth than thou." [And therewithal he drew a letter out of his pocket . . . .]

Lord Cecil.—"Sir Walter Raleigh, if my Lord Cobham will now affirm, that you were acquainted with his dealings with Count Aremberg, that you knew of the letter he received, that you were the chief instigator of him, will you then be concluded by it?"

Raleigh.—"Let my Lord Cobham speak before God and the King, and deny God and the King if he speak not truly, and will then say that ever I knew of Arabella's matter, or the

(*n*) When Popham summed up the evidence he said, "just then it came into his mind why the accuser should not come face to face with the prisoner, because he might detract his evidence; and when he should see himself must die, he would think it best that his fellow should live to commit the like treason, and so get revenge." Accuser here means accomplice. So the reason assigned by this righteous judge for not obeying the law is, lest the witness should unsay what he had said, that is the very reason why he should be put to the test. Political Tracts, vol. 2, p. 6.

money out of Spain, or the Surprising Treason, I will put myself upon it. God's will and the King's be done with me!"

Lord Cecil.—"Then, Sir Walter, call upon God to help you, for I do verily believe my Lords will prove this."

Lord Henry Howard.—"But what if my Lord Cobham affirm anything equivalent to this; what then?"

Raleigh.—"My Lord, I put myself upon it."

Attorney.—"I shall now produce a witness *vivâ voce*:"

He then produced one Dyer, a pilot, who, being sworn, said, "Being at Lisbon, there came to me a Portugal gentleman, who asked me how the King of England did, and whether he was crowned? I answered him, that I hoped our noble King was well, and crowned by this; but the time was not come when I came from the coast for Spain. 'Nay,' said he, 'your King shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned.' And this, in time, was found to be spoken in mid July."

Raleigh.—"This is the saying of some wild Jesuit or beggarly priest; but what proof is it against me?"

Attorney.—"It must per force arise out of some preceding intelligence, and shews that your treason had wings."

Raleigh.—"If Cobham did practice with Aremberg, how could it but be known in Spain? Why did they name the Duke of Buckingham in Jack Straw's rebellion, and the Duke of York in Jack Cade's, but to give countenance to the treasons?"

Cobham's Letter of Justification to Raleigh.

"Seeing myself so near my end, for the discharge of my own conscience, and freeing myself from your blood, which else will cry vengeance against me, I protest, upon my salvation, I never practised with Spain by your procurement; God so comfort me in this my affliction as you are a true subject, for anything that I know. I will say as Daniel, *Purus sum a*

sanguine hujus. So God have mercy upon my soul, as I know no treason by you."

Raleigh.—"Now I wonder how many souls this man hath! He damns one in this letter, and another in that."

"HERE WAS MUCH ADO: Mr. Attorney alledged, that his last letter was politely and cunningly urged from the Lord Cobham, and that the first was simply the truth; and that lest it should seem doubtful that the first letter was drawn from my Lord Cobham by promise of mercy, or hope of favour, the Lord Chief Justice willed that the jury might herein be satisfied: whereupon the Earl of Devonshire delivered, that the same was mere voluntary, and not extracted from the Lord Cobham upon any hopes or promise of pardon."

"This was the last evidence."

Raleigh, aware as he expresses himself of the "cruelty of the English law," endeavoured to destroy himself in the Tower. The motive for this undoubtedly was, the desire to preserve his estate for his wife and children. The punishment of pressing to death, which some have encountered for the same object even as late as the reign of George the Second, if I mistake not, was so horrible, and the notion of a fair trial in that age so utterly chimerical (*o*), that he resolved upon this alternative. It is remarkable that Coke, unscrupulous as he was, never alluded to this circumstance. To whatever this was owing, assuredly it was not to any feeling of decency or sense of justice to the prisoner.

Thus, on the single evidence of Cobham, never confronted with Raleigh, who retracted his confession, and then, according to the advocates of the Crown, recalled his retractation,

(*o*) The jurymen who acquitted Throgmorton were imprisoned for eight months and heavily fined. Yelverton, in his Reports, preserves an account of similar treatment of a jury who had acquitted a prisoner of murder against the direction of the judge. Wharton's case—Popham: Gawdy (iterum crispini); and Fenner valde fuerunt irati, &c.

did an English jury, to the amazement and horror of the bystanders, and the perpetual disgrace of the English name, find the most illustrious of their fellow subjects guilty of high treason. Cobham was brought to the scaffold, and then, repeating his former charge against Raleigh, was pardoned. Lingard, who is as thoroughly dishonest as Hume or Southey, affects to be deceived by this shallow artifice, and argues, that as Cobham, with death before his eyes, reiterated the charge, he spoke the truth in at first accusing Raleigh,—as if the pardon was not communicated to Cobham, and the condition of its grant stipulated beforehand!—as if, amid the mass of falsehood, intrigue, and treachery, which surrounds this and every other transaction of James's reign, such a proceeding was not for every reason probable!—and as if Cecil, or James, or Cobham, would shrink from crimes far blacker and schemes far more ignominious! Yet Lingard is not ashamed to say that the King's sagacity excited universal admiration,—a courtier of James the First could have said no more; and this is the way in which, with the exception of the works of Rapin and Hallam, this portion of English history has been written.

It would be foreign to the purpose of this Treatise to enter into any account of the fate of Raleigh, of his long captivity, of his disastrous voyage, and of his cruel death. But there is(*p*) one circumstance so glorious to his memory, which Hume has suppressed, that I cannot forbear relating it. It is this; when Raleigh was entrusted with the command of the Guiana expedition, the Earls of Pembroke and Arundel became his sureties that he would return and place himself again in the King's power. He was aware of James's intention to sacrifice him to Gondomar, and yet he came back to release his friends from their obligations. Hume, persevering in his falsehoods, describes Raleigh's attempt to escape; but he omits, by a most shocking prevarication, to say, that this attempt was not

made till after Raleigh, by his formal surrender to Sir Jervis Stukeley, had exonerated his friends from all responsibility; then, indeed, he endeavoured to escape from the power of the paltry tyrant, in which, with such heroic fidelity, he had chosen once more to place himself. Hume's narrative leaves the reader with an impression directly opposite to the truth.

One fact more will shew the English system in its true colours. A condemnation had been obtained so unjust that it could not be executed. Thirteen long years had elapsed, during which this illustrious victim of Scotch meanness and Spanish jealousy languished in captivity. The heart of an Inquisitor might have been touched by his sufferings and his fortitude. But Raleigh had exhorted the great council of the nation to make terms with James before he took possession of his (*q*) throne; Prince Henry, the poisoned son of James, had appreciated his godlike intellect; and in the reign of Elizabeth he had contributed largely, by his deeds and counsels, to the humiliation of the Spanish nation, which James now courted with such abject sycophancy. These were crimes not to be forgiven. He was now a ruined man. Lady Raleigh's prayer, that she might not be stripped of the estate at Sherborne, had been answered by James with all the coarseness and indifference to human suffering for which the worst of his countrymen and the worst of rulers are notorious,—"I mun ha' it, woman, I mun ha' it for Carr!" The hearth of Raleigh was now the spoil of a Scottish menial; an expedition was contrived in such a way that its success was impossible; he was appointed to command "a motley company of rascals," in a most critical and important enterprise; he himself, attacked by a conta-

(*q*) Raleigh was the Marquis Posa of the English Don Carlos. Philip's letter to the Duke of Alva, announcing with ominous brevity the imprisonment (which was the death) of his son, is vol. 4, p. 485, Documentos inéditos de la historia de España,—a work which ought to make all connected with the management of the British Museum hide their faces. Philip says, he prefers the welfare of religion "a todo lo demas que toque a la carne y sangre," &c. James had no such excuse.

gious disorder, was "in the hands of death for six weeks;" he came home an attainted citizen, a ruined outcast, a heart-broken man. Still this was not enough. His death was resolved upon; and some justification for it was desirable. Demosthenes, in one of his fiercest invectives against his rival, tells the Athenians, that it was the peculiarity of Philip's fortune, that whenever he wanted a consummate villain for the execution of his designs, he always found them even baser and more detestable than he could expect. Such seems to have been also the fortune of English sovereigns. It was determined to find a keeper of the Tower, who should insinuate himself into Raleigh's confidence, write down all the sorrowful complainings of the captive, and intercept his letters to his wife, in hopes that something like proof of a treasonable disposition might be elicited. Accordingly Sir Allen Apsley, a man of honour and humanity, the father of the lofty minded Mrs. Hutchinson, was dismissed, and a wretch, called Wilson, made Lieutenant of the Tower. He discharged the worshipful office committed to him as Tiberius might have desired. Never deviating for an instant from the path of baseness, never softened by the bodily suffering of his captive, never touched by the least sympathy for fallen greatness, he faithfully communicated to Naunton, James's secretary, every effusion of each unguarded moment, and the contents of every letter from Raleigh to the wife he loved (*p*). Nothing,

(*p*) A note from Sir Walter Raleigh to his Lady :—

"18th September.

"I am very sick and weak. This honest gentleman, Mr. Edward Wilson, is my keeper, and takes pains with me. My swollen side keeps me in perpetual pain and unrest. God comfort us!

"Yours, W. R."

Lady Raleigh's answer :—

"I am sorry to hear, among many discomforts, that your health is so ill. 'Tis merely sorrow and grief that, with wind, hath gathered into your side. I hope your health and comforts will mend, and mend us for God. I am glad to hear that you have the company and comfort of so

however, transpired to serve the purpose of the Court, and he was compelled to satisfy his own malignity and the malignity of his employer by the most virulent abuse of the captive, whom he affected to console. In one letter to the King he says, "I hope by such means as I shall use to work out more than I have done; if not, I know no means but a rack and halter:" in others he calls him "hypocrite," "arch-hypocrite." Naunton, acknowledging the safe arrival of Wilson's reports, says, at the end of his letter, "the best comfort I can give you is, that you shall not long be troubled with him, proin tu quod facturus es, fac cito et frontem occasionis accipe et preme quantum potes, potes enim et certe vis" (*q*). There being no other resource, James was obliged to strip his pitiful malevolence bare in the sight of Europe, and to execute him on his former sentence.

There are few passages that shew the little generosity of Hume's nature, and the low standard of his morality, more painfully than his attempt, unsuccessful and sophistical as it is, to gloss over the conduct of James to Raleigh. That no sort of reliance is to be placed, I do not say on his accuracy, but on his veracity as an historian, and that his sole object, in writing that portion of his history, was to justify the Stuarts, is disgraceful enough to his reputation. But I own his remarks on James's conduct to Rochester and Buckingham, of the true

good a keeper. I was something dismayed at the first that you had no servant of your own left you; but I hear this knight's servants are very necessary. God requite his courtesies, and God in mercy look on us!

"Yours, E. RALEIGH."

Jardine, cit. ap., vol. I, p. 492.

(*q*) Letter of Secretary Naunton to Coke:—

"Sir,

"I read most of both your letters to his Majesty, who allows well of your care and discretion. I hope you will every day get ground of that hypocrite that is so desirous to die, mortified man that he is! His Majesty was well pleased with your past services; he will think long for the ripening and mellowing of the observations and conferences by which you are to work upon that cripple." Jardine, loc. cit.

meaning of which he was quite aware, his observation, "that no one who was not cynically austere would censure the king's choice in his friends and favourites," which he knew were the scandal of his court, licentious as it was, of his queen, and of the age, as well as the apathy with which he regards the bottomless falsehood and genuine baseness of James's character, as exhibited in Raleigh's trial and execution, produce on me a still stronger sensation of disgust even than his deliberate falsehoods, and shew a want of moral delicacy, an obtuseness to great and generous sentiments, which the most virulent bigotry might better account for than excuse. It is impossible not to regret that such wonderful abilities, such power of writing, such capacity for seizing the true features of philosophical history, should be combined with an almost absolute indifference to right and wrong, to truth and falsehood, to the happiness or misery of the human species; but, at the same time, we may learn from so striking an example, that even the intellect of Hume, when it is not supported by a firm adherence to the eternal laws of morality, cannot rescue its possessor from self contradiction and contempt.

Other English trials there are, those, for instance, of Alicia Lisle and Mrs. Gaunt, which make the soul more sick than this of Sir Walter Raleigh, but there is none which sets the blood more on fire with indignation. All Scotland, from the beginning of time to the present hour, has never produced a single man fit to be named in the same chapter of history with him; nay, even in more favoured regions, where more highly gifted races are settled, to whom refined taste and polished eloquence, and, above all, lofty aspirations, which we strive to attain by painful toil and diligent cultivation, and which, if they are not preserved among us by constant efforts, fall away and perish; are natural and familiar, the spontaneous growth of a blessed soil,—even there we shall find very few entitled to rank among his competitors. He was the Themistocles of England; and almost the first act of the Scotch dynasty, whom

we had raised from sordid obscurity to the throne of Elizabeth, was to imprison and to destroy him,—a crime for which the blood of their whole race would be an insufficient atonement,—an injury for which the addition of a kingdom such as Scotland then was, would have been but a poor compensation,—a disgrace which the counsels of Pym, and Hampden and Elliott, the death of Charles, and the glories of Cromwell, can hardly wash away; and if any thing could add to our notion of such unfathomable baseness, if any thing were wanting to make our scorn and loathing for his murderer complete, it is to find the minister of James actually taking credit in his correspondence with the Spanish Court for Raleigh's execution, and attributing it to his master's desire to cultivate the friendship of the King of Spain. Nothing can go beyond this,—James's foul demeanour,—the disgusting letters he wrote to Somerset and Buckingham, which Wilson tells us would make the most hardened strumpet blush, and which Mr. Hume says in one of those passages, not only so unworthy of the philosopher, and so inconsistent with the historian, but so scandalously disgraceful to the man, none but a cynic would find fault with,—are lost sight of in the contemplation of such immeasurable turpitude. Such was the man who was told by the Bishop of London that, after Christ, he was the best King that had ever reigned, by one of his Archbishops (Whitgift), that undoubtedly he spoke by the special inspiration of the Spirit of God, and who, another Archbishop (Laud) declared, after his death, was, on account of his virtues and purity, beyond all doubt translated to Abraham's bosom! (*r*)

(*r*) In Bishop Williams's funeral sermon on James, there is an allusion to the intimacy between James and Villiers—by whom (as Harrington thinks) in all probability James was poisoned—so hideously revolting that I dare not cite it, nor can I think of it without shuddering. But as an instance of flattery which does not quite freeze the blood, take the same bishop's speech in which he says, "God *and the King* are averse to nullities." And again, "Many times it falls out with the assent of Kings as it does with God." A Welsh bishop, in a preface to the Welsh translation of the Bible, apologizes for preferring the Supreme Being to James the First. Amos, p. 509.

This is the extract from the letter of the minister of Elizabeth's successor to the King of Spain:—

"His Majesty has given them (the Court of Spain), so many testimonies of his sincere intentions towards them, which he daily continues, AS NOW OF LATE CAUSING RALEIGH TO BE PUT TO DEATH, CHIEFLY (*s*) FOR GIVING THEM SATISFACTION."

Another trial which has stamped its character on the age is that of the Earl of Somerset for Overbury's murder. Before I enter upon its details, I will state, as concisely as it is in my power, the events with which the history of this unhappy man is immediately connected, and which led to the termination of his life in a manner so tragical and so appalling. Soon after the accession of James, the Lady Frances Howard, daughter of the Earl of Suffolk (Lord Thomas Howard, son to the Duke of Norfolk, beheaded under Elizabeth, who, at the time of her trial, was Lord Treasurer), and great-niece of the Earl of Northampton (Lord Henry Howard, brother to that Duke of Norfolk, a nobleman of great attainments and of infamous character), married, at the age of fourteen, the Earl of Essex, then of the age of fifteen years. The consummation of the marriage was delayed, and the Countess of Essex fell in love in the mean time with Viscount Rochester, the patron of Sir Thomas Overbury. An adulterous intrigue was carried on for some time, and in order to get rid of all restraint, it was at last resolved, with the assistance of the English King, and English Bishops, that the Countess of Essex, on reasons notoriously false and frivolous, should be divorced from her first husband. In spite of the opposition of Abbott, Archbishop of Canterbury, who had not lost all sense of shame, and by the violent and indecent interference of James (*t*), (this best of rulers, if we may believe Bishop Bancroft, after Christ), who, to all his other turpitudes, added that of pandar to his minion,

(*s*) Rushworth, vol. 1, p. 6.

(*t*) Bishop Bilson was very active in the same cause, and his son, in consequence, was called Sir Nullity Bilson.

—the divorce, to the mockery of all religion and all law, was pronounced, and the Countess of Essex became the wife of the Viscount Rochester. There can be no doubt that Overbury vehemently remonstrated against this marriage; and it is probable that his opposition was no secret to the Countess, a woman capable of every crime. There can be no doubt also, and this is a point most material to the consideration of this strange inauspicious history, that James, for some reason or other, detested Overbury. This antipathy was notorious. Overbury, after the death of Prince Henry (1612), and before the marriage of his patron Somerset, was flung into the Tower (1613) by James's express command, and there he was poisoned. Two years after his death, when James was weary of his minion Somerset, and attracted by the handsome person of the courtly Villiers,—in consequence, as was said, of some disclosures from abroad, a story that I confess appears to me very improbable, and that, if *all* the facts are examined, nobody can think worth serious notice, an investigation was set on foot into the manner of Overbury's death.

The proceedings which took place at the trial of the murderers of Sir Thomas Overbury are pregnant with mystery and suspicion. Garbled as the reports of the trial evidently are, enough transpires to shew that there was in all those invested with authority, Lord Coke included, an earnest desire to conceal some portion of the truth, to stifle some portion of the evidence; and that the unhappy man fell a victim to the fears or hatred of one far more powerful than any one whose name appears upon the proceedings.

Coke carried with him to the Bench the same servility (*t*) to the powerful, and virulence to the weak, which he had exhibited at the Bar. As this notorious fact has been disputed in a quarter from which it was natural to expect a deeper and more accurate view of this portion of history than any these pages can present, I am happy to be able to fortify this my opinion by

(*t*) Juxta adulatio et superbia.

the authority of the greatest constitutional lawyer of our day, I mean Mr. Amos, in his able and learned Work on the trial of Somerset. But independently of all authority, I shall prove this statement by facts, which leave little to be surmised and nothing to be mistaken. I shall prove that the demeanour of Scroggs on the Bench was never more disgraceful than that of Coke during these trials; that in his eagerness to gratify James, he scrupled not to run counter to principles he himself laid down, to take, in his own affected phrase, "auricular opinions," which he told Bacon was illegal "of the judges," to state what he knew to be false, to sit as judge in his own case, to garble depositions, and to browbeat those who were on trial for their lives. I shall also shew that his disgrace was owing, not to any display of independence, but to his allusion to Prince Henry's murder, by which the King was terrified and provoked.

Coke presided at the trial of Weston. He charged the grand jury with the pedantry peculiar to himself. The bill was found, and the prisoner put upon his trial. When asked whether he was guilty or not guilty, he answered, "not guilty." Being asked how he would be tried, he said he would be tried by God. I will now quote a passage to shew how the English law punished this answer:—

"And so when no persuasions could prevail, the Lord Chief Justice plainly delivered his opinion, that he was persuaded that Weston had been dealt withal by some great ones, guilty of the same fact, as accessary, to stand mute, whereby they might escape their punishment; and, therefore, he commanded (for satisfaction of the world), that the Queen's attorney there present should declare and set forth the whole evidence, without any fear or partiality; and yet notwithstanding, he once more used much persuasion to the prisoner to consider what destruction he brought upon himself by his contempt; and declaring unto him how his offence of contempt was in refusing his trial, and how the laws of the land had provided a sharper and more severe punishment to such offenders than

unto those that were guilty of high treason; and so he repeated the form of judgment given against such, the extremity and rigour whereof was expressed in these words, '*onere, frigore, et fame.*' For the first, he was to receive his punishment by the law;—to be extended, and then to have weights laid upon him, no more than he was able to bear, which were by little and little to be increased.

"For the second, that he was to be exposed in an open place, near to the prison, in the open air, being naked.

"And lastly, that he was to be preserved with the coarsest bread that could be got, and water out of the next sink or puddle to the place of execution, and that day he had water he should have no bread, and that day he had bread he should have no water; and in this torment he was to linger as long as nature could linger out, so that oftentimes men lived in that extremity eight or nine days; adding further, that as life left him, so judgment should find him."

But (*u*), it will be said, in that age similar absurdities were to be found in the law of all countries. My answer is, first, that the cruelties in the law of other countries, shocking and pernicious as they were, might answer some conceivable purpose. Torture might extract the truth, and contribute, in some cases, to the detection of guilt, as well as to the oppression of innocence, whereas it is the peculiar and provoking distinction of many absurdities of our law, that they arise solely from a childish love of form, and are pointed to no object or aim whatever; it is not that they are wrong means to a particular end, but that there is no end at all to which they are directed—they are mere wanton, gratuitous nonsense. For instance, how did it forward the ends of justice that the prisoner should repeat the words "and by my country," before

(*u*) I find, though I did not know it when I wrote this passage, that Selden has made the same remark. In other countries, he says, the use of torture is intelligible; with us it is done at command, without inquiry and without an object.

he was tried? In what way did such articulated air contribute to the detection of his guilt? What crimes did it reveal? What gap in the evidence did it supply? How did it lighten the duties of the judge, or lessen the responsibilities of the jury? You give a man the alternative of perishing, without a trial, in torture, or of consenting to a particular mode of trial. Of what value is his consent? And yet, for the sake of this miserable fallacy, that the ministers of justice might say, "Prisoner, you have *put yourself* for trial upon your country, which country have found you guilty," a form of expression which had some meaning when it was originally used, and the prisoner might have chosen ordeal or trial by battle—(either of them, by the way, better guarantees of innocence than a trial under the auspices of my Lord Coke, or Jeffreys, or Saunders),—for the sake of such solemn foppery as this, men, accused and untried, were subjected for centuries to the most hideous tortures. Secondly, I would remark that this enlightened practice continued to be the law of England till the twelfth year of George the Third (*t*). Such were the enlarged, philosophical views, and such the disinterested love of humanity, which characterized the members of our Legislature (*u*). And this outrage on reason and humanity (which, if the Encyclopedists or Mirabeau had invented it, would have been the topic of incessant invective, and have furnished the enemies of freedom and of discussion with a weapon to the latest posterity) continued to be solemnly enacted in Courts of justice, in a country in which sat a deliberative assembly composed of representatives freely chosen by the people.

In Weston's case, when the trial did proceed, every species

(*t*) Blackstone takes credit for its abolition then as a proof of our liberality!

(*u*) Lord Hervey tells us, that it was an avowed maxim of Sir R. Walpole, never to promote any one in the Law or the Church who had suggested any reform in either.

of irregularity was committed; examinations of witnesses, who might have been heard *vivâ voce*, were read, confessions put in, and Coke interposed repeatedly against the prisoner, guilty most undoubtedly, but not so guilty as others who escaped. As a specimen of Lord Coke's judicial integrity, take the following passage:—

"And for this purpose his Majesty hath, with his own hand, written two sheets of paper on both sides, concerning justice to be administered to all parties which were to be examined; which writing the Lord Chief Justice shewed to the Lord Mayor, and the rest of the Commissioners; and then he declared the King's justice."

And here, as it suited his purpose, he laid down the following just and simple principles for the direction of the jury:—

"That albeit the poisoning in the indictment is said to be with rosalgar, white arsenick, and mercury sublimate, yet the jury were not to expect precise proof in that point, shewing how impossible it were to convict a poisoner who useth not to take any witnesses to the composing of his sibber sauces; wherefore he declared the law in the like case; as if a man be indicted for murdering a man with a dagger, and it fall out upon evidence to have been done with a sword or with a rapier, or with neither, but with a staff; in this case the instrument skilleth not, so that the jury find the murder. And so in this prisoner's case, if they would be satisfied of the poisoning, it skilleth not with what."

Why, indeed, it should be necessary to state a particular poison in the indictment, when another poison might be proved,—what purpose was answered by such a proceeding,—how it contributed to assist the prisoner, or further the purposes of justice, my Lord Coke did not state; nor, though the law in this respect continued to be the same, has any one pointed out a reason for a course which, however analogous to other portions of our law, is scarcely to be vindicated on any principle of sense or equity.

Before Weston had resolved to plead (*v*), Sir E. Coke adopted a course of proceeding altogether without example and without warrant; "he called upon Sir Lawrence Hyde, the Queen's Attorney, and those of council for the King, to manifest unto the audience the guilt of Weston by his own confession, and if, in the declaration thereof, they meet with any great persons whatever, *as certainly there were great ones* confederate in that fact," he was "boldly and faithfully" to state what another person had said against them. Such a proceeding, if the value of a cabbage had been at stake, Sir E. Coke well knew was contrary to the first principles of positive law and of natural justice.

This, however, was done; and Hyde, encouraged by the Court, called the marriage of the Earl of Somerset, a marriage made, as we have seen, under the immediate auspices of the King, and sanctioned by the authority of the prelates of the English church, "an adulterous marriage;" and that the Countess of Somerset (in no way before the Court) "was a dead and rotten branch, which, being lopt off, the noble family of Howard would prosper the better." All this wicked injustice did Sir E. Coke, holding the scales of justice with so firm a hand as we are told, allow to proceed without restraint or interruption. On the 23rd of October Weston pleaded; an event which Sir E. Coke ascribes, with his usual sincerity, to the immediate interposition of the Holy Ghost, but which, in all probability, was owing to a false promise of the Attorney General. The examinations and confessions were read,—a witness was called, who repeated a speech of Weston to the effect that he hoped the great flies would not escape if the little ones were caught,—and Weston was convicted. Sir E. Coke's irregular proceeding, in allowing the examinations to be read before the prisoner pleaded, had, it seems, attracted notice, for after

(*v*) This proceeding, says Mr. Amos, is one of the most irregular and unfair that occurs in the history of the English law. Trial of Somerset, p. 379.

Weston's conviction he told the jury the outrageous falsehood, "that by the laws of the land they ought and were bound to do so, notwithstanding the greatness of any who might thereby be impeached;" of whom, though they had never been placed upon their trial, this upright judge went on to say, with equal taste and probity, that it was "unum crimen," but not "unicum crimen." In the mean time, notwithstanding Coke's dislike to "auricular communications" with a judge, he kept up a close and anxious correspondence with James as to the demeanour of the prisoner.

In passing sentence, Lord Coke went out of his way to assure his audience, "that there was no practice of conspiracy in prosecuting this business;" "he solemnly protested to God that *he knew of none*, nor of any semblance or colour thereof; and therefore he much inveighed against the baseness and unworthiness of such as went about so untruly and wickedly to slander the course of justice." Those who know anything of the character of Lord Coke will not be disposed to attach much importance to his appeal to Heaven; but what this passage of officious servility does shew beyond question is, that suspicion was excited, that the public murmured, and that those murmurs did not spare Coke's master. Nothing else would have elicited such a vindication.

The next trial was that of Mrs. Turner. That she was the friend of that abandoned woman, the Countess of Somerset, is certain; and that she was privy to Overbury's death is very probable: but evidence of that crime, in the report of her trial, there is none: though letters and conversations, to which she was not a party, were given in evidence against her. The oracle of English law, before the jury were charged, told the prisoner, in their presence, that she had the seven deadly sins, *viz.*, a whore, a bawd, a sorcerer, a witch, *a papist*, and a murderer.

Elwes, the Lieutenant of the Tower, was next tried. I

incline to think that the question he put to Coke is the true statement of his case:—

"If one that knoweth not of any plot to poison a man, but only suspecteth, is no actor or contriver himself, only imagineth such a thing; whether such a one be accessary to the murder? For the words of the indictment are, abetting and comforting with malice. Now if there be any man that charges me, expressly or in direct terms, that I was an abettor; or if the Court shall think, in this case which I have put, that such a concealing without malice is an abetting, I refuse not to die, I am guilty." This was the sum of his speech.

Sir E. Coke then, in a passage which I think must have escaped the notice of his biographer, said from the Bench,—"It is not your deep protestations, nor your appealling to God, that can sway a jury from their evidence. . . But to leave you without excuse, and to make the matter as clear as may be, here is the confession of Franklin [which he then drew out of his bosom], saying, This poor man, not knowing Sir Jervis should come to his trial, this morning he came unto me at five o'clock, and told me, that he was much troubled in his conscience, and could not rest all that night until he had made his confession; and it is such a one [these were his words] as the eye of England never saw, nor the ear of Christendom never heard."

"In the whole history of our state trials, there is perhaps no instance of such an unfair manner of adducing evidence as that which is here related," is the commentary of Mr. Amos, which hardly can be reconciled with the opinion of those who would have us believe that Sir E. Coke's enormities as an advocate were atoned for by his purity as a judge. In the confession which Coke then proceeded to read, there was not one syllable of legal evidence against Elwes. Now Sir E. Coke has, in his own handwriting, left an account of his own opinion of the character of Franklin, the witness whose testi-

mony he affects to consider so irresistible, and I doubt if there exists anywhere a memorial more authentic of complete depravity. "*For Franklyn* (Coke writes), *he is only reserved for a time to give some light of this work of darkness. But the hour of your justice and the wickedness of the man is such as long continuance of his life cannot consist together; and therefore, after a convenient time, when as much as can be is extracted from him,* as can be, *execution shall be done, and your Majesty never troubled therewith.*" This passage is in the letter to the King, for the "auricular system" was extended to every prisoner without exception (*w*).

(*w*) "Lord Chief Justice Coke.

"Right trusty and welbeloved Councellor. Trusty and welbeloved we greet you well. We have received your letter of the 19th of this month, wherein you give us a large account to our good satisfaction of your late proceedings with Weston; which they give us cause to be most heartily sorry that the *least touch* of so foul a fact should fall upon *the honor and reputation of any that holdeth* so near a place about our person; so do we give God thanks, and withall commend your industry and endeavours that the truth is discovered, that thereby so heinous and wicked an offence may receive in due time condigne and exemplary punishment. We have great reason to approve as we do the moderation and discretion which you have used in the whole course of your proceedings against Weston, towards whom we require you even in Christian charity to employ your best endeavours, both by sending able and worthy preachers to him, and by your own exhortations to make him sensible of the danger of his soule if he shall persist in this contumacy, not to submit himself to the trial of the law; but if you shall find him still to continue stubborn and obstinate, which God forbid, then we do require you without delay to proceed to judgment, which our will and pleasure is should punctually be executed, according to the strictness and rigour of the law, whereof you are before to forewarn him; for why should pity be taken of the body of that man who, for want of grace, hath no commiseration of his own soule. And because we *concurr in opinion with you,* that Weston having neither lands nor goods to lose, by practice hath bin wrought to this obstinacy, perhaps upon this sinister suggestion, that the accessory cannot be called in question unless the principal be first condemned, we do require you our Chief Justice, and the Lords who are joined in commission with you, to examine Weston himself, if no man hath practised with him, *before whose arraignment on Monday next you may likewise examine all other parties against whom you may conceive just suspition,*

Sir Gervas Elwes's defence was in substance this. "If I be guilty, my Lord Suffolk, who is not even accused, the

namely, the Earl of Somerset and the lady his wife, whom on like manner you are to examine on those points mentioned in the former letters of the Commissioners in this particular; you may remonstrate unto them how unworthy a thing it is in the state they now stand, to heap sin upon sin, and to charge their consciences with the apparent danger of the damning of the soule of that miserable wretch, who, as he hath bin the murderer of another, so now will be the murderer of himself; whereby let them know they can little relieve themselves, if they shall be found guilty, for which we profess we shall be heartily sorry. This being our resolution, to use all lawful courses *that the foulness of this fact be sounded to the depth*, that for the discharge of our duty, both to God and man, the innocent may be cleared, *and* the nocent, as the nature of the offence shall deserve, may severely be punished.

"To our right trusty and welbeloved Councellor Sir Edward Coke, Knight, our Chief Justice of England, and to our trusty and welbeloved the Judges of our Bench."

"Most Gracious Sovereign,

"I, your Chief Justice, do in most humble manner inform your Majesty, that according to your Majesty's most princely and christian consideration and care to save Richard Weston's soul, the Bishop of London, on Saturday last, and the Bishop of Ely, on Sunday, spent a long time with him, using all the strength and fire of persuasion they could, and yet to their seeming profited nothing, but left him obstinate and undurate. The Bishop of Ely offered him to fetch any jesuit or priest out of some of the prisons, who would [as he assured himself] come with him in the grounds of his perswasion, to whom he answered, that if the Bishop of London and the Bishop of Ely could not perswade him, neither jesuit nor priest should do it. But yesterday morning, upon speech with the Sheriff's servant [by the instance of the Holy Ghost], he offered to put himself upon the country; and when he had affirmed so much to the Sheriff [who had dealt honestly in the cause], he said withall, I hope they do not make a net to catch the little fishes as flies, and let the great go.

"According to our commission, and your Majesty's direction, yesterday we proceeded against him, who willingly put himself upon God and the country, and thereupon a very substantial and understanding jury was returned and sworn; all the confessions and testimonies were read distinctly and planely, and he openly and freely acknowledged all his confessions to be subscribed by his mark, and that they were all true, and were taken with mildeness and gentle means, without any threatning and

Lord Treasurer, and father of the Countess of Somerset, is still more so, as I can prove by his letters, which are in my

hard words. After the evidence given for your Majesty, the prisoner was patiently heard as long as he would speak, and in the end being demanded if he would speak any more, and if he would he should be heard, he openly acknowledged his said former words, namely, I hope they do not make a net to catch the little fishes as flies, and let the great go, and said he could say no more. Whereupon the jury departed from the Bar, and after a mature time of deliberation they returned, and with one consent found him guilty. Whereupon judgment is given, and execution awarded, and in the mean time especial care is commanded to be taken for the saving of his soule. And this is the true manner and order of our proceeding. What a multitude were present, how they were satisfied, and how your Majesty's justice was applauded, we leave it to the report of others. And we, according to our most bounden duty, shall ever pray to the Almighty for your Majesty in all prosperous and happy state long to continue. From Sergeant's Inn, this present Tuesday morning, the 24th of October.

"Your Majesty's most humble subjects and servants,

"Edw. Coke. Jo. Croke.

"Jo. Doddridg. Rob. Houghton.

"To the King's most excellent Majesty.

"[Indorsed]. From my Lord Coke and the Judges of the "Bench to his Majesty."

"Upon reading of the examinations subscribed by himself, he could deny none of them, and confessed that he had been mildly and temperatly dealt withall. If he shall persist in his contumacy, we most humbly desire your Majesty's directions whether we shall proceed in judgement and execution against him on Monday or no; and if we shall, whether it be not your Majesty's pleasure he shall be executed according to the judgement of the law. And I, your Chief Justice [albeit I had no warrant therefore], was bold in manifestation of your Majesty's zeal to justice to publish your Majesty's prim and pertinent direction and interrogatories written with your own grand hand, for the finding out of this foul fact, which [as the sequel show] had an extraordinary blessing of God, and which very many desired to see. And I, your Chief Justice, did further remember the famous and worthy example of the Lord Sanquer. And albeit your Majesty had highly advanced out of your princely favor the now Earl of Somersett to great dignities and estate, yet your Majesty, out of your respect to justice, suffered the course of law to proceed against him, and that he was justly committed to the Dean of Westmin-

possession. He and his uncle, the Earl of Northampton, whose letters to Rochester you have read against me, appointed Weston, by whom the murder was perpetrated, to the situation which gave him the opportunity of its perpetration, not I. I took Sir Thomas Overbury into my custody under the express order of the King, communicated to me by the Earl of Northampton, to whom I gave an account of the prisoner's conduct. It is true that I once suspected an intention of foul play on the part of Weston; but I remonstrated with Weston. He expressed contrition; and I supposed that

ster's house, under the safe custody of Sir Oliver St. John, and the Countess also restrained of her liberty.

"But we all certify your Majesty, that in the carriage of the whole cause there appeared not to us any shadow or spark of *conspiracy*, combination, or plot to scandalize or lay an aspersion upon any, but that the proceeding had been just, orderly, and honorable. And with what great applause your Majesty's princely zeal of justice therein was of all the hearers accepted, it much rejoiced our hearts *to behold*. And we shall continually pray to the Almighty for your Majesty in all prosperous and happy estate long to continue. 19th October, 1615, at nine of the clock.

"Your Majesty's most humble and faithful subjects and servants,

"Edw. Coke. Jo. Croke.

"Jo. Doddridg. Rob. Houghton.

"To the King's most excellent Majesty.

"[Indorsed]. From my Lord Chief Justice and the Judges "of the Bench to his Majesty."

The Commissioners' Report to the King touching the Earl of Somerset:

"We are of opinion that there is vehement suspicion, and that the matter, upon consultation of the examinations and testimonies, is pregnant against the Earl of Somerset for being accessory to the poisoning of Sir Thomas Overbury before the fact done; and we had resolved to have committed the Earl to the Tower, before his Majesty's coming to Whitehall, if he had not had the custody of the seales and other ensignes and ornaments of the King's special favor. And the said seales and ensignes being taken from him, we held it necessary that the said Earl be committed to the Tower.

"T. Ellesmere, Canc. Zouche.

"Lenox. E. Coke.

he had abandoned his design. Encouragement he had none from me. If the murder was committed at the instigation of the Earl of Suffolk's daughter, and the Earl of Suffolk gave the murderer the means of committing the crime, how am I responsible? Why is he at liberty? So far from conniving at the crime, I was the first person who gave the intelligence which led to Weston's conviction. Whatever I might suspect, I had no share in the transaction."

Elwes gave a darker aspect to the whole transaction; he was a man of superior rank and ability to the criminals who had hitherto been tried for their share in the murder of Overbury; he was not so easily to be daunted by the demeanour of the Chief Justice. He resolved to lay bare what he knew of the conduct of those of whom, whether their accomplice or not, he was certainly to be the victim. He accused the Lord Treasurer. "If I be in the plot," said he, "the Lord Treasurer is. I have his letter to shew; in it he called me to his lodging. My wife has the letters from my Lord Treasurer."

Coke, this upright judge, told him, that "his accusation of the Lord Treasurer was most malicious, for in the examinations he had taken, and in all the exact speech he could work for finding out the truth, he saw not that honourable gentleman any way touched. No *vivâ voce* evidence was brought against Elwes. Letters from the Earl of Northampton to Rochester were read against him; and the statement of Franklin. He told Lord Coke, "You have not observed your own rule in my case; you have paraphrased upon every examination; you have aggravated every evidence, and applied it to me, so that I stand clearly condemned before I be found guilty." He was convicted and executed.

Franklin was next convicted on his own confession; and Coke wrote an elaborate letter, describing his conduct at the trial to the King.

But before this trial he had already committed an act of unparalleled injustice by sitting as judge in his own cause—on Lumsden, Hollis, and Wentworth, in the Star Chamber.

The two latter were charged (*x*) with having questioned Weston at his execution, and Sir John Hollis of having said at Weston's trial, that if he were on the jury he should not know what to do. Lumsden was accused of having addressed a letter to the King, reflecting on the conduct of Coke in publishing the evidence against the prisoner before his trial, which natural ebullition of an honest nature Lord Bacon termed "an empoisonment of the King's ear." Sir E. Coke remarked, that "he who infuses into his Majesty's ear the least suspicion of his judges, commits a kind of treason." He asked Hollis, "Quæ tanta fuit Tyburn tibi causa videndi?" He related how two lines of Ovid had cured him, Coke, of going to see executions: it is unlucky that he found none to cure him of seeing prisoners tortured. He applied to himself, with regard to his judicial conduct, the words of Abimelech, "In reis Domine quod feci in simplicitate cordis et munditie manuum;" and he ended by "exhorting gentlemen to take heed how they fell into discourses of these businesses at their chambers, for if a man speak irreverently of justice in these matters, the bird that hath wings will reveal it." Could an emissary of Philip the Second say more? Hollis was fined 1000*l.*, and imprisoned a year; Wentworth 1000 marks, and imprisoned a year; Lumsden was fined 2000 marks, imprisoned for a year, and moreover until he should before the King's Bench submit himself, confess his fault, and produce his authors. Mr. Amos makes the following remarks on this little episode in the life of the judge who, from pure love of justice, abhorred auricular communications:

"Our judicial annals," remarks Mr. Amos, "happily do not present *any other case* in which the first principles of justice have been so flagrantly violated as in this instance, in which we find Sir E. Coke giving judgment in what was emphatically his own cause. It is not to be wondered at that he should have designated a complaint made of his own official conduct a "kind of treason." But the sentencing Mr. Lumsden to

make a submission for this offence, before himself sitting at Westminster, might have been thought revolting to any mind capable of regarding any consideration but the impulses of its own passions."

The only occurrence in our judicial annals at all similar to the conduct of Sir E. Coke in this proceeding is that of Chief Justice Scroggs, in the reign of Charles the Second, who bound over Richard Radley to appear before the Court of King's Bench, for having *said* to one Robert Raylett, "If you think to have the money you have overthrown me in, you may go to my Lord Scroggs, for he has received money enough of Dr. Wakeman for his acquittal."

The next trial, that of Sir Thomas Monson, exhibited James in a light still more suspicious and degrading. Weldon —and it should be remembered that Weldon's accounts of all that is most suspicious have received, since the publication of the Losely Papers, authentic corroboration—gives us the following narrative:

"The next that came on the stage was Sir Thomas Monson; but the night before he was to come to his tryall, the King, being at the game of Maw, said, To-morrow comes Tom Monson to his tryall; Yea, said the King's Card-holder, where *if he doe not play his master-prize* your Majesty shall never trust me; this so *run* in the King's *minde*, as the next game he said he was sleepy, and would play out that set next night; the Gentleman departed to his lodging, but was no sooner gone, but the King sent for him; what communication they had I knew not, (yet it may be can more easily guesse than any other), but it is most certaine, next under God, that Gentleman saved his life, for the King sent a post presently to London, to let the Lord Chiefe Justice know he would see Monson's examination and confession, to see if it were worthy *to touch his life for so small a matter*; Monson was too wise to set anything but faire in his confession; what he would

ment. The King sent word he saw nothing worthy of death, or of bonds, in his accusation or examination. Cook was so mad he could not have his will of Monson, that he said, Take him away, we have other matters against him of an higher nature; with which words out issues about a dozen warders of the Tower, and tooke him from the barre; and Cook's malice was such against him, as though it rained extreamly, and Monson not well, he made him goe afoot from the Guild-Hall to the Tower." Now this account is confirmed by the narrative of Coke's grandson, which I place in the note (*x*), that the reader may compare it with Weldon's, and by the

(*x*) "Sir Edward lay then at the Temple, and measured out his time at regular hours, two whereof were to go to bed at nine o'clock, and in the morning to rise at three. At this time Sir Edward's son, and some others, were in Sir Edward's lodging, but not in bed, when the messenger, about one in the morning, knocked at the door, where the son met him, and knew him: says he, 'I come from the King, and must immediately speak with your father.' 'If you come from ten kings,' he answered, 'you shall not; for I know my father's disposition to be such, that if he be disturbed in his sleep, he will not be fit for any business; but if you will do as we do, you shall be welcome; and about two hours hence my father will rise, and you then may do as you please,' to which he assented.

"At three Sir Edward rung a little bell, to give notice to his servant to come to him; and then the messenger went to him and gave him the King's letter, and Sir Edward immediately made a warrant to apprehend Somerset, and sent to the King that he would wait upon him that day.

"The messenger went back post to Royston, and arrived there about ten in the morning. The King had a loathsome way of lolling his arms about his favourites' necks, and kissing them; and in this posture the messenger found the King with Somerset, saying, 'When shall I see thee again?' Somerset then desinging for London, when he was arrested by Sir Edward's warrant. Somerset exclaimed, 'that never such an affront was offered to a Peer of England in the presence of the King.' 'Nay, man,' said the King, 'if Coke sends for me, I must go;' and when he was gone, 'Now the Deel go with thee,' said the King, 'for I will never see thy face any more.'

"About three in the afternoon the Chief Justice came to Royston; and so soon as he had seen the King, the King told him that he was acquainted with the most wicked murder by Somerset and his wife that was ever perpetrated, upon Sir Thomas Overbury; and that they had made him a

following passage from a letter, in Coke's own handwriting, to King James, which, if it existed alone, would be sufficient to shew that his objection to "auricular taking of opinions" was mere hypocrisy. It is to this effect:

"Most Gracious Sovereign,

"That your Majesty may not impute any negligence to me in those things that concern my place, and especially when it concerns your Majesty, I have sent herewith Mr. Septon's examination, which was taken by me long before Mr. Secretary's letters, which I received at twelve.

"This letter written to Sir W. Monson, surmising your Majesty's *censure touching the weakness* of the evidence against Sir Thomas Monson, hath wrought an extreme obstinacy in Sir Thomas Monson," &c.

This corroborates Weldon's statement, and shews that the King *had* written to the Lord Chief Justice touching the case of Sir Thomas Monson. The following account of the trial has been preserved to us:

"When he came to the bar, he made a motion to the Lord Chief Justice; That whereas he had written unto his Lordship to ask the Lord Treasurer two questions, which my Lord would do; he desired then an answer, and that Sir Robert Cotton might be present.

"After the questions were read, he was indicted for conspiring with Weston to poison Sir Thomas Overbury; to which he pleaded, Not Guilty, and would be tried by God and his country.

"Then the Lord Chief Justice addressed his speech to Sir Thomas Monson, saying, Whereas you name my Lord Treasurer; every man's fame is dear unto him, and he hath ever been honourable, you shall hear what he hath answered

pimp, to carry on their bawdry and murder; and therefore commanded the Chief Justice with all the scrutiny possible, to search into the bottom of the conspiracy, and to spare no man, how great soever; concluding, 'God's curse be upon you and yours, if you spare any of them! and God's curse be upon me and mine, if I pardon any one of them!'" And see Whitelocke, p. 295.

to my letter,—'After my hearty commendations, I have heard that Sir Thomas Monson thinks I can clear him, but I know nothing of him to accuse or excuse him; but I hope he is not guilty of so foul a crime.'—You hear (quoth he) that he will neither accuse you or excuse you."

Monson.—"I do not accuse the Lord Treasurer nor calumniate him, for I know he is very honourable, but I desire to have an answer to my two questions."

Lord Chief Justice.—"You shall hear more of that when the time serveth; do you as a Christian, and as Joshua bad Achan, '*My son, acknowledge thy sin, and give glory to God*'!"

Monson.—"If I be guilty, I renounce the King's mercy and God's; I am innocent."

Lord Chief Justice.—"*There is more against you than you know of.*"

Monson.—"If I be guilty, it is of that I know not."

Lord Chief Justice.—"*You are popish;* that pulpit was the pulpit where Garnet died, and the Lieutenant as firmly; I am not superstitious, but we will have another pulpit."

Doderidge.—"It is an atheist's word to renounce God's mercy; you must think the change of your lodging means somewhat."

Hyde.—"I have looked into this business, and I protest, my Lord, he is as guilty as the guiltiest."

Monson.—"There was never man more innocent than I; in this I will die innocent."

"The Lord Chief Justice (*y*) having at this trial let drop

(*y*) "It was intended the law should run in its proper channell, but was stopt and put out of course by the folly of that great clerke, though no wise man, Sir Edward Cooke, who, in a vaine glorious speech, to shew his vigilancy, enter into a rapture as he then sat on the Bench, saying, God knows what became of that sweet babe Prince Henry [but I know somewhat]; AND SURELY, IN SEARCHING THE CABINETS, HE LIGHTED ON SOME PAPERS THAT SPAKE PLAIN IN THAT WHICH WAS EVER WHISPERED; which, had he gon on in a gentleway, would have falne in of themselves, not to have been prevented, but this folly of his tongue, *stopt the breath of that discovery, of that so foule a murder, which, I fear, cryes still for vengeance.*" Weldon.

some insinuations that Overbury's death had somewhat in it of retaliation, as if he had been guilty of the same crime against Prince Henry, Sir Thomas Monson's trial was laid aside, and himself soon after set at liberty; and the Lord Chief Justice *was rebuked for his indiscretion, and before the next year expired removed from his post.*"

This, and *not* his resistance about the "commendams,"(*y*) was the cause of Sir E. Coke's disgrace; and I must (*z*) say that I am astonished in a writer of Lord Campbell's known accuracy, research, and acuteness, to meet with such a passage as the following: "When all the other judges basely succumbed to the mandate of a sovereign who wished to *introduce* despotism under the forms of juridical proceeding, he did his duty at the sacrifice of his office." Now I think it as clear and certain, and incontrovertible, as any fact related

(*y*) "Sir Thomas Monson, another of the Countess's agents in the poisoning contrivance, was arraigned for it, but his good luck was, that at his trial the Lord Chief Justice Coke brake forth to an expression, intimating from the Earl of Northampton's assuring the Lieutenant of the Tower, that the making away of Overbury would be acceptable to the King, or from some other hint that Overbury's untimely remove had something in it of relation, as if he had been guilty of the same crime against Prince Henry. Upon this, Monson's trial was laid aside, *and the Chief Justice's wings were clipt.*" Whitelocke, p. 295. Lord Campbell has followed Blackstone, who, with all his great merit as a writer, is by no means a very safe guide on such a subject. Coke's tenacity for the jurisdiction of the Court of Queen's Bench, arose solely from his own pedantry, vanity, and self-importance. His resistance on the matter of commendams flowed from the same source as his absurd and unjustifiable attack on Chancellor Ellesmere; neither had any thing to do with his disgrace.

(*z*) There can not be a doubt that James spoke the exact truth when he said, "he is the fittest instrument for a tyrant that is to be found in England." His exertions as a member of Parliament, in the cause of constitutional freedom, were owing entirely and exclusively to mortified vanity and reiterated disappointment; and giving Williams the Great Seal, it is curious that he retained the same habit of adulation as a patriot. He called Buckingham "our Saviour," as Lord Clarendon tells us in great scorn.

in history, "that Lord Coke was not disgraced for resisting the mandate of a sovereign," but for an injudicious speech, which he meant for adulation, but which "caught the conscience of the King."

Secondly. That the man who destroyed prisoners, by garbling extracts of their statements, was not a murderer only, but an assassin, and, therefore, was not deterred by any sense of duty or of right from performing any function imposed upon him by his Sovereign.

Thirdly. That his resistance to the will of James proceeded not from love of justice, but from hatred of Bacon.

Fourthly. That so far from *introducing* such a system as Lord Campbell mentions, James found it established with almost every other device that could tend to oppress innocence, and that it continued, with many other such practices to the days of Lord Mansfield.

And lastly. That Coke, on and off the Bench, was ready to connive at any practice however nefarious, in spite of his own recorded judgment, except when his infernal temper and detestation of Bacon's great qualities flung him off his bias.

But that Lord Campbell's veneration for his learned predecessor, in the office of Attorney General, has cast a mist over his judgment no one will doubt, who reads in a writer of tried humanity (*a*), the following passages: "he (Coke) laid down in the most peremptory manner, that torture was contrary to the law of England," and three lines lower, "he thought the Crown not bound by this law, and a warrant for administering torture being granted by the council, he *unscrupulously attended to see the proper degree of pain inflicted.* I do not know that this practice reflects *serious discredit* on his memory!"

So stung was James by this ebullition of Sir E. Coke's loyalty, that he took a course as self-condemning as the intolerable consciousness of guilt ever dictated to a suspected

(*a*) Lord Campbell was not only a most successful, but a most humane Attorney General.

criminal. "He went," says Wilson, "to the council table, and kneeling down, there desired God to lay a curse upon him and his posterity for ever if he were consenting to Overbury's death." The imprecation he made on himself and his posterity if he forgave the murderers of Overbury, and his subsequent pardon of the two principal murderers, may teach us the value we ought to annex to his adjurations.

The sudden termination of Monson's trial excited much scandal. Dark rumours soon began to be whispered abroad; nor is this surprising, for Monson was precisely the man against whom, if Overbury was poisoned, the evidence was morally speaking most conclusive. He had induced Elwes to accept the office; he had recommended Weston to Overbury; his servant had carried the poisoned tarts and jellies from the Countess; his servant had carried the letter containing poison from the Countess to the Lieutenant; he had been the bearer of a message from the Earl of Northampton to the Lieutenant to keep the prisoner close, and to debar his friends from access to him; he had at his own personal request been appointed to keep Sir Thomas Overbury.

Hyde, the counsel, declared in open Court that he was guilty as the guiltiest. Well then might the sudden stopping of Monson's trial (he was soon afterwards set at liberty) put strange imaginations into men's heads.

Lord Campbell gives high praise to Coke, because in a civil case, the case of commendams, he refused to attend to a message from the King ordering him to postpone the trial. But if the love of justice was really the motive of Coke's conduct on this occasion, how came it not to operate in this case of a murderer, a case so much more serious, and on which any undue interference was so much more dangerous to the pure administration of the law? How came he to do in Monson's instance, what he had stated was contrary to his duty in another less important case?

Now, it is a remarkable circumstance, that during the whole

time Overbury was ill in the Tower, and while he was struggling with the poison, he was attended by Dr. Mayerne, the King's physician, famous for his skill in chymistry. In no one trial of those who suffered, or were put in jeopardy for Overbury's murder, was Mayerne produced as a witness. Lobell was the apothecary who made up Mayerne's prescriptions. It was the disclosure of an apprentice of Lobell's abroad, that was said to have occasioned the suspicion of Overbury's murder. Lobell had delivered into the hands of Coke all Mayerne's prescriptions; none of these prescriptions were produced; and Lobell, notwithstanding his terror and prevarication, was never even taken into custody. And on this part of the case it may be remarked, that in Mayerne's collection of cases for which he wrote prescriptions, every thing relating to Prince Henry's illness is torn out of the book.

If these circumstances alone were to be considered; the King's detestation of Overbury,—the conversation of the card table,—the sudden message to Coke,—the pardon of Monson,—the allusion of Coke,—the fury of the King,—the absence, contrived it must have been, of the physician and apothecary of Overbury, the very witnesses who could give most important evidence,—the acknowledged guilt of the Countess of Somerset, and the guilt imputed actually to her father, Suffolk, by Elwes directly, and covertly by Monson;—there would be enough to constitute a grave and substantial charge against James's memory. For it is remarkable that Elwes, who was guilty at most of connivance, but who was not the direct instrument of Suffolk and Northampton, and the King, but chosen by Monson their immediate instrument, was executed; and that Monson who *was* in direct communication with Suffolk, and who might, therefore, be guilty, acquainted with James's share in the transaction, and who was determined to say what he knew, if driven to extremity, was, in spite of the universal conviction of his guilt, dismissed unhurt; combine

these facts with the conversation at Royston, cited from Welden, and can there be any reasonable doubt, that of some horrible crime or other the King had a guilty connivance and participation; evidence however there is,—evidence arising from the King's own conduct, still more pointed and insurmountable.

The last scene of this tragic history was now about to be performed. The inferior instruments of guilt had been punished, and now a more august and awful spectacle was to be exhibited. England was invited to behold the noble and consolatory example of a monarch, deaf to entreaties, and immoveable by affection, putting aside every motive that might ruffle the serene majesty of justice, or interfere with the punctual discharge of that duty, which he had bound himself by the most dreadful imprecations to fulfil; never, if the oaths and adjurations of Kings were not mere air and empty sounds; never had a bandage thicker and more impenetrable been placed over the eyes of justice; never had her sword been grasped by a hand firmer and more inexorable.

Then stood before the peers of England, Frances, Countess of Somerset, foul within from the leprosy of accumulated guilt, but still dazzling with outward loveliness; for whom, three short years before, judges had perverted law, prelates trampled on the Gospel, and the Church had sanctified adultery; the scandal of her ancient line, and the shame of womanhood itself, whose hate was death, and whose love was infamy. To the frightful charge alleged against her, she pleaded guilty. Care had been taken that she should. Sir Francis Bacon, then Attorney General, writes to Sir George Villiers, "There is a direction given to Mr. Lieutenant, by my Lord Chancellor and myself, that as yesterday Mr. Whiting, the preacher, a discreet man, and one that was used to Hetwiss, should preach before
teach her, and move her generally to confession." In the same letter Bacon says, "My Lord Chancellor and I have

used a point of providence, for I did forecast that if anything should be spoken that should shew him (Somerset) guilty, she might break out into passionate protestations for his clearing, which, though it may justly be made light of, is better avoided. Therefore the Chancellor and I have devised, that upon the entrance into that declaration she shall, in respect of her weakness and not to add to her former affliction, be withdrawn." In other words, if she attempted to shew that Somerset was no party to her crime, she was, on pretence of sympathy, to be hurried away. Moreover, so much did this anxiety weigh on Bacon's mind, that he prepared a question for the judges, "Whether, if the lady make any digression to clear his Lordship, she is not, by the Lord Steward, to be interrupted and silenced?" These fears were never realized. The Countess of Somerset complied at once with the suggestions that had been made to her; but scarcely were the words which branded her as the most cruel, as she was known to be the most licentious, of women, out of her lips, when the King fulfilled his part of the compact, and she received from the Lord Steward and the Attorney General, the latter making use of the characteristic phrase, "mercy and truth are met together,"—assurances of her impunity.

The Countess of Somerset had been submissive, but her husband was made of sterner stuff. Every artifice was employed to shake his courage and bend his resolution. Lord Bacon's letters, commented upon by James, prove that the terror of the King, lest this accused man should disclose some secret to his judges, was boundless. The passages concerning a "little charm," or "evangile" (good tidings); the bearer of this message, "a new man," because "what is ordinary worketh not so great impressions as what is new and extraordinary;" the time, "so as not to stay in the stomach too long;" and yet not to be too near the day of trial, lest the motive should be too palpable; the anxiety that Somerset should know the care the King had of him, and the tokens of

his Majesty's compassion for him; the softening of the arguments before the peers, lest Somerset "should grow desperate and tax the King," are trumpet tongued, and tend to but one conclusion. In order, however, to shew the full extent of the anguish and solicitude of James, I insert a passage which has received from the Losely Papers (*b*) the most authentic corroboration:—

"And now, for the last act, enters Somerset himself on the stage, who [being told, as the manner is, by the Lieutenant, that he must provide to go next day to his trial] did absolutely refuse it, and said they should carry him in his bed; that the King had assured him he should not come to any trial, *neither durst the King bring him to trial;* this was an high straine, and in a language not well understood by Sir George Moore [then Lieutenant in alwaies his roome], that made Moore quiver and shake, and however he was accounted a wise man, yet he was neare at his wit's end.

"Yet away goes Moore to Greenwich, as late as it was [being twelve at night], bounseth at the back-staires, as if mad, to whom came Jo. Leveston, one of the groomes, out of his bed, enquires the reason of that distemper at so late a season; Moore tels him he must speake with the King; Leveston replyes, he is quiet, [which, in the Scottish dialect, is fast asleep]; Moore sayes, you must awake him. Moore was called in, [the chamber left to the King and Moore]; he tels the King those passages, and desired to be directed by the King, for he was gone beyond his owne reason to heare such bold and undutifull expressions from a faulty subject against a just Soveraigne. The King falls into a passion of teares: 'On my soule, Moore, I wot not what to doe; thou art a wise man, helpe me in this great straight, and thou shalt finde thou dost it for a thankfull Master,' with other sad expressions; Moore leaves the King in that passion, but assures him he will prove the utmost of his wit to serve his

(*b*) Appendix (1).

Majesty; and was really rewarded with a suit worth to him 1500 pounds.

"Sir George Moore returnes to Somerset about three next morning, of that day he was to come to triall, enters Somerset chamber, tels him he had been with the King, found him a most affectionate Master unto him, and full of grace in his intentions towards him; but [said he], to satisfie justice, you must appeare, although returne instantly again, without any further proceedings—only you shall know your enemies, and their malice, though they shall have no power over you. With this tricke of wit he allayed his fury, and got him quietly, about eight in the morning, to the Hall, yet feared his former bold language might revert againe, and being brought by this tricke into the toile, might have more inraged him to fly out into some strange discovery, for prevention whereof he had two servants placed on each side of him, with a cloak on their armes, giving them withall a peremptory order, if that Somerset did anyway fly out on the King, they should instantly hoodwink him with that cloak, take him violently from the bar, and carry him away; for which he would secure them from any danger, and they should not want also a bountifull reward. But the Earle, finding himselfe over-reached, recollected a better temper, and went on calmly in his tryall, where he held the company untill seven at night. But who had seene the King's restlesse motion all that day, [sending to every boat he saw landing at the bridge, cursing all that came without tydings], would have easily judged that all was not right, and there had been some grounds for his feares of Somerset's boldnesse; but at last one bringing him word he was condemned, and the passages, all was quiet. This is the very relation from Moore's owne mouth, and this he told verbatim, in Wanstead Parke, to two gentlemen [of which the Author was one]."

In opening the proceedings on Somerset's trial, Lord Bacon laid down one manifestly false rule of evidence, namely, that

as Weston had been found guilty of poisoning Overbury, Somerset could not deny that Overbury was poisoned, and poisoned by him. The proceedings were carried on in the usual manner. Depositions were read,—some upon oath, some, Bell's for instance, not upon oath; and Lord Chief Justice Coke had the effrontery to tell the peers, that "when in their testimony people accuse themselves, it is the same as if they gave their testimony upon oath." Conversations between Elwes and Monson, stated in depositions, were also given in evidence. When Lord Bacon had concluded his share of the prosecution, Lord Ellesmere, the Lord Steward, (and it should be recollected that Bacon had recommended particular caution in the selection of the Lord Steward), thus addressed Somerset,—

"My Lord, you have heard what has been urged against you, and may imagine that there rests much behind; and therefore *you had best confess the truth*; otherwise you will lose more and wind in yourself."

To which Somerset made the significant reply, "My Lord, I came here with a resolution to defend myself."

The subsequent evidence was still more grossly irregular. Weston's examination was read; Franklin's examination was read; Countess of Somerset's letter to Elwes was read; a powder was mentioned,—on which the counsel for the Crown, Serjt Montagu, remarked, "Four several juries have found that this powder was poison, and that of this poison Overbury died." Lord Bacon again endeavours to induce Somerset to confess. Serjt. Crew declares, "that his positive refusal to confess is an implicative confession." The Lord Steward tells him "that his wife has confessed, and that there is great hope of the King's mercy if he mars not that which she made." He then alludes to the fate of Biron, who had been executed in France, and says, that if he had confessed Henry the Fourth would have pardoned him;—"and I think there never is nor was a more merciful King than our Master. But Biron

persisted in his denial, and you know his end." To which Somerset answers, "I am confident in mine own cause, and am come hither to defend it." He then entered upon his defence, which he continued amid perpetual interruptions from the King's counsel. He was, however, found guilty. It certainly is singular that disjointed fragments of Weston's depositions only were read, and that even thus it appeared that no communication had taken place between Somerset and Weston, as Weston, who gives the most direct and circumstantial evidence against his wife, says nothing immediately affecting him. Whether Somerset was guilty, or not, of the murder of Overbury, is a question of considerable difficulty. That the legal proof against him was insufficient everybody must admit: but that, whether he was guilty or innocent, James's conduct towards him was that of a man capable of the worst and most atrocious actions, is incontestable. If James believed that Somerset was innocent, why did he urge him to plead guilty? If he believed him guilty, why did he pardon him? The inference I draw from an attentive and diligent collation of such accounts as I have been able to peruse is this; that Overbury was, as Somerset's creature, an accomplice in the poisoning of Prince Henry; that he was thrown into the Tower and there poisoned, at the instigation of James and the Countess of Somerset; that Somerset was conscious of the crime, but did not contribute to its perpetration. That James hated Overbury is certain; "much ado" writes the Earl of Southampton to Sir R. Winwood, "there has been to keep Sir T. Overbury from a public censure of banishment and loss of office, such *a roote of hatred* lies in the King's heart towards him." In a letter to Winwood, dated 1613, it is said, that the King sent to offer Overbury an embassy, which was refused, and that Overbury added some speech which was ill taken, and that thereupon the King sent for the council, and after an angry speech, gave order to them to send Overbury to prison. Roger Coke mentions also, that

it was commonly said that Overbury had vented some stinging sarcasms on the Court, which had come to the King's hearing. Be this as it may, the proofs against James do not stop with the mere pardon of Somerset: other infamy is behind. Immediately after his conviction, Somerset wrote to James in a strain which might well incense the most callous of mankind. In it he menaces James with "a mean of intercession," which it was in his (Somerset's) power to employ, but from the use of which he had hitherto, from regard to the King, abstained. And what is the result? That he succeeds completely: nay, farther, James actually interfered to prevent Somerset's degradation as a knight of the garter, and the shield and blazon of a convicted felon were, by the special interference of the Sovereign, and to the scandal of astonished Europe, allowed to remain suspended among the arms of the heroes of Poictiers and of Agincourt, and of those on whom, in later times, a grateful country had conferred the most splendid reward that spotless honour and transcendent merit could obtain. It has been endeavoured to account for James's indulgence to Somerset by the humanity of his disposition. His conduct to Arabella Stuart (*b*), whom if he did not destroy he allowed to die broken hearted in the Tower; his conduct to Raleigh; his recommendation to the States to burn Vorstius; and the fate of Bartholomew Legate and Edward Wightman, whom he did actually burn alive, because they were not so well acquainted with the essence of the Supreme Being as he considered himself to be,—are sufficient answers to this hypothesis.

(*b*) "The Lady Arabella, daughter of Charles Stuart, younger brother of the King's father, having married Sir William Seymour, son of the Lord Beauchamp, and grandchild to the Earl of Hertford, both allied to the Crown and committed to the Tower, designed an escape by disguises.

"But the poor Lady, fearful and staying beyond the hour at which they were to meet, her husband went to sea without her, leaving notice for her to follow; but she was apprehended and brought back to the Tower, where she died, which set men's tongues and fears on work that

The tissue of this web of iniquity is not yet quite unravelled. History has not yet fully laid bare the secret at which James trembled like "a guilty thing," and which, though Lord Coke affected not to surmise it, it is clear Lord Bacon guessed at. Was it only the consciousness of the foul and flagitious impurities which those recorded by Suetonius hardly surpass, and in which it is well known James had wallowed with his minions? Or was there some crime, still darker and more horrible than any which the chroniclers of scandal might relate? Was the death of Prince Henry, the hope and darling of the nation, connected with the terrors of his father and the sullen menaces of the prisoner?

There are three points to be considered:

First. Was Prince Henry poisoned?

Secondly. Was Somerset privy to the crime?

Thirdly. Was James, morally speaking, Somerset's accomplice?

With regard to the first point, it cannot, in my opinion, be reasonably disputed. The value of historical testimony is much impaired if Henry died a natural death. As formerly the deaths of almost all eminent men were ascribed to poison, latterly writers have fallen into an opposite extreme, and refused to believe such a death, unless corroborated by evidence which it is impossible to produce. Of this scepticism Voltaire is a great example. He carried his unbelief so far that he denies that the Duchesse d'Orléans (*b*), the sister of Charles the Second, whom Bossuet has made immortal, was poisoned. Now this I look upon to be as certain as that she existed: and almost equally conclusive is the evidence of Prince Henry's murder. There is not one contemporary writer of the history of that time who does not either openly express or indirectly insinuate that such was his opinion;—Whitelocke, Osborne, Wellwood, Weldon, Wilson, Spark, the Author of "The Tract Truth Brought to Light by Time," Har-

(*b*) St. Simon, vol. 5, p. 224.

rington, Cornwallis, Henry's personal attendant at the time of his death, and, above all, the circumstances (*c*) of his death,—all speak the same language, and point to the same conclusion. Such was the opinion of his brother Charles the First; such was the opinion of his mother, an opinion which, in the agonies of her grief, she did not conceal; such was the opinion of Lord Bacon, and such was the opinion of the most acute lawyer England then contained, a man accustomed to scan and examine evidence, a man of great diligence and sagacity, and who, during his indefatigable labours connected with the trial of Overbury's murderers, in the course of which he examined, Lord Bacon tells us, three hundred witnesses, found evidence that satisfied him that Prince Henry was poisoned,—I mean Sir Edward Coke, of whom it is a remarkable fact the Queen was on all occasions the steadfast advocate (*d*).

(*c*) Sir C. Cornwallis, the Prince's Chamberlain, writes, that he was seized with sudden illness almost immediately after dining with his father at Whitehall; he complained of a shivering, attended with great heat and headache, which from that time never left him: and he was obliged "suddenly to take leave, and go to St. James's to bed." He had eat with a "seeming good appetite," and had heard two sermons in the morning. The *same evening* he was "tormented with an excessive thirst, which never afterwards abated."

(*d*) "Only one *originall letter* I have in my custody, which, *tho' not in direct terms*, yet *strongly hints at some such villany*. The letter is wrote to Sir Ralph Winwood by Sir Robert Naunton [who was then seeking a publick employment by the mediation of my Lord Rochester], and bears date the 17th of November, 1612; in which, after he has given him a large account of his visiting my Lord of Rochester, he has these words: Touching our *palladium* which we have lost, *I hold it neither fit to write what I conceive, and less fit to be written to your Lordship*. It is given out by his confidents, that he had a design to have come over with the Paulsgrave, and have drawn Count Maurice along with him *with some promises*, and done some exploit upon the place that shot the Paulsgrave's harbinger, and happily *to have seen the Lansgrave's daughter*, or I know not what. That this he meant to have done, whatsoever it was, *clam Patrem et Senatum suum*; and hatching some such secret design, *which was made subject to misconstruction*, it is now become abortive like that of Henry the Fourth of France. Sir Henry Neville told me, *he had vowed*

The two next points are set at rest by the same answer. For if Somerset did poison Prince Henry, his firmness, his bold defiance of the King, his letter so extraordinary in its tone and in its effects, his dark menaces, his insinuation,—are at once accounted for. I am not now arguing that he did commit the crime, but I say that, if he did, to suppose that the death of Prince Henry was not what he alluded to, and that his knowledge of James's guilt was not the secret of the influence he possessed over the King—an influence which not only was enough to induce James to violate a public and most awful oath, which a very trifling motive would have induced at any time either him or his son to disregard, but to spare the life, the life justly forfeited, of a man whom he abhorred, nay, to leave him in abundance,—would be to disregard the testimony of facts. There is a mysterious threat which is to be accounted for; if the crime *was* committed, what else can account for it so well? Again, supposing the crime committed, and committed by Somerset: supposing this, what is the conduct of James? James knew that Coke believed, from his most minute and careful investigation, that Somerset was the murderer of his son. Does he institute any inquiry? He stifles, as far as he can, every whisper of suspicion; he punishes Coke, and he pardons Monson, openly accused by Coke as the murderer of Henry; he pardons and enriches Somerset (*d*), guilty of great personal insolence to himself, and reiterating that insolence after his

that never idolater should come into his bed. And I was ascertained, that in his sickness he applied this chastisement for a *deserved punishment upon him, for having ever opened his ears to admit treaty of a popish match.*" Winwood, vol. 3, p. 410.

(*d*) "And there were other strong inducements, to beleeve Somerset knew that by the King, he desired none other in the world should be partaker of, and that all was not peace within in the peace-maker himselfe; for he ever courted Somerset to his dying day, and gave him 4000*l.* per annum for fee farme rents, after he was condemned, which he took in his servants' names, not his owne [as then being condemned, not capable of]; and he then resolved never to have a pardon."

condemnation, when his life and fortune were in his hands. Whatever shews Somerset's guilt, then, proves James's participation, and the truth of Wilson's (a well informed and authentic writer) remark, "That if that which gave life to his (Henry's life) had been less, he might have lived longer."

That Prince Henry was poisoned is, I think, a fact placed beyond all reasonable doubt; that *if* he was poisoned by Somerset, James was morally Somerset's accomplice, appears to me an inevitable corollary. Let us then see what the evidence is that Somerset was the criminal; the answer to this is, that all the evidence which proves Prince Henry to have been poisoned at all, proves Somerset to have been his murderer,—all the letters and conduct of Somerset, the contemporary writers, the belief of Coke, the conduct of James, and the conviction of Henry's mother, Queen Anne (*e*); never after her son's death would she endure Somerset's presence, and the only political intrigue she ever meddled with was that which ended in his destruction (*f*). Whatever proves the guilt of James, proves the guilt of Somerset; whatever proves the guilt of Somerset, proves the guilt of James. You may if you please deny, in spite of the evidence, that Prince Henry was poisoned at all; but if he was poisoned, the argument drawn from the dark hints of Somerset, and the effect produced by those hints on the mind of James,—above all, from James's conduct to Monson, openly accused as the murderer of his son, is cogent and almost irresistible. It is only by mixing up these questions, which ought to be kept distinct and examined separately, that any reasonable doubt can be flung upon the subject. Prince Henry detested Somerset, of which his attendant Cornwallis has preserved a remarkable proof, and either did actually strike, or was on the point of striking him with a

(*e*) Wilson, p. 79.

(*f*) She interfered to stop the general pardon of which Somerset had obtained a promise, and which was so framed as to include every crime

racket. On the other hand James detested Henry (*e*), of whose influence and popularity he was afraid, who swore no popish princess should enter his bed, who made no secret of his contempt for his father and his admiration for Raleigh; and to such a point was the detestation carried, that he never went near him during his mortal sickness, and would not allow any mourning for his death. And if James wanted a precedent, the recent and tragical fate of Don Carlos (1568) was an example which, master of kingcraft as he was, the murderer of Raleigh would not disdain to imitate (*f*).

The technical point of the law of evidence decided in the case of Somerset, though it sets reason at defiance in the most daring manner, continues to be undisputed law down to the present day. Even a layman may take some interest in it; and at any rate it will serve to shew the kind of doctrine that lawyers, if left to themselves, transmit, without a syllable of

(*e*) He exclaimed, "Will hee bury me alive?"

(*f*) "This is certain, the Court was full of suspicions about it (Henry's death), and it was whispered about that the Prince having entertained a mortal prejudice to the favourite Carr, he was taken off to prevent the effects of it. These surmises came likewise to be insinuated in the pulpit; and we have yet extant in print, a sermon preached at St. James's upon the dissolution of his family, wherein the preacher that had been his domestic chaplin made such broad hints about the manner of his death, that melted the auditory into a flood of tears, and occasioned his being dismissed the Court. Some years after, when the murder of Sir Thomas Overbury came upon the stage, at one of the trials before the Lord Chief Justice Coke, there escaped him some words in heat that plainly imported his suspicion that Overbury had been poisoned, to prevent the discovery of another crime of the same nature committed upon one of the highest rank, whom he termed a sweet prince, which was taken to be meant Prince Henry; for which rashness the Lord Chief Justice lost the King's favour, and sometime afterwards his place.

"Mr. Fox, writing to Lord Lauderdale, says; 'I recollect the impression upon my mind was, that there was more reason than is generally allowed for suspecting that Prince Henry was poisoned by Somerset, and that the King knew of it after the fact.'" State Trials, vol. 3.

"Some that knew the bickerings between the Prince and Rochester, muttered out dark sentences." Whitelocke, p. 291.

censure, or a hint even of doubt, from one generation to another.

It was established (*f*), then, in Somerset's case, that a particular time and a particular place, at which the murder imputed to him was committed, must be stated in the indictment, that is, in the written charge against him; and it was also laid down, that the same instrument must specify the particular kind of poison by which the crime had been accomplished. It might be supposed that all these specifications were intended for the sake of accuracy, and to put the accused more pointedly on his guard, that, for instance, if he was accused of having committed the crime in England on the 10th of August, and he could prove that he was on that day in the East Indies, he might consider his acquittal certain. So far was this from being the case, that it became established law that although, if no particular time and place and means of death are alleged in the indictment or written charge, the prisoner must be acquitted, and that even if the charge states the crime to have been committed between any particular time, as between Monday and Friday in the same week, the prisoner must be acquitted, because the charge is not stated with sufficient precision; yet the proof need not correspond with the allegation; and although a different time, a different place, and a

(*f*) Macalley's case, 9 Rep. Part 67 a, p. 122, Fraser and Thomas Ed. The indictment for the murder of Fells alleged, that upon a plaint entered the Sheriff of London issued his precept to Fells' serjeant at mace to arrest Murray. Now on the evidence it appeared that there was in fact no precept, but that, by the custom of London, after a plaint had been entered, any serjeant might arrest the defendant in the suit. But it was held by all the judges, that the variance was immaterial, for the warrant was but one circumstance, and it was not necessary that it should precisely be found by the jury, for the indictment alleged that the prisoner killed Fells of malice prepense; and although the evidence varied from the special matter, yet as it shewed that the prisoner killed Fells of malice prepense, it maintained the indictment. "It is sufficient if the substance be found without precise regard to circumstance." . . . . "And yet such circumstance (*i. e.* a false one) ought not to be omitted"!!!

different poison from those stated should be proved, the indictment will be sustained. A jurist, or indeed a farmer from the plough, might ask, why should it be necessary to assert what it is not necessary to prove, nay, what it is allowed to contradict? Why not give the same latitude to the statement that you do to the proof? Why this affected and illusory ostentation of mock accuracy (*g*), which can only serve to mislead the prisoner if he is innocent, or enable him to escape if he is guilty,—this outward certainty and intrinsic doubt? He may ask,—but it is from those who uphold the countless and flagrant absurdities of the English law (system it is not), from the advocates of special pleading, of giving colour, of negatives pregnant, of obsolete fictions, of one set of Courts that decide on written, and another on oral evidence,—that he must expect an answer. The formality of the law is the prudery of a harlot.

It is this strange union (*h*) of useless precision and mischievous laxity, of the strictest adherence to form and the most wanton disregard of substance, of the most scrupulous accuracy, where accuracy can only serve the purpose of dishonest litigation, and of the utmost latitude, where a cover can be afforded to oppression; like the Giant, in Rabelais, swallowing windmills at one time, and choking at the pat of fresh butter at another; that distinguishes the English law so unfavourably from that of any other civilized country. There is as great a difference between such a law and one placed on

(*g*) In Lord Winton's case, 1716, the Attorney General spoke out,—"The prisoner loses no benefit nor gets any by having a day changed or omitted, for since it is of no use, he must provide for his defence *as if no day was laid.*" Amos, p. 248. Yet if no day was laid, the prisoner must be acquitted. Can human folly go farther? And this in a practical country (as we delight to call ourselves), where pettifoggers presume to sneer at the French code and system of registration!

(*h*) "This hypocritical mark of certainty vanishes, when we are told neither the time, nor the place, nor the particular means of death, are matters of substance." Amos, p. 247.

a firm basis, as between the melting hailstone and the solid pearl.

In order to make this specimen of English justice complete, it may be remarked, that Lord Bacon told the peers, on the trial of Somerset, that the verdict of the jury against Weston, with which Somerset had of course no concern whatever, was, on one principal point, conclusive against him (Somerset),—"That which your Lordships are to try is, not the act of empoisonment, for that is done to your hands,—all the world, by law, is concluded to say that Overbury was poisoned by Weston" (*i*). And as the consummation of iniquity, Serjeant Montagu, who told the peers that one poison might be laid in the indictment and another proved, afterwards insisted on the conviction of the former prisoners as proofs that the very particular poison had been used, "Four juries have found that this white powder was poison, and that of this poison Sir Thomas Overbury died."

That James himself was poisoned is, I think, though the evidence has been suppressed and distorted by most historians, a fact as well established as it is reasonable to expect. We have at least as much proof of it as of the death of Edward the Second by violence in Berkeley Castle. All the contemporary writers believed it. It was the subject of a formal charge adopted by the majority of the House of Commons soon after the accession of Charles; a body who, whatever prejudice and passion may suggest, were remarkable for nothing more than for the forbearance and moderation of their proceedings, till they found they had to do with one for whom the ties and obligations that bind men in society were

(*i*) But adulation led Bacon into still more flagrant a rebellion against the principles of jurisprudence. He writes to King James to say, "that there may be an evidence so balanced as it may have sufficient matter for the conscience of the Peers to convict, and yet leave sufficient matter in the conscience of a King to save his life!" So that it might be the duty of judges to convict on evidence so precarious as to oblige the King to pardon!

wholly without a meaning. The undisputed facts are these: James (*k*) had never forgiven Buckingham for his conduct in breaking off the Spanish match and impeaching the Earl of Middlesex; and of this Buckingham was quite aware; the fate of Somerset was before his eyes. James hated Charles. Lord Clarendon tells us, "he, James, only wanted a brisk and resolute counsellor to assist him in destroying the Duke." James had meanwhile an attack of the ague, from which he was recovering, when the Countess of Buckingham, the Duke's mother, administered to the King in the absence of his physicians a plaister and posset; of which James complained much, as did his physicians, and after which he got worse and worse till he died. Now these are facts about which there is no dispute whatever; they are admitted, and have never been denied. These are the published words of Whitelocke, a grave and cautious writer: after saying that the King fell sick of a tertian ague, "Whether he received anything that extorted his aguish fits into a fever, which might sooner stupify his spirits and hasten his end, cannot be asserted; but the Countess of Buckingham, who trafficked much with mountebanks, and whose fame had no good favour, HAD BEEN TAMPERING WITH THE KING IN THE ABSENCE OF THE DOCTORS, AND HAD GIVEN HIM A MEDICINE TO DRINK, and laid a plaister on his side, *which the King much complained of*, and they were admitted by the persuasions of the Duke her son" (*l*). But as an instance of the care with which everything unfavourable to

(*k*) Rushworth, vol. 1. Hacket's Life of Williams, p. 197. Biddle, vol. 1, p. 40. James had received from the Spanish ambassador notice that Charles and Buckingham were engaged in treasonable designs against him, and that he was as much a prisoner [illegible] own palace as Francis the First was at Madrid. This information [illegible]d James into deep melancholy. "He entertained the Prince [illegible]e with mystical speeches." He set off suddenly for Windsor, and made some trifling excuse for leaving Buckingham behind, who entreated him with tears to tell him the cause of his displeasure. Williams sought out Buckingham whom he found in agonies of despair. This was A. D. 1624.

the house of Stuart that can be found in our national archives has been suppressed, a passage has been omitted (*m*) from Whitelocke's relation of his embassy to Sweden; in which Whitelocke says, that he told Queen Christina "that the doctors who attended King James did testify that, contrary to their order, a plaister and drink with powder was given him by the Duke's mother, that he took it by persuasion of the Duke and his mother . . . that the King cried out, 'that which George has given me has killed me,' and that his body swelled very much; the Queen said then certainly he was poisoned." Burnet says that Somerset had been sent for by James a little before his death, that this fact had transpired (*n*) and induced Buckingham to destroy his master. But still stronger is the argument from the care taken by Charles to suppress all investigation, after the charge had been formally made by Parliaments containing men as judicious, able, and learned as England has ever held. Is not the suspected murderer of a father a strange favourite for the son? Does not the solemn accusation of the great council of the nation deserve respect? and if Buckingham had been innocent, or indeed if his guilt could not have been proved, what had he or his patron more to desire after a charge so made than a careful inquiry? Does not this strengthen Milton's charge against Charles, not only of being privy to his father's death, but of being linked to Buckingham by gross and scandalous vices, "continentiam ejus laudas quem cum Duce Buckinghamio omnibus vitiis

(*m*) Brodie, vol. 1, p. 4.

(*n*) Hitherto the advocates of the Stuarts have adopted Quintilian's advice with regard to this charge, "ut quod dicendo refutare non possumus id tanquam fastidiendo vocaleitremus." In some letters of that day which have recently been published, written from London, not by a republican, but, as I think, by a clergyman, the disgust excited by Charles's protection of Buckingham, who was believed to have poisoned his father, is alluded to.

coopertum novimus (*o*)?" I shall leave this question of evidence with the following passages from his contemporary Harrington, one of our best and most neglected writers, and from Wilson, an honest and authentic historian, "We shall not trouble his ashes with the mention of his personal faults, only, if we may compare God's judgments with apparent sins, we find the latter end of his life neither fortunate nor comfortable to him. His (James's) wife, distasted by him, and some say . . . . . his eldest son dying with too violent symptoms of poison, *and that as is feared by a hand too much allied*, his second son, against whom he ever had a secret antipathy, scarce returned from a mad and dangerous voyage . . . . . and lastly, HIMSELF DYING OF A VIOLENT DEATH BY POISON, in which his son was *more than suspected* to have a hand; as may be inferred from Buckingham's plea that he did it by command of the Prince (*p*), and Charles's dissolution of the Parliament that took in hand to examine it; and lastly, his indifference at Buckingham's death, though he pretended all love to him alive, as glad to be rid of so considerable and dangerous a partner in his guilt; yet the mitred Parasites of those times could say, one went to Heaven in Noah's Ark, the other in Elisha's Chariot,—he dying of a pretended fever, she (the Queen), as they said, of a dropsy" (*q*).

"But our King that was very much impatient in his *health*, was patient in *sickness* and *death*. Whether he had received any thing that extorted his *aguish fits* into a *feaver*, which might the sooner stupifie the *spirits*, and hasten his end, cannot be asserted, but the Countess of Buckingham [who trafficked much with mountebanks, and whose fame had no

(*o*) Lord Spencer, a loyalist, in arms for the King, writes from the King's camp at Shrewsbury to his wife, "that the conversation was so coarse and indecent (he uses a more homely and stronger word), that I thought I had been in the drawing-room." Sidney Papers, vol. 2, p. 668.

(*p*) Observe, not denying the fact.

(*q*) Harrington's Grounds and Reasons of Monarchy, p. 31.

great savour] had been tampering with him, in the absence of the doctors, and had given him a *medicine* to drink, and laid a *plaster* to his side, which the King much complained of, and they did rather exasperate his *distemper* than allay it: and these things were admitted by the insinuating persuasions of the Duke her son, who told the King they were approved medicines, and would do him much good. And though the Duke after strove to purge himself for this application, as having received both medicine and plaster from Doctor Remington, at Dunmow, in Essex, who had often cured agues and such distempers with the same, yet they were arguments of a complicated kind, not easie to unfold; considering that whatsoever he received from the doctor in the *countrey*, he might apply to the King what he pleased in the *Court;* besides the act itself [though it had been the best medicine in the world] was a daring not justifiable; and some of the King's physicians mutter'd against it, others made a great noise, and were forced to fly for it; and though the still voice was quickly silenced by the Duke's power, yet the clamorous made so deep impressions that his *innocence* could never wear them out. And one of Buckingham's great provocations was thought to be his fear, that the King being now weary of his too much greatness and power, would set up Bristol his deadly enemy against him, to pull him down. And this medicine was one of those thirteen Articles that after were laid to his charge in Parliament, who may be misinformed, BUT SELDOM ACCUSE ANY UPON FALSE RUMOR OR BARE SUGGESTION; and therefore IT WILL BE A HARD TASK for any man to EXCUSE THE KING his successor, FOR DISSOLVING that Parliament, TO PRESERVE ONE THAT WAS ACCUSED BY THEM FOR POISONING HIS FATHER. . .

"For Doctor Lamb, a man of a infamous conversation, was much imployed by the mother and the son, which generally the people took notice of, and were so incensed against Lamb, that finding him in the street in London in the year 1628,

they rose against him, and with stones and staves knockt out his brains, as may be more particularly related in its due time" (*r*).

Before we take our leave of the period in which Sir E. Coke flourished, I will refer to some cases in his Reports which I have not yet mentioned, and which illustrate the subject under our consideration. Goddard's case is reported vol. 1, p. 431, of Thomas and Fraser's excellent edition, and it furnishes, just as if it had been reported in Meeson and Welsby, a curious instance of the difficulty of enabling justice to triumph over the various impediments wantonly accumulated in her path by the caprice, perverted ingenuity, and barren erudition of English judges. A deed had been relied on, bearing date at one time, whereas it was requisite to shew that it was made, as in fact it had been made, at another; in other words, that the precise day of the date (a point generally most immaterial) had been inaccurately stated. Here was a fine opportunity to display all the mock diamonds which form the treasure of an English lawyer. Here was an inextricable labyrinth of authorities to be threaded, including the sayings, reported in the Year Books, of judges who lived when commerce was unknown, and two-thirds of the House of Lords believed that every one who could sign his name was a magician. Here were technicalities thick as the motes that people the sunbeam, or as the objections that people what I suppose is equally lucid, the mind of a pleading judge in the simplest case, and of about the same intrinsic value,—to be solved, and absurdities to be reconciled, which required all the ingenuity of those who presided in our Courts of justice. The law attaches a mysterious sanctity to a deed; it believes in the infallibility of wax and parchment. Lord Tenterden says somewhere that this is a peculiarity of the English law, and so no doubt it is. What then is to be done? Here is a deed—a genuine deed, signed in reality by

(*r*) Wilson's James the First, p. 287.

the person whose signature it bears, bearing date 4th April, 24 Eliz. Now the fact was, that the defendant did deliver it as his deed on the 30th July, 23 Eliz., when he was alive, and not on the 4th April, 24 Eliz., when he was dead: therefore the jury, finding the whole transaction honest and otherwise unexceptionable, "prayed the advice of the Court, whether it was the defendant's deed." And it was adjudged by Anderson, Chief Justice, Periam, and Walmesly, that it was his deed; and the reason of their judgment was (observe, reader), "that although the obligee," (the plaintiff), "in pleading, cannot allege the delivery before the date," (why? because)—"it was so adjudged in 1 Hen. 6, which case was affirmed to be good law, and" (another reason) "because the plaintiff is *estopped* to take an averment against any thing expressed in the deed; yet the jurors who are sworn to say the truth are not estopped" (this is lucky), "for an estoppel is to conclude one to say the truth" (*i. e.* to prevent one from saying it), "and therefore the jury cannot be estopped, because they are sworn to say what is true; *vide* 1 Hen. 4, 6 b, 35 Assis. 8, 17 Edw. 3, 6, Plowd. Comment. 515 a." Now the plain English of this is, that the plaintiff *must* say what is false, but the jury *may* find what is true,—which, all things considered, is an indulgence to reason seldom granted by our law. Why, indeed, the plaintiff was not allowed to state the truth, as well as the jury to find it, it is not easy to discover. It is quite conformable to plain sense (*s*), that if A. has induced B. to act in a certain way by alleging a particular state of facts, that if A. bring an action against B., he shall not be allowed to deny his own statement, whether in a deed or out of it. But why not (*t*) say the truth? Why not say, "Whether these facts are true or not is nothing to the purpose; you told me they were true, I acted upon your representation, and from that representation you must not now

(*s*) This is well illustrated by the case of Cox *v.* Cannon, 4 Bingham's New Cases, 454.

(*t*) It is now held that this may be done. Steel *v.* Mart, 4 B. & C. 280; Hall *v.* Cazenove, 4 East, 477.

depart." This is an estoppel. But how does this apply to an averment altogether immaterial? "The date of a deed is not of the substance of a deed, for if it has no date, or a false or impossible date, the deed is good, for there are but three things of the essence of a deed,—writing in paper or on parchment, sealing, and delivery." Ib. "And when a deed is delivered, it takes effect (*t*) from the day of the delivery, and not of the date." Yet still so great is the reluctance (*u*) to part with absurdity, which our legislators display, that though the facts are precisely the same, yet if the pleading be shaped in one technical form instead of another, though the meaning of the party be substantially the same, and so understood by his antagonist, the fact which is, and ought to be, necessarily conclusive for the plaintiff, ceases to be so (*v*). And thus it was decided in a very recent case (*w*), in which it was determined that a verdict which, if pleaded in bar, would be conclusive, when given in evidence is not conclusive.

In Ferrer's (*x*) case, vol. 3, p. 271, same edition, it was decided, that a recovery in one action is a bar as to that or the like action of the like nature for the same thing for ever. True, however, to its ruling genius, the law immediately proceeds, on technical grounds, to qualify this beneficial principle. "But if he be barred in a *real* action . . . . . he may have an

(*t*) All the matter of a deed must be written before sealing and delivery, for if a man seals and delivers a blank piece of paper, and gives directions for an agreement to be written above it, the deed is void. Shep. Touch. p. 54. Though a deed made with blanks, and afterwards filled up and delivered by the agent of the party, is good. Texeira *v.* Evans, 1 Anst. 229.

(*u*) The love of our legislators for absurdity, the tenacity with which they cling to every rag of the worn out garments of folly, reminds me of Aristotle's magnificent illustration of the eagerness with which we seize on the arguments for the existence of the soul after death. "The very dress that a friend has worn," he says, "is dearer to us than the entire person of a stranger."

(*v*) Trevivan *v.* Lawrence, Salk. 276; Com. Dig. tit. "*Estoppel*," A.

(*w*) Voogt *v.* Winch, 2 B. & Ald. 672.

(*x*) See Lord Ellenborough's remarks on this case. Outram *v.* Mor-

action of a higher nature, and try the same right again." "As if a man be barred in an assise of novel disseisin, yet upon shewing a descent or other special matter, he may have an assise of mort d'ancestor, aiel, or bisaiel, entire sur disseisin to his ancestor. So it is said, if a man be barred in a formedon in discender, he may have a formedon in reverter or remainder, for that is an action of a higher nature." What a consolation for a man, ruined by incessant litigation, to know that the new action was called a "formedon in reverter." This case is of historical value, as it shews that actions in ejectment were becoming frequent. The old real actions were so oppressive and ruinous, and so pregnant with vexatious chicane, that in order to escape from them people had recourse to ejectment, by which, though not equally conclusive, possession could be obtained. Ejectment continues to be the disgrace of the law to the present hour. It is a curious proof of the hostility of lawyers to the simple and intelligible manner of obtaining justice. The plaintiff and defendant are both fictitious. It consists of a series of clumsy falsehoods, in the shape of a supposed letter from a nominal being to the real defendant, annexed to a statement that another shadowy being has done certain acts, which of course never happened; and this stupid, circuitous, barbarous proceeding, invented under the Plantagenets as a means of escaping from the snares of what were called real actions, and which were still more intolerable, continues to be law in England at the present hour. It was (*y*) *carefully preserved* by the reformers of the law and the inventors of the New Rules in 1830!

(*y*) I may here remark, that in ejectment, where title to land is concerned, there is no special pleading, and the Commissioners of Law Reform give as a reason why there should be none, the reason that if special pleading were introduced in ejectment, the security of the possessors of landed property would be at end. Why then is it kept where personal property is at stake? Is not this making special pleading like Don Quixote's balsam of Fierabras, that was excellent for the knight, but poison to the squire? Posterity will wonder at an infatuation in clinging

Now, as the plaintiff in an action of ejectment is not a real being, of course the man who lurks under his assumed name may assume any other name, and if he be a rich man, may bring any given number of actions to recover the property he covets. If ejectment had been the law of Palestine, the murder of Naboth would have been useless. It is true, that at the present day the Courts will interfere to prevent the repetition of this action beyond a certain number of times, but this was not the rule in Coke's time; and, accordingly, in Ferrer's case, he complained that "the neglect of the ancient common law, by introducing trials of rights and titles of inheritance and freehold in *personal* actions, in which there is not any end or limitation of suits, has introduced four great inconveniences. 1. Infiniteness of verdicts. 2. Contrarieties of verdicts one against the other. 3. Continuance of suits twenty, thirty, or forty years, to the utter impoverishment of the parties. 4. All this tends to the dishonour of the common law." As a specimen of the jargon (*z*) in which

law was supposed to be accomplished, and also at the determination then exhibited of obliging the public to compensate for the loss of one absurdity by the renovation of another. Thus, in ejectment you have no special pleading, but a string of useless falsehoods, making the proceeding quite unintelligible to a layman;—so it is, disfranchising Grampound we keep Old Sarum. In other cases you have not the fictions of ejectment, but you have the chicane of special pleading and the New Rules, which, if devised for the purpose of enabling wrong to triumph over right, could not be more effectual. In a common law trial, the judges see and hear the witnesses, but besides the influence of special pleading, the jury must be unanimous. In Chancery, the suitor is free from the New Rules, but the judge does not see or hear the witnesses, &c. &c. &c.

(*z*) "*Vide*, reader, in my Preface to the fourth part of my Reports, f. i. b. for the inconveniencies which ensue on the breach of any of the ancient and fundamental rules of the common law. And by all these differences and reasons you will better understand your books, in 8 Ed. 2; Droit, 35; 4 Ed. 3; Droit, 31; 3 E. 3. 16; 7 Ed. 3. 19; 8 Ed. 3. 54; 9 Ed. 3. 13; 18 Ed. 3. 31. 35; 18 Ed. 3; Estoppel, 221; 30 Ed. 3. 19; 13 Ass. p. 1; 17 Ass. p. 27; 27 Ass. p. 21; 28 Ass. p. 14; 30 Ass. p. 8; 30 Ass. 51; 31 Ass. 28; 32 Ass. 13; 31 Ass. 14; 33 Ass. 5; 19 Ed. 3;

Coke was bred, I subjoin the conclusion of this case in a note.

Lord Cheyney's case (*a*) is reported vol. 3, p. 137, of the

7 H. 4. 15; 3 H. 6. 15; 22 H. 6. 27; 7 E. 4. 19; 2 R. 3. 14; 10 H. 6. 5; 37 H. 6. 31, 32; 12 E. 4. 13; 9 H. 7. 23; 21 H. 7. 24; 29 H. 8; Br. Det. 174; 33 H. 8; Action sur le case, Br. 105; 7 Ed. 6; Estoppel, Br. 162; 23 Eliz.; Dyer, 371; Bracton, lib. 4, fol. 262. Note, reader, at the common law, if lands had been conveyed out of the degrees, so that the demandant could not have a writ of entry in the *per*, or *per & cui*, the demandant was put to his writ of right; for no writ of entry in the *post* was at the common law, and the reason thereof was as hath been said *quod sit finis litium*, and that he who had right should take his remedy by writ of entry, before there could be more than two alienations, and all this appears by the statute of Marlebridge, cap. 30. *Vide* F. N. B. 192; 7 Ed. 3, 25. & 325; 17 Ed. 3. 69; 22 Ed. 3. 1; 7 H. 4. 17, &c."

(*a*) "Sir Thomas Cheyney, Knight, Lord Warden of the Cinque Ports, 1 Eliz., made his will in writing, and thereby devised to Henry his son divers manors, and to the heirs of his body, the remainder to Thomas Cheyney of Woodley, and to the heirs male of his body, on condition 'that he or they, or any of them, shall not alien, discontinue, &c.' And it was a question in the Court of Wards, between Sir Thomas Perot, heir general to the Lord Warden, and divers of the purchasers of Sir Thomas Cheyney, if the said Sir Thomas should be received to prove by witnesses, that it was the intent and meaning of the devisor to include his son and heir within these words of the condition (he or they), and not only to restrain Thomas Cheyney of Woodley, and his heirs males of his body; but Wray and Anderson, Chief Justices, on conference had with other justices, resolved, that he should not be received to such averment out of the will, for the will concerning lands, &c., ought to be in writing, and the constructions of wills ought to be collected from the words of the will in writing, and not by any averment out of it; for it would be full of great inconvenience, that none should know by the written words of a will what construction to make, or advice to give, but it should be controlled by collateral averments out of the will: but if a man has two sons both baptized by the name of John, and conceiving that the elder (who had been long absent) is dead, devises his land by his will in writing to his son John generally, and in truth the elder is living; in this case the younger son may, in pleading or in evidence, allege the devise to him; and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead; or that he at the time of the will made, named his son John the younger, and the writer left out the addition of the younger: for in 47 E. 3. 16. b. the case was, Robert Peynel had issue two sons baptized by the name of William, and levied a fine to Sir

same edition. It illustrates the rule which Lord Bacon has condescended to explain, and which is well known in our law, of latent and patent ambiguity. The rule is, that an ambiguitas patens in a written instrument may be explained, and an ambiguitas latens may not. "Patens is that which appears to be ambiguous on the deed or instrument. Latens is that which seemeth certain and without ambiguity for any thing that appears on the deed or instrument, but there is some collateral matter *out* of the deed that breeds the ambiguity."

A patent ambiguity (*b*) requires no illustration; wherever the meaning is doubtful on the face of the instrument to be construed, there is a patent ambiguity.

It is a latent ambiguity if I leave my manor of Dale to my cousin Titius, and it turns out that I have two cousins of that name, then as evidence extrinsic to the deed was admitted to shew that I have two cousins called Titius, evidence extrinsic

to Robert and William his son generally; and after the death of Robert, William the younger son brought a *scire facias* against the heir of William the elder; and the younger, by the rule of the Court, averred that the fine was levied to make him heir *prist*, *&c.*, and upon that issue was taken. And no inconvenience can rise if an averment in such case be taken in case of a devise by will, for he who sees such will, whereby land is devised to his son John, cannot be deceived by any secret invisible averment: for when he sees the devise to his son John, he ought at his peril to inquire which John the testator intended, which may easily be known by him who wrote the will, and others who were privy to his intent; and if no direct proof can be made of his intent, then the devise is void for the incertainty, as the render also would be in the said case of the fine, as to William, for the law will not make the one or the other by construction inheritable, for neither the elder son shall have it by course of law, because the elder need not have an addition, nor shall the younger have it by construction by reason the father need not have limited the land to the elder, because the land after the death of the father would descend to the elder. But he shall have it whom the father intended to advance with it, and for want of proof of such intent, the will or the render for the incertainty (as hath been said) is void; and so the doubt in 11 H. 6. 13, well explained."

(*b*) Maxims of the Law, Regula 25, vol. 4, p. 79; Bacon's Works, p. 800. Examination of the case of Goblet *v.* Beechey and others, by Wigram.

to the deed will be admitted to shew which of the two I meant.

Four cases,—the case of Peacham (1615), the case of Owen (1615), the case of Williams (1619), and the case of Pine (1628), may be considered together for the purposes of this inquiry.

Peacham, a clergyman, was tried for high treason in compassing the death of the king. The overt act alleged in the indictment was the composition and writing of a certain libel. The libel was contained in a sermon which had never been preached, and which was found in his closet. Many of the judges, said Croke, were of opinion that this did not amount to treason. He was, however, convicted of high treason. But the sentence was never inflicted.

The overt act charged in Owen's indictment was, that he had said, "The King being excommunicated by the Pope, may be lawfully deposed and killed by any one, which killing is not murder." The prisoner was convicted of high treason, and judgment passed on him by the Lord Chief Justice Coke; another proof of his wicked conduct as a judge. It is not known whether he was executed (*c*).

The case of Williams is a still more frightful instance of injustice. The overt act charged against him was, that he had written two books, one entitled "Balaam's Ass," the other "Speculum Regni," in which he took upon himself the office of a prophet, and affirmed, upon the authority of the passage in Daniel, "time, times and a half," "that the King which now is will die in the year of our Lord 1621," arguing "that the time when Antichrist was to be revealed was the time when sin was at the highest; that sin was then at the highest, *ergo*, &c. . . . ." In the same strain of judicious interpretation he explained, that the court was the abomination of desolation

(*c*) If we compare these proceedings with those of the Spanish Inquisition, in the cases of Luis de Leon, Documentos ineditos per la Historia de Espana, vol. 11, and of Sanchez de las Brozas, vol. 2, p. 5, ib., the

and the habitation of Devils; and "these and many other such opinions all the Court clearly held were evidence of high treason by the common law, for these words import the end and destruction of the King and his realm:" "and treason," said Montagu, "is 'crimen læsæ majestatis,' and how can the King be more hurt than by the broaching and buzzing of such opinions in the ears and hearts of his people?" Williams rested his defence on three grounds: first, that what he wrote proceeded not out of malice to the King, but love—for which he appealed to the publication itself: secondly, that it was merely opinion, and could not be taken as an overt act, inasmuch as it rested there, and was connected with no treason, rebellion, or conspiracy: and thirdly, that he had never published his book at all, but had sent it secretly to the King, sealed up in a box. In spite of these unanswerable arguments, the poor fanatic was convicted and executed. Such an offence would hardly have been so punished, unless heresy had been imputed, in France, Italy, Germany, or Spain at that time.

Pine's case. Pine was indicted for high treason in imagining the death of the King. The overt act charged was, speaking seditious words, attributing to the King want of capacity, and describing him as unfit to rule. In this case the judges were convened to decide, whether speaking such words amounted to treason; and they decided, after an examination of several precedents, that it did not(*r*). For they resolved "that, unless by particular statute, no words will amount to treason, for there is no treason this day but by 25 Edw. 3, for imagining the death of the King; and the indictment here must be framed on one of the points in that statute; and the words spoken can be but evidence to discover the corrupt heart of him that spoke them, but of themselves they are not treason, neither can any indictment be framed on them." The statute requires

(*r*) And so he escaped altogether. Charles preferred his impunity, to the promulgation of the doctrine that his offence was not capital, from the Bench. Henry Third, of France, bore a great deal more from [illegible]

that the accused should be "*attainted of open deed*;" now words to recommend another to engage in a treasonable design, are an overt act of the species of treason above mentioned; "they are uttered in contemplation of a traitorous purpose actually on foot, or intended, and in prosecution of such purpose" (*s*). Such words are an overt act. But words uttered without any reference to any treasonable act or purpose are not such an overt act. An overt act must not only be looked upon as evidence of the guilty purpose of the heart, but as the means by which that purpose is to be accomplished. "Loose words," says Mr. Justice Foster, "not relative to acts, are at worst indications of the malignity of the heart." But though mere words do not amount to an act, they are, when they accompany an act, in treason as in other cases, evidence of the intention with which that act is done; and may qualify an act with the degree of malignity that amounts to treason. In such cases, however, as Mr. Phillipps remarks, it is not the words, but the act which the words explain and prove, that amounts to treason, and ought to be so charged in the indictment (*t*).

Lord Audley's case exhibits such a scene of abominations that I am anxious to pass over it as hastily as I can. The crimes charged against the prisoner were of the foulest nature. The judges, according to the fashion of the age, were consulted before the trial by the Attorney General, and they declared the law to be:—

1. That a peer could not waive his trial by peers.
2. That he could not challenge his peers.
3. That he might have counsel only for points of law.
4. That examinations could not be made use of against the prisoner unless they were upon oath. But that his own examination, not upon oath, might be employed against him.
5. That the wife might be a witness against her husband, *ex necessitate rei.*

(*s*) Foster, p. 200.
(*t*) Phillipps, vol. 1, p. 93.

That Lord Audley had been guilty of the most disgusting and horrible turpitude is evident; but it is no less clear that he was improperly convicted. The evidence given by his wife was entitled to no credit or even consideration, as she had suffered a long interval to elapse without complaining of the injuries she now attested. Lord Audley, confessing that his sins were many and heinous, maintained to the last moment his innocence of the charges on which he was convicted.

Another witness against him, who was executed, also declared, just before his death, that Lord Audley's wife was a woman capable of any crime, and that a great portion of her evidence was false. This was precisely one of those cases which illustrates most remarkably the evil of not allowing counsel to prisoners (*u*). An acute and intelligent advocate, by an examination of witnesses so suspicious, and guilty, on their own shewing, of such enormous wickedness as those against Lord Audley, must have ensured his acquittal; as it was, he was convicted by a majority of three only. Twelve peers acquitted him. I can hardly lament his fate, but he fell a victim to the absurdity of our institutions, in refusing counsel to men on trial for their lives, and in adopting (as they still continue to do) one system for discovering the truth where the life of a man, called in one way, is at stake, and a different one where that of a man, addressed in a different manner, depends upon the trial.

The law now says, if you are called my Lord, the right way of finding out the truth is this method; if you are called Sir, the right way of finding out the truth is that one; and this, in the nineteenth century, when a man who would look for coal in an improper stratum would be reckoned a maniac. The heart of many a spectator must have ached when the aged prisoner,

(*u*) Lord Audley said, "I have been close prisoner these six months without friends, without counsel, without advice. I am ignorant of the advantages and disadvantages of the law, and am but weak of speech at the best, and therefore I desire to have the liberty of having counsel to speak for me."

after a solemn protestation of his innocency, said that he left three woes to the consideration of his Peers:

1. Woe to that man whose wife should be a witness against him!

2. Woe to that man whose son should persecute him and conspire his death!

3. Woe to that man whose servants should be allowed witnesses to take away his life!

He said further, his wife had been naught in his absence, and had had a child (*v*).

That his son was now become twenty-one years old, and he himself old and decayed,—that the one would have his lands, and the other a young husband; and, therefore, by the testimony of them, and their servants' added to their own, they had plotted and contrived his death.

In this case it does not appear that Lady Castlehaven was produced face to face against her husband, though she was at the reiterated demand of the accomplice produced against the latter; many of the witnesses, however, were produced, though their examinations were read. The indictments against him were three, and they were tried together. It is remarkable, that the principal witnesses against Lord Castlehaven, Fitzpatrick and Broadway, retracted their confessions. "Broadway," say the judges in their report to the King, "very impudently denied his own confession taken before the Lords in the trial of Lord Audley; he pretended he was annoyed, and knew not what he subscribed. He would not be satisfied unless the Lady was produced face to face, which she was. Fitzpatrick pretended he was promised security from danger, and so sought to raise a suspicion as if he had been wrought upon to be a witness to bring Lord Audley to his end." The report ends, that it was not for the "honour of common justice" that these prisoners should be pardoned, which Charles, from some crooked motive

(*v*) This was confirmed on the scaffold by one of the witnesses against Lord Audley, who stated also that she destroyed the child.

or other, was disposed to do; and, accordingly, they were executed. It is manifest that they were both unworthy of credit, and that a conviction grounded on their testimony was unjust. Broadway said on the scaffold, "that my Lord Dorset had entrapped him to his destruction, saying upon his own honour, and speaking in the plural number (as the mouth of the whole Board), that whatsoever he delivered should no ways prejudice himself; he thereby got him to declare the Earl guilty."

The trial of Strafford was the dawn of a better day, soon overcast, indeed, by the bigotry and pusillanimous conduct of those who replaced the line of Stuart on the English throne, but during which, nevertheless, some gleam of the light of freedom was generally visible. This was the period announced in the glorious language of Milton, "Methinks I see in my mind a noble and puissant nation rousing herself like a strong man after sleep, and shaking her invincible locks. Methinks I see her as an eagle, mewing her mighty youth, and kindling her undazzled eyes at the full midday beam, purging and unscaling her long abused sight at the fountain itself of Heavenly radiance,"—language that to us, degenerate from long and avowed corruption, the helots of mere material interests, careless of all that we cannot put into our pockets or count upon our fingers, and looking up with boundless veneration to technical rank and stupid opulence, may seem inflated and extravagant, but which to a mind like Milton's fortified by the incessant study of the great writers of antiquity, exalted by those glorious deeds in peace and war, which had raised this country to an unequalled height of glory, and inspired by the hope (alas, too soon dispelled) of contributing to realize the splendid vision of a free republic, was natural and appropriate. The death of Strafford is to be justified, not by any positive law, for there are some cases which no positive law can reach, but by a necessity paramount to all law. It was justifiable as the suspension of the Habeas Corpus Act is justifiable, as

flinging goods overboard in a storm is justifiable, as the division of food in a besieged town is justifiable, as the decree of the Roman Senate, "ne quid detrimenti respublica caperet" was justifiable. If the necessity was not real (*w*), those fathers of the Commonwealth, who carried the best qualities of Englishmen to a height they never since have reached, were criminal; but if the necessity was imminent, if the life of Strafford and the freedom of Englishmen were incompatible, then they acted like patriots and like statesmen. Is there any one acquainted with the history of the time, who has read Strafford's letters breathing the most rancorous hostility to freedom, or considered his words and actions, who can doubt that the liberties of England would have been exposed to perpetual jeopardy during every minute of Strafford's future life? Can any one who admits this, resist the corollary, that his life was forfeited to the State? They who voted for the bill of attainder, might take with Cicero, "maximum illud pulcherrimumque juramentum, se rem publicam servâsse." No positive law sanctioned the expulsion of James the Second, yet no one worth reasoning with will dispute its justice. In like manner, though no statute could be quoted to justify the execution of Strafford,—the great object of all laws and all statutes, the welfare of those whom he had systematically endeavoured to make slaves, not freemen, was its justification and its guarantee.

The same argument applies to the case of Charles,—I mean not as to its expediency, which is one question, but as to its justice, which is another. Charles had violated over and over again the fundamental laws which he had sworn over and over again to keep holy and to obey. He had inflicted the most savage and illegal punishments on innocent men. He had destroyed the security of social life. He had, without a shadow of right, seized on the goods of his subjects, and imprisoned their persons in a long and cruel bondage. He had caused the

(*w*) If "necessity," when fictitious, is the "tyrant's plea," when real, it is the statesman's justification.

death of Cotton(*x*) and of Elliott. He had obliged thousands of industrious and blameless subjects to fly to the wilderness (*y*), and to seek in exile a shelter from his persecution. Remonstrances, petitions, laws, oaths, were of no avail. He was the determined enemy of freedom, by whatever name it was called, and by whatever institutions it was guaranteed. He had (the fact is proved beyond all doubt by the Marquis of Antrim's defence in Charles the Second's time) encouraged the insurrection which led to the massacre of the Protestants in Ireland. He had let loose upon a patient and considerate people all the horrors of civil war. All technical rules, and the laws intended for an ordinary state of things, disappear before such enormous wickedness.

ὡς ἀπόλοιτο καὶ ἄλλος, ὅτις τοιαῦτά γε 'ρέζοι.

The trial of Charles the First was a proceeding for ever glorious to the English nation. "The fame of it went forth into all lands, and its glory to the ends of the earth." It was intended to be, and it has been, one of the great landmarks

(*x*) Sir Robert Cotton, the great antiquarian, died of a broken heart, in consequence of his imprisonment and the seizure of his papers. A speech in Parliament was his offence. "Six members of the House of Commons, who had been forward in vindicating the privileges of Parliament, were committed close prisoners for many months together, without the liberty of using books, pen, ink, and paper, while they were detained in this condition, and not admitted to bail according to law. They were also vexed with informations in inferiour Courts, where they were sentenced and fined for matters done in Parliament, and the payment of such fines extorted from them. Some were enforced to put in security of good behaviour before they could be released; the rest, who refused to be bound, were detained divers years after in custody, of whom one Sir John Elliot, a gentleman of able parts, that had been forwardest in expression of himself for the freedom of his country, and in taxing the unjust actions of the Duke of Buckingham, while that Duke lived [though the truth be, that those speeches of his were no other than what carried the public consent in them], dyed by the harshness of his imprisonment, which would admit of no relaxation, though for health's sake he petitioned for it often, and his physitian gave in testimony to the same purpose." May's History of the Parliament, 4to edition, p. 9.

(*y*) The same cause, religious persecution, has produced, within the last ten years, the same effect in the dominions of the King of Prussia.

of history. It was not the act of a furious multitude, or of a savage demagogue, or of a tribunal of assassins. It severed the chain which bound the nations of modern Europe to the earth. It was the first great proof in modern times that the prejudices of Gothic ignorance, and feudal barbarity, and superstitious infatuation were giving way, that kings were no longer irresponsible, and that the sword of justice was above them. The "enormous faith," as one of our poets calls it, of many made for one, received its death wound on the scaffold of Charles the First. If, indeed, like lawyers, we are to swerve and shiver at a noble deed, and stand disputing about forms and precedents while the commonwealth perishes for want of faithful service, or if, yielding to a superstition still more ignoble, we are to invert the great tenet of Christianity, and hold that man may become God among us, then, indeed, the death of this bad King was a crime inexpiable; but if we listen to the language of reason, as delivered to us by her chosen oracles in ancient or in modern times, if we consider the purpose for which Kings were appointed by social creatures, or if we examine the lessons written by Nature herself, when no appeal can be made to experience or meditation, on the heart of the savage in the wilderness, we shall consider it an imperishable monument of English justice.

Charles (*y*) died well,—

> "Nothing in his life
> Became him like the leaving it,"

not better than many good and many bad men before and after him have died,—not more nobly than Sir Henry Vane or

(*y*) Such a question may fairly be discussed now, as it is one in limited monarchies purely of speculation. The execution of Louis 16, misled as he had been into treason to his people, has always appeared to me an act of wanton barbarity. The personal inviolability of the Sovereign in limited monarchies, and the personal responsibility of his ministers, cannot be insisted upon too strongly. I speak of limited governments only, for in absolute monarchies the case is altogether different. If Catharine of

Algernon Sydney,—not more serenely than Lord Lovat; but his deportment throughout was manly, calm, and dignified. Far be it from the writer of these pages to qualify by a single epithet the merit of those virtues which he had learnt in the school of adversity, or to detract by a single word from praise that is so unquestionably his due.

Yet, although my "faith" as to the motive of the execution of Charles the First is that of Milton, and although I firmly believe that its lasting effects have been beneficial to mankind, its immediate policy was questionable. It may well be doubted whether any cause contributed so much to that act of incredible madness and folly, the unconditional restoration of the Stuarts, and the crimes and miseries which followed it.

The judicial enormities of Charles the First's reign, scarcely relate to the matter now under consideration; but if the reader will turn to the proceedings in Lilburne's case, A. D. 1637, he will see that the Attorney General (*z*), afterwards Lord Chief Justice, actually employed his clerk to entrap the prisoner into a confession. The downfall of the Stuart dynasty produced a great temporary improvement in the administration of justice, which, but for the folly of the English in restoring to the throne that detestable and detested race, might have been as permanent as it was considerable (*a*). The English language

Russia, after the murder of her husband, or the sack of Warsaw, or if Charles 12, after the murder of Patkul, or Frederic William I of Prussia, after kidnapping the citizens of other states and cutting off their hands and feet, for endeavouring to return home, had been tried and executed, the example would have been a salutary one. But since the Gothic monarchies have been shaken, and the people have been more consulted in public affairs, punishments have become milder, and conquerors more humane. Pressing to death, the evisceration of a living man, burning alive, "Luke's iron crown, and Damiam's bed of steel," were not the inventions of popular governments.

(*z*) State Trials, vol. 3, p. 1817.

(*a*) This was at last accomplished, in spite of the opposition of lawyers, and much to the regret of Blackstone, in the fourth year of George 2. So we continued, in company with Russia, to use the Julian calendar till

was substituted under the Commonwealth for the horrible jargon in which, up to that time, the proceedings in our Courts of justice had been carried on. With the restoration of Charles the Second the old gibberish was restored. This is a proof of the intense bigotry peculiar to the English. I believe the history of all free countries might be ransacked in vain to find another such instance of servile submission to authority, on the part of the people and their representatives, and obstinate hostility to improvement on the part of the class whom they obeyed. The case most nearly approaching to it, is the establishment of special pleading, in 1830, in a shape more odious and contracted than it had before exhibited, by those to whom the task of reforming our jurisprudence was entrusted. The country that endures the system of pleading in use under Edward the First in the nineteenth century, might well submit to Norman French and corrupt Latin in the seventeenth.

Another salutary legal measure, which would have prevented an immense mass of litigation, was stifled at the Restoration, and has not yet become law (*b*). I mean a Register for Deeds affecting landed property. Blackstone sneers at this proposal, and thereby gives us another proof of the unhappy and narrowing effect of professional habits on his mind. It is a measure so important, that even among us, and though it tends to prevent fraud and to diminish litigation, it cannot much longer be delayed. One great improvement, however, was preserved. During the time of the Commonwealth, it became a recognised principle of law, that the witnesses against prisoners must be sworn and confronted with them.

the year 1751. The Duke of Newcastle uttered the genuine sentiment of those entrusted with our affairs, when he implored Lord Chesterfield to give up his bill for putting an end to this barbarity, and "conjured him not to stir things that had long been quiet, adding, that he did not love new fangled things." Chesterfield's Works, vol. 2, p. 464.

(*b*) "Another, and perhaps the greatest cause of multitude of suits, is this, that for want of registering of conveyances of land, which might easily be done in the townships where the lands lie, a purchase cannot

The rules of evidence still continued vague and unsatisfactory, but this was a great step in the right direction, which, strange to say, the Court lawyers found it impossible to retrace. The principle laid down by the statutes already referred to—of Edw. 6, to which so many noble victims had appealed in vain, and which the Pophams(*a*) and Cokes had contrived to frustrate, was now established permanently. Torture disappeared for ever from this part of the island. And though the "res dura et regni novitas" forced Cromwell upon measures affecting the constitution of our Courts of justice, which appear harsh and arbitrary, the adoption of those measures proceeded from no desire to corrupt the purity of the Bench; and the acquittal of Lilburne, within the clash of the pikes that had guarded Charles to execution, was a signal triumph of its integrity. Cromwell's object was, not to procure convictions against the innocent, but to ensure the punishment of the guilty, which, in a country so torn by factions as England, was difficult; for even when traitors were seized with arms in their hands, endeavouring to overthrow the Commonwealth, their acquittal by some juries would have been inevitable. Under the Stuarts, the criminal quality of the imputed acts was not disputed, but the acts themselves were denied, and judges obliged juries to find that they were proved, sometimes on insufficient evidence, sometimes on no evidence at all. Under Cromwell, the acts were not only not denied, but boasted of, and juries refused to allow that they were criminal. The right of self preservation which every government must possess, justified the change of tribunal. Call that government usurpation if you please; say that it ought never to have existed; say, with James the First, that the Dutch were rebels for resisting Philip the Second; say that the government of Charles the First and Charles the Second was preferable to freedom; argue for Divine right and passive obedience, as if you were an Oxford tutor or undergraduate;—all this is

(*a*) Popham introduced the practice of fining jurors for their verdicts.

collateral to the question, whether a government is to allow treason to be committed, and the assassination of its head to be attempted with impunity—for that was the alternative. A single royalist juryman might have ensured the escape of the most cowardly assassin, (such as those royalists were who murdered their unarmed foes (*b*) in Holland); and even to this hour, this admitted absurdity of obliging people who differ, to say on their oaths that they agree, still flourishes under our enlightened system, encouraging perjury in the jury, and affording impunity to the criminal; when, however, traitors, as to whose guilt there is no doubt, are acquitted by the judges, because in their eyes treason is no crime, but a duty, government cannot long continue. As to the security for innocence furnished by juries, if their prejudices were inflamed, Tiberius could have wished for no fitter instrument. The foulest crimes to be found in the history of civilized man, have been perpetrated by means of juries: nor will any one who reads the trials of witches, of the Rye House Plot, of the Popish Plot, of Mrs. Gaunt and Lady Alicia Lisle, when, as a contemporary says, they would have found Abel guilty of the murder of Cain, doubt that Cromwell substituted for them a far more righteous, as well as a far more competent tribunal. Yet such is the blindness of party, that men who say nothing of the manner in which juries were fined under the Tudors, or selected by party sheriffs solely to commit murder, in Charles the Second's time, expatiate with horror on this measure of Cromwell's, which was justified by reason, and enforced by the

(*b*) Lord Clarendon actually says of the murders of Ascham and Dorilaus, State Papers, vol. 3, p. 144, "It is a worse and baser thing that any man should appear in any part beyond sea, under the character of an agent from the rebels, and *not* have his throat cut." And then Cromwell is blamed for establishing, not a dishonest or corrupt, but an informal tribunal. If such a sentiment had ever escaped his lips, he would have been far more criminal. Again, Lord Clarendon actually sneers at Penruddocke for not murdering Judge Rolle, whom Penruddocke seized in the act of administering justice at Salisbury, 1655. If such conduct was deemed lawful on one side, can we wonder at severity on the other?

necessity of his situation. There is not in any one trial under the Commonwealth, any single instance of the facts having been wrested, or the evidence strained, to procure the conviction of a prisoner. The evidence as to the facts, is as conclusive as the evidence against the regicides; in either case the guilt which those facts establish will be considered in different lights by readers of different parties. But for the browbeating, the oppressive and cruel questions, the insults to the prisoner, the unfair interruptions, which as surely mark a trial between 1660 and 1688, as the presence of a judge and jury, we shall vainly seek under Cromwell for any parallel. He who chose Blake for his admiral, was not indifferent to the glory of his country, nor he who chose Hale for his judge, to the purity of its tribunals (*c*).

The execution of the Duke of Hamilton was to the full as justifiable as that of any other rebel seized with arms in his hands, assisting a foreign power against the established government of his country,—as justifiable as the execution of the rebels in the northern insurrection under Elizabeth, or of the rebels after the battle of Culloden in 1745; nor does the character of this nobleman appear to me the least calculated to inspire compassion for his fate. His own interest seems to have been the sole object of every action of his life. The account of his trial is clearly written by a virulent partizan; but Whitelocke tells us, that he told his judges how, if he were spared, he could disclose important secrets. Goring the profligate minion of the profligate Henrietta, deserved a hundred deaths, for his treason in peace and his cruelty in war. But I own I deeply regret the death of the gallant, frank, and high spirited Lord Capel. True, he was the determined and inveterate enemy of the Commonwealth,—true, he had taken arms against its liberties; but his conviction was deep, his bearing noble, his purpose loyal (in the true sense of that much

(*c*) Cromwell had no alternative but to act as he did, or allow religious persecution. The intolerance and bigotry of the Scotch and the Presbyterians left him no choice, and ruined the cause of freedom.

polluted word), and disinterested. The execution of such a man, if it be not a national disgrace, is a national misfortune, and one which every reader of every party should deplore.

The escape of the turbulent Lilburne was, perhaps, rather an advantage than an injury to the government; it clearly shewed that men held their lives under the law. Lilburne was a perverse, shallow, and thoroughly wrong headed demagogue, steeped in the narrowest prejudices, and endowed, for the misfortune of himself and others, with a pernicious fluency of expression. Nothing could exceed the petulant insolence of his demeanour to his judges. Relying upon his old stock grievance, and forgetting the change which had actually taken place, he began, "To complain that the formalities of the law are put upon me, the signification of which is writ in such language as I cannot read, much less understand; and will you destroy me for not knowing that which it is impossible for me to know?" The judges quietly remarked, "Mr. Lilburne, you were speaking of the laws in other tongues; those that we try you by are in English, and we proceed in English against you, therefore you have no cause to complain of that." Lilburne nothing daunted or abashed by the mistake, proceeded to take the most captious and absurd objections, to shew very great ignorance of our legal history, and to overbear the judges by his violence and incessant interruption. The judges (*c*), on their side, endeavoured to induce him to confess, and summed up much too anxiously for a conviction. Keble, the President, reproached him for his intemperance, "After we have sat patiently to hear, and provided a stool for you to sit upon." But no depositions of witnesses, no confessions of accomplices, were read against him, manifest as his hostility to the govern-

(*c*) Keble seems to have been as much shocked by Lilburne's quoting Coke's Commentaries *on Plowden*, as by any other part of his defence. The blood boiled in his veins, as if he had been now sitting in the Court of Exchequer, and he broke out, "To set Coke's Commentaries on Plowden! when there is no such commentary! Go to your matter of fact; trouble yourself no more with Coke! He has no Commentary on Plowden."

ment was, and desirous as it was for a conviction. The intrepid and eloquent libeller ended his defence in these words:—"Therefore (*c*) as a freeborn Englishman, and as a true Christian that now stands in the light and presence of God, I do with an upright heart and conscience, and a cheerful countenance, cast my life, and the lives of all the freemen in England, into the hands of God and his gracious protection, and into the care and conscience of my honest jury and fellow citizens, who, I again declare, by the law of England, are the conservators and sole judges of my life, having inherent in them alone the judicial power of the law as well as the fact. *You, judges, that sit there, being no more, if they please, but cyphers to pronounce the sentence, or clerks to say amen to them*; and therefore you, gentlemen, are the sole judges and keepers of my life, at whose hands the Lord will require my blood in case you leave any part of my indictment to the *cruel and bloody* men; and therefore I desire you to know your power, and consider your duty to God, to me, to your own selves, and to your country; and the gracious assisting Spirit, and presence of the Lord God Omnipotent, the Governor of Heaven and Earth, and all things therein contained, go along with you, give you counsel, and direct you to do that which is just and for his glory!"

(The people with a loud voice cried, amen! amen! and gave an extraordinary great hum, which made the judges look somewhat untowardly about them, and caused Major General Skippon to send for three more fresh companies of soldiers).

But in Lilburne's case, and Love's, the defects of the English method of proceeding, and the hardship it imposed on the person accused, were sufficiently visible even amid the petulance and perverseness of the prisoners. In Love's case, Keble would not allow the prisoner a copy of the indictment, and the absurdity was pointed out by Hale, the prisoner's counsel. Hale insisted also, that two witnesses were necessary in cases of treason, under the statutes of Edward the Sixth,

(*c*) He was tried by a jury.

which, as he justly said, and as was not denied by those who argued against him, were not repealed by the statute of Philip and Mary in point of testimony. But the counsel for the prosecution said, though two witnesses are necessary, one witness to one overt act, and another to another, of the same treason, are sufficient within the act. Another question raised by Hale was, "whether a person menaced that he shall lose his life if he did not discover another, and that he shall have his life if he do discover him, be a competent witness, or no?" Hale proceeds to argue, that under the statute of Edward the Sixth the witness must be lawful and sufficient (*d*), thus altering the common law; that before the tribunal he was addressing, combining the functions of judge and jury, such a witness especially must be insufficient. "I will not dispute," Hale continues, "whether a plotter and confederate may be such a witness, but whether a person detected, whose life is in the hands of the State, can." These objections were overruled; but they are remarkable, as they seem the first notice of the distinction between the competence and the credibility of a witness, which afterwards proved so fruitful a cause of litigation. The objection is, not that the witness is unworthy of credit, but that he ought to be, for the purposes of the cause, as if he did not exist. I quote an extract from the trial which shews that the Law of Evidence was far from its maturity:—

Att. Gen.—"What has Mrs. Love (prisoner's wife) said to you?"

Witness.—"I saw her ever and anon."

Att. Gen.—"What has she said to you?"

Witness.—"She has wished me, with tears, not to discover anything, and to have a care of her husband; I think she hath."

Att. Gen.—"Did not Mr. Love say?" (putting words into his mouth).

Witness.—"He did."

And the evil of such a method soon appears, for the witness very soon remarks, "I confess before Potter, and Mr. Attorney General did *prompt* me."

Att. Gen.—"Prompt you, Sir!"

Witness.—"Before he *did remember me* of the words, I had forgot them," &c.

Many of the Attorney General's questions were in this shape: Was it not? &c.: Was it not said that? &c.: Did not you make? &c.: Did you not receive? &c.: Was there no expression of thanks? &c.: Was not the message well approved of, and the letter to be returned and 100*l.* in money? &c.; questions that would now be considered most improper and oppressive. The contents of a letter were stated, which letter was read in Love's study; but for aught that was proved in his absence. Love objected, "This is gross darkness for you to dictate words to him and then to say, Was it not thus or this effect?—and so to put in the mouths of the witnesses what you would have them say." *Att. Gen.*—"When you go in darkness it is gross treason."

Among the incidents of this trial was that of a witness (*c*) summoned and refusing to be sworn; for this he was fined 500*l.*, and removed to prison. Love's language and conduct shewed that the Presbyterian clergy would, if they had found opportunity, have been as arrogant and offensive as the High Church of England party, and that Cromwell had formed a proper estimate of their intolerance. It appeared clearly that Love had entered into a criminal correspondence with Charles the Second and the Scotch; that Colonel Titus had been sent over with one hundred pounds to pay his expenses. Potter, Adams, and Taquel all swore that letters came from Scotland with the letter L., giving an account of the fight at Dunbar, and also letters from the Earls of Argyle, Lothian, and Loudun, to raise ten thousand pounds and hire shipping to land 5000 men in England. This was held evidence of a

(*c*) Jackson, a Presbyterian minister.

criminal correspondence to restore the King contrary to the Ordinance of 1648, "That whoever shall proclaim, declare, publish, or anyways promote Charles Stuart, or any other person, to be King of England without consent of Parliament, shall be adjudged a traitor, and suffer death as a traitor;" and also of an offence against the Ordinance of the 1st July, 1649, "That if any shall procure, invite, aid or assist foreigners or strangers to invade England or Ireland, or shall adhere to any forces raised by the enemies of the Parliament, or Commonwealth, or keepers of the liberties of England, all such persons shall be guilty of high treason." The Court, after a six days' hearing, pronounced sentence of death upon him. Charles the Second had now entered England at the head of 16,000 Scotchmen, and it was thought expedient to shew that the liberties of England were not to be endangered by the caprice and bigotry of the Presbyterian clergy. Nevertheless Cromwell, hating bloodshed and touched probably by the recollection of Love's former services, sent Love a reprieve, and conditional pardon; but the messenger was intercepted, and the Cavaliers, finding that he was the bearer of Love's pardon, out of revenge for Love's conduct at Uxbridge, where he had thwarted the King's Commissioners, destroyed the letter, though Love was actually for their sake in bonds. The consequence of this atrociously wicked action was, that Love was executed according to his sentence (*d*).

In the case of Falconer (*e*), who was tried for perjury which had caused the sequestration of Lord Craven's estate, evidence was given of the bad character of the accused,—how at Petersfield he had drunk a health to the Devil in the middle of the street; an objection was taken to the written proof of the oath on which perjury was assigned as being a copy of a

(*d*) Neale, vol. 4, p. 47.
(*e*) State Trials, vol. 5, p. 362.

copy. The original document was lost: it had been written at Haberdashers' Hall; thence a transcript of it had been taken to the Council of State; from the Council of State it had been carried to Parliament, and there it had been transcribed in the Journal Book. The Journal Book was not produced, but a sworn copy of it was tendered against the accused. The objection was, "that the prosecutors have produced a copy of Falconer's oath, which ought not to be admitted, because it is but a transcript of a transcript, a copy of a copy brought from Haberdashers' Hall to the Council of State, and from the Council of State to Parliament, and there the copy is entered in the Journal Book." The objection did not prevail; the counsel for the prosecution urging, that the copy they produced was indorsed with Lord Bradshaw's hand. One argument used by the prosecuting counsel seems to shew, that the distinction between an objection to the value of evidence, and an objection to its admissibility, was not very clearly established. "Shall it be believed that a man shall be confiscated and lose his estate, and not so much as an oath taken against him?"

When Charles the Second, owing to the narrow intolerance of the Presbyterians, and the frantic zeal of the landed aristocracy, was, in spite of the remonstrances of Sir Matthew Hale, replaced by the aid of Monk, the basest of the base, without one single condition or guarantee, on the throne, which, following in the track of his father and grandfather, he was about to cover with fresh disgrace, the nation began almost immediately to suffer the well deserved consequences of its slavish infatuation. Before the festal blazes which had welcomed the return of corruption and dishonour to this country were extinguished, they who had fancied that they were only selling the liberties of others, began to find out that they had parted with their own. It soon became evident that the pedantry, the hostility to all enlarged or generous views, the disregard of every principle

that does not address (*f*) itself directly to the exigencies of the hour, the senseless passion for routine, the unreasoning suspicion of theory, the utter want of statesmanlike foresight or legislative capacity, which, from the death of Cromwell to the present hour seems woven into our national existence; which has so often made our councils ridiculous and our victories unavailing, which has made us speak of liberty itself with scorn, and induced us to incur a debt of hundreds of millions to establish a treaty which, fortunately for mankind, is now almost waste paper, and of which in the abuses we endure, and in the feeble remedies which at intervals of centuries we propose, in what is called litterature among us, in our institutions, in our social habits, and, above all, in our laws, examples so incredible may be discovered,—were to meet with a signal and instantaneous punishment. In this instance the cause followed the effect with a rapidity which no sophistry could hide, and no stupidity misunderstand; under Cromwell we were free, feared, and magnanimous, the bulwark of our friends, the terror of our enemies; under Charles the Second we were profligate, despised, and servile, distrusted by our allies, and insulted by our foes, of whom our monarch was the hireling; under Cromwell we put an end to religious persecution abroad; under Charles we renewed it with tenfold fury at home; under Cromwell our judges were learned and righteous, and the accused were treated with humanity; under the Stuarts, our Courts of justice were dens of murderers, in which those presided who were most abject in their wickedness, most distinguished for ferocity, and most incapable of shame. At first, some feeble attempts were made to preserve an appearance of impartiality. The trials of the regicides contain, generally speaking, very few instances of the improper admission of evidence, or of direct interference on

(*f*) "Hi *qui in Horam viverent* non modo de fortunis et de bonis civium, sed ne de utilitate quidem suâ cogitaverunt." Could Cicero have described better the great majority of our public men?

the part of the Court with the province of the jury. Some servile ejaculations from the courtiers or renegades on the Bench, some few marks of antipathy in the judges, some instances of prejudice and misrepresentation which may be pointed out, hardly furnish any important exception to this statement. The trials, on the whole, are far more decorous, and apparently just, than those on the Popish and Rye House Plots, when the influence of the Stuart monarchy had corrupted the minds and blunted the sensibilities of the people. The reason may be traced in part to the beneficial influence of republican sentiments and doctrines, but is, no doubt, owing in a still greater degree to the fact, that such attempts to procure conviction were unnecessary. When the great iniquity had been committed of putting the regicides on their trial,—when it was once resolved that the blood of men like Harrison, and Scroop, and Jones, of men who would have done honour to Greece and Rome, was to be poured out in expiation of the well deserved death of the incorrigible deceiver, who had kindled the flames of civil war in England, and sanctioned the Irish massacre, the work of the royalist was done. If the execution of Charles the First was a crime, there could be no doubt as to the guilt of the accused, or, indeed, as a member of Parliament observed, more logically than suited the false position of his audience, as to the guilt of those who took up arms against him. If the hostile acts and feelings of the Sovereign justify his subjects in taking arms against him, they justify them (if it be necessary) in putting him to death. The policy of his execution may be doubted, but not its justice. The relation of Sovereign and subject is at an end; and the man who has been King is liable to any punishment that the good of the community which his wickedness has put in jeopardy requires.

The trials of the regicides, however, were conducted with tolerable candour. The facts alleged against them were proved by evidence the most unquestionable, and the deed itself, in

the elevated quotation of Harrison, was not done in a corner. They died as became men who had served their country faithfully, and who fell in the cause of freedom. In spite of the tortures inflicted upon them,—tortures which had never been inflicted on the traitors to the Commonwealth,—tortures prolonged with wanton malignity by the hangman, to whose discretion and humanity the English legislator, down almost to our own days, confided such extensive powers,—tortures which cannot be thought of without shuddering; in spite of the ghastly spectacle purposely exhibited before their eyes to shake their constancy; in spite of the mangling and mutilation, and ripping up of their own living bodies, their courage never quailed. The vengeance of their enemies was as impotent upon them as upon the dead bodies of statesmen and of heroes, of Cromwell and of Blake, which, with a meanness and ferocity that the lowest rabble, maddened by oppression, could not surpass, and which thoroughly illustrates the character of the Stuarts, were with many others torn out of the graves, and hung on gibbets. Sophocles, in his most affecting drama, when he wanted to describe a despot infatuated by success, and mad with arrogance, represents an insult offered by him to a dead body (an insult far short of that sanctioned by the rulers of England), as the last act of tyranny sublimed to frenzy. Such is the difference between the elegant humanity of Greece, and the feudal institutions of the barbarians to whom we owe the rudiments of our civil policy. If, however, the regicides had been impassive and invulnerable, they could not have acted with more heroic resolution. They addressed the people with cheerfulness and confidence, "It is an ill cause," said one of them when he was interrupted, "that cannot bear the words of a dying man." The same spirit which had caused their triumph supported them in their defeat; no misgiving clouded their recollections of what they had done—no compunction disturbed the fortitude with which they prepared to suffer. The sublime lesson of the great republican poet, which

ought ever to be in the minds of those who engage in civil struggles, might have been taken from their conduct :—

> "To suffer as to do,
> Our force is equal, nor the law unjust,
> Which so ordains.
> I laugh when those who at the spear are bold
> And venturous, if that fail them, shrink and fear
> What else they know must follow, to endure
> Exile, or ignominy, or bonds, or pain,
> The sentence of their conqueror."

It seemed as if the stern determination which was shewn when they sat in judgment on Charles Stuart was now no longer necessary to uphold their constancy, but had given way to feelings in which stoical pride was less largely mingled. If ever any cause was illustrated by the death of its votaries, the cause of the Commonwealth was ennobled by that of the King's judges. In the midst of the overflowing servility and adulation which pervades this portion of our history, we may turn to the demeanour of these men as a proof that the old English honour and firmness of purpose were not extinct among us, and say, in the words of the historian, "non tamen adeo virtutum sterile sæculum ut non et bona exempla prodiderit . . . contumax adversus tormenta fides, supremæ clarorum virorum necessitates, et laudatis antiquorum mortibus, pares exitus."

But no language can better describe the sentiments of men, nor shew how inaccessible they were to all vulgar motives (*h*), than that of Mrs. Hutchinson, who tells us in her beautiful and affecting narrative, that her husband "looked on

(*h*) I quote the following passage as a specimen of the means adopted by the English government of that day for refining and improving the people :—"When Mr. Cook was cut down and brought to be quartered, one they called Col. Turner called to the sheriff's men to bring Mr. Peters near, that he might see it; and by and by the hangman came to him, all besmeared in blood, and rubbing his bloody hands together, he tauntingly asked, Come, how do you like this, Mr. Peters; how do you like this work? To whom he replied, I am not, I thank God, terrified at it; you may do your worst." State Trials, vol. 5.

himself as judged in their judgment, and executed in their execution." She then proceeds to say, in a strain of lofty eloquence,—

"As for Mr. Hutchinson, although he was very much confirmed in his judgment concerning the cause, yett here being call'd to an extraordinary action, whereof many were of severall minds, he address'd himselfe to God by prayer, desiring the Lord that, if through any humane frailty he were led into any error or false opinion in these greate transactions, he would open his eyes and not suffer him to proceed, but that he would confirm his spiritt in the truth, and lead him by a right-enlightened conscience; and finding no check, but a confirmation in his conscience that it was his duty to act as he did, he, upon serious debate, both privately and in his adresses to God, and in conferences with conscientious, upright, unbiassed persons, proceeded to sign the sentence against the King. Although he did not then believe but it *might one day come to be againe disputed among men*, yett both he and others thought they could not refuse it witouth giving up the people of God, whom they had led forth and engaged themselves unto by the oath of God, into the hands of God's and their enemies, and therefore he cast himselfe upon God's protection, acting according to the dictates of a conscience which he had sought the Lord to guide accordingly the Lord did signalize his favour him" (*i*).

With a view to the trial of the regicides, it was resolved by the judges that it would be sufficient if one witness proved one act of traitorously compassing the King's death, and another witness proved another overt act of the *same species of treason.* Now this decision in one sense was the sound one, and was afterwards sanctioned by the statute of William the Third, if the act spoken to by the second witness was an overt act laid in the indictment, or if it had any tendency to prove an

(*i*) Hutchinson's Memoirs, p. 158, 8vo.

overt act laid in the indictment. But the judges in admitting proof of the confinement of the person of the King, which was not one of the overt acts laid in the indictment, and in the resolution which sanctioned the admission of such evidence went beyond these limits. This resolution was, that "if any one overt act tending to the compassing of the King's death be laid in the indictment, any other act which tends to the compassing of the King's death may be given in evidence together with that which is laid." Lord Hale, indeed, qualifies this doctrine by the addition, that the act proved must be "of the same species of treason," which, though not laid, may be given in evidence to aggravate the crime or make it more probable. This position in its full latitude is quite untenable. Everything that is evidence against the prisoner of the specific charge he is called upon to answer, is, of course, evidence against him. Beyond that limit, evidence of other and different crimes is inadmissible. If a man is charged with stealing a horse on Tuesday, it never could be right to prove that he stole a cow on the Monday before, though remotely, such an accusation might be said to have a bearing on the charge, as it shews that the accused is a man who has committed a felony, and, therefore, the charge of stealing the horse is more probable than if it had been brought against a man whose character was free from stain. For the same reason, if the overt act of treason, against which the prisoner is to defend himself, is that of having levied war against the King; evidence that he did some other act in no way connected with the charge ought not to be allowed, as such evidence could only serve to inflame the prejudices of the jury, and to surprise and perplex the prisoner. Three years afterwards, however, the judges went further, and declared that if *none* of the overt acts laid in the indictment were proved, it would be sufficient to prove any other overt acts of the same species of treason. The rule ought to be from analogy to other criminal proceedings, that any overt act of the prisoner tending to prove the specific act

alleged as the overt act in the indictment, may be given in evidence, whether committed in the same or any other county. But if the act has no such tendency, and is not alleged in the indictment, it ought not to be received in evidence. Such was the principle laid down by Holt in Rookwood's case, in commenting on the 8th section of the 7 Wm. 3, c. 3.

Colonel Hutchinson, a man of austere and republican virtue, and worthy to be the husband of a woman as high-minded as any commemorated in ancient or modern story, was sent for, at the suggestion of Colonel Inglesby, by the Attorney General, to furnish the evidence of which the government stood in need. Colonel Hutchinson had signed the death warrant of Charles the First, but his reputation was so spotless, that the solicitations of his brother-in-law, a royalist of great influence, prevailed, and he was pardoned. Inglesby, to save his life, invented a story, to the effect that Cromwell had put a pen into his hand, and obliged him to sign the warrant. Hutchinson told the Attorney, with very refined irony, "that in a business transacted so many years ago, wherein life was concerned, he durst not bear a testimony, having at that time been so little an observer, that he could not remember the *least* tittle of *that most eminent circumstance* of Cromwell's *forcing* Colonel Inglesby to set to his unwilling hand, which, if his life had depended on the circumstance, he could not have affirmed; and then, Sir, he said, if I have lost so eminent a thing as that it cannot be expected less eminent passages remain with me. Then being shewn the gentlemens' hands, he told him he was not well acquainted with them, as having never had commerce with the most of them by letters, and those he could own he could only say they resembled the writings he was acquainted with: among them he only pickt out Cromwell's, Ireton's, and Lord Grey's," who were all dead. I cannot forbear from giving my readers the pleasure of perusing the next passage, which will shew them how the pure and generous felt at the trial of the regicides. "The next day the Court sate, and the

Colonel was fetcht in, and made to pass before the prisoners' faces, but was examined to nothing, which he much waited for. The sight of the prisoners, with whom he believed himself to stand at the bar; and the sight of the judges, among whom was that *vile traitor,* who had sold the men that trusted him, (Monk), and he that openly said he abhorred the word accommodation, (Ashley Cooper), and the Colonel's own dear friend, (Denzil Holles), who had wished damnation to his soul if he ever suffered pennie of any man's estate, or a hair of any man's head to be touched,—the sight of these had so provoked his spirit, that if he had been called to speak he was resolved to have borne testimony for the cause and against the Court, but they asked him nothing" (*i*).

(*i*) Hutchinson's Memoirs, p. 279. Hutchinson was put to death in another way; he was taken up on a groundless charge, and sent to the Tower, where an attempt was made to poison him. This was to a certain degree frustrated, and he was destroyed in the same way as no doubt hundreds never heard of perished. "A few dayes after, at nine of the clock att night, after his wife was gone from him, Cressett brought the collonell a warrant, to tell him that he must, the next morning tide, goe downe to Sandowne Castle, in Kent, which he was not surpris'd at, it being the barbarous custome of that place to send away the prisoners, when they had no knowledge, nor time to accommodate themselves for their journey . . . . . When he came to the castle, he found it a lamentable old ruin'd place, allmost a mile distant from the towne, the roomes all out of repaire, not weather-free, no kind of accommodation either for lodging or diet, or any conveniency of life . . . . . For beds he was forc'd to send to an inne in the towne, and at a most unconscionable rate hire three, for himselfe and his man, and Captaine Gregorie, and to get his chamber glaz'd, which was a thorowfare roome, that had five doores in it, and one of them open'd upon a platforme, that had nothing but the bleake ayre of the sea, which every tide washt the foote of the castle walls; which ayre made the chamber so unwholesome and damp, that even in the summer time the collonell's hat case and trunkes, and every thing of leather, would be every day all cover'd over with mould, wipe them as cleane as you could one morning, by the next they would mouldie againe; and though the walls were foure yards thick, yet it rain'd in through cracks in them, and then one might sweepe a peck of saltpeter of of them every day, which stood in a perpetuall sweate upon them . . . . . .
. . . . The physician came allong, he enquired of the ma[illegible]

Of all the trials which speedily followed the Restoration, the most shamelessly iniquitous was that of Sir Harry Vane. Even among the atrocities and follies of English law, and the absurd resolutions of English judges, it is startling from its utter defiance of all reason. "According to the resolutions of the judges," says Mr. Justice Foster, "every man in the kingdom who had acted in a public situation, under a government possessed for twelve years of the sovereign power, was involved in the guilt of treason." Sir Matthew Hale, for instance, might certainly have been convicted on these principles. He had taken the engagement to be true and faithful to the Commonwealth of England, without a King or House of Lords. Among other resolutions of the judges one was, "That although Charles the Second was *de facto* kept out of the exercise of the kingly office, he was yet *de facto* King," an absurdity that, as propounded from the Bench of Justice, the history of free countries, except England, may be defied to match. Mr. Hume's remarks on the trial of Vane, prove not only the extreme inaccuracy, or rather the utter disregard of truth with which his history is tainted throughout, but the degraded notion of morality, of which, like too many of our countrymen, that great writer is upon all occasions and in all his writings the complacent and systematic advocate. "The Court, considering more the general opinion of his active guilt in the beginning and prosecution of the civil wars, than the acts of treason proved against him, took advantage of the letter of the law and brought him in guilty." It is difficult to say whether history, reason, or morality, are most disregarded in this passage. First, with regard to history: the Court considered neither the letter nor the spirit of the law, but violated, as the passage cited from Mr. Justice Foster proves, both alike. Secondly,

him what kind of person the collonell was, and how he had liv'd and been accustom'd, and which chamber of the castle he was now lodg'd in? Which when the man had told him, he say'd his journey would be to no purpose, for that chamber had kill'd him." As was the case.

with regard to reason: if the Court did not consider the acts of treason charged against Vane, how could it take advantage of the letter of the law? Thirdly, with regard to morality: it is evident that this accusation of a man for one crime, and condemning him for another, has Mr. Hume's implicit approbation (*k*).

The indictment charged Sir Harry Vane with compassing and imagining *the death of Charles the Second*, and conspiring to subvert the ancient and kingly government of the realm. The overt acts stated were, that the prisoner, in concert with other traitors, assembled and consulted to destroy the King and government, and to exclude the King from the exercise of his royal authority; and that he took upon himself the government of the forces of the nation by sea and land, and appointed officers to hold command in an army raised against the King; and for the purpose of effecting his design did actually, in the county of Middlesex, levy war against the King. "We shall prove," said Sir Geoffry Palmer, the Attorney General, "that the prisoner sat with others in several councils, encroached the government, levied forces, appointed officers, and, at last, levied open and actual war at the head of a regiment;" and he added, "we shall confine our charge to the reign of his present Majesty."

The prosecuting counsel first produced a warrant under the hand and seal of the prisoner, on the 30th of January, 1649, directed to the officers of the navy, and commanding them to issue stores for the service of the government. This was proved to be in the handwriting of Vane by Thomas Lewis

(*k*) In the same spirit Hume remarks on the legal murder of the Marquis of Argyle, 1667, "As he was universally known to have been the chief instrument of past disorders and civil wars, the irregularity of his sentence, and several iniquitous circumstances in the mode of conducting his trial, *seem on that account* to admit of some apology!!!" Monk disclosed Argyle's private correspondence. This would lower the character

and Thomas Turner, "neither affirming that they saw him write it, but knowing his hand believed it to be so."

The journals of the House of Commons were produced, and the entries read. Among them, the instructions on which the Council of State was to act: "That you, or any four or more, are to suppress all and every person and persons pretending title to the kingly government of this nation, from or by the late King Charles Stuart, or his son." This, said the Attorney General, was to destroy, in the first part, the King's person, and in the second, his government. Another entry proved, that Vane was chosen a member of the Council of State, and acted on these instructions. William Dobbins and Matthew Lock say, that they several times saw Sir Harry Vane sit in a committee of the Council in the years 1651, 1652. Other acts and writings of the prisoner, in the exercise of his function, were then established by proof. Two witnesses, of the names of Marsh and Pucy, proved that he proposed a new model of government, Whitelocke being in the chair. Pucy said, that if Vane did not propose, he argued in support of it. One of the principles laid down was, "that it is destructive to the people's liberty (to which, by God's blessing, they are restored), to admit any earthly King or single person to the legislative or executive power in this nation." Wallis proved that Vane had commanded a company of soldiers at Southwark, and Cook, that he had delivered five pounds to Captain Guin to be distributed among them. This closed the evidence for the prosecution; "on which Sir Harry Vane was required to make his defence, and go through his defence at once, and not to reply on the Queen's counsel, who were to have the last word with the jury."

The prisoner made, as it would have been easy for a person of less abilities than he possessed to do, an unanswerable defence. He had on his side (*l*) the law of the land, as pro-

(*l*) Lord Coke, in his third Institute, expressly declares, that "a King who hath right and is out of possession, is not within the Statute of

mulgated in the famous statute of 11 Hen. 7, made after the soil of England had been soaked through with the blood of her noblest families, on the scaffold and in the field, which, whether declaratory of the common law, as some writers suppose, or not, was declaratory of common sense, and was express and positive to the effect, that he who obeyed the King *de facto* for the time being, should in no wise be convicted or attainted of high treason. He had on his side the petition of the Lords and Commons that his life might be spared, and he had on his side the direct promise of the King; yet were all these securities nothing. "Though we know not what to say to him," said one of the bloodhounds of the Crown, "we know what to do with him." "I would gladly know," said Vane, "that person in England, of estate, fortune, and age, that hath not counselled, aided, or abetted, either by his person and estate, or submitted to the laws and government of the powers that then were; and if so, then by your judgments upon me you condemn, by necessary consequence, and in effigies, the whole kingdom." Lord Clarendon, unjust and tyrannical as he was, never alludes to Vane's trial or execution (*m*).

Treasons." This was quoted by Vane, Pluis d'Assise, Bagot, Year Book, p. 2; Bagot's case, 9 Edw. 4, Year Book: "Every one who grants a charter of pardon must be roy de faits." This case is the more remarkable as it was before the act Hen. 7. "It is fit there should be a King to maintain law." Hallam, vol. 2, p. 24; Phillipps's State Trials, vol. 1, p. 280. Bl. Com. vol. 4, p. 77. "When an usurper is in possession, the subject is excused and justified in obeying and giving him assistance, otherwise, under an usurpation, no man could be safe if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience; nay, farther, as the mass of the people are imperfect judges of title (of which in all cases possession is *primâ facie* evidence), the law commands no man to yield obedience to that prince whose right is by want of possession rendered uncertain and disputable, till Providence shall think fit to interpose in his favour, and decide the ambiguous claim. Therefore, till he is entitled to such allegiance by possession, no treason can be committed against him."

(*m*) This note from "the Merry Monarch" to Clarendon explains the death of Vane:—"The relation that hath been made to me of Sir H. Vane's carriage yesterday in the Hall, is the occasion of this letter, which, if I am

It is certainly a portentous proof of the callous indifference to common probity and honour, which distinguished the leading practitioners in our Courts of justice in that age, that Maynard should have been one of the counsel in the prosecution of Vane. With still more shocking depravity we shall find Pollexfen, the great whig lawyer, acting as counsel for the prosecution in the trial of Lady Alicia Lisle, and thus making himself an accomplice in that which is not only as foul a murder, but an act of inhumanity as bestial as any that is recorded in ancient or modern history. Were it not indeed for the names of Vaughan, Hale, and Holt, during this portion of our history, we might imagine that the awful satire of Dante had been realized, and that after the souls had quitted the bodies of the men most prominent in our Courts of justice, demons had assumed their shapes and were acting in their stead. On the caprice and pedantry which has always characterized the acts, writings, and decisions of our principal lawyers, there was now grafted a meanness and delight in human suffering which the monks of the middle ages would have found it difficult to surpass; and yet from these times precedents are daily quoted as authorities in our legal arguments. Among the points established in Sir Harry Vane's trial, one was, that a bill of exceptions could not be tendered in a criminal case. By the Statute of Westminster the second, 13 Edw. 1, c. 31, the party who excepted to the direction given by the judge to the jury, as misstating the law, was empowered to tender him a bill of exceptions, in which the error objected to by the counsel was specified, and require him to put his seal to it. If he refused so to do, the party

rightly informed, was so insolent as to justify all he had done, acknowledging no supreme power in England but a parliament, and many things to that purpose. You have had a true account of all; and if he has given new occasion to be hanged, certainly he is too dangerous a man to let live, if we can honestly put him out of the way. Think of this, and give me some account of it to-morrow, till when I have no more to say to you. To the Chancellor. C. R."

might issue a compulsory writ against him, commanding him to seal it if the alleged fact was truly set forth. If the judge returned that the fact was untruly set forth, an action would lie against him for a false return.

This bill of exceptions (*n*) is in the nature of an appeal; and after judgment given in the Court below, was decided by the next immediately superior Court.

"Sir Henry offered in his own defence the bill of exceptions, which he brought with him ready drawn, and offered it

(*n*) Lord Coke justifies the enactment by a quotation from Judges, chap. 19, v. 30. Dowman's case, Reports, vol. 5, p. 23; Part 9, p. 13 b., fol. ed. In the second Institute he says, that before the statute of Westminster the second, at common law a man might have a writ of error for an error apparent on the face of the record. "Now the mischief was," that if the judge overruled improperly an objection, this error of the judge did not appear on the record or written account of the proceedings. "So, as it never was entered of record, this the party could not assign for error, because it neither appeared on the record, nor was it an error in fact, but in law, and so the party grieved was without remedy, for whose relief this statute was made." Coke's Institutes, vol. 2, p. 426.

Hawkins, vol. 4, p. 457, Pleas of the Crown, says, citing Sir H. Vane's case, "It has been adjudged that no bill of exceptions is grantable on an indictment for treason or felony, having never been thought to extend to any such case, it being plain that it could not but cause an infinite delay of justice." In a note, he extends the rule to all criminal cases. I will admit the necessity. But if all power of objecting to the misdirection of a judge, which the litigant possesses in civil cases, is taken away in criminal cases from an imperious necessity, is not the importance of having men legally educated for judges in criminal cases increased tenfold? And how can the English law be defended, which entrusts the administration of criminal law, in by far the greater number of cases, throughout England (towns excepted), to men who may never have opened a law book in their lives, to whom no one would trust the decision of the simplest question of property? If a single prisoner be tried by such a judge has he not a right to complain? Such is the regard the law of England shews for the liberty and character of the poor. These are sad scenes,—

"Quæque ipse miserrima vidi*
Et quorum pars '*parva*' fui."

* At Stafford in former days.

to the judges, desiring them, according to the Statute of Westm. 2. 31, made 13 Edw. 1, to sign it. This he urged so home, that the statute was consulted and read in Court, running in favour of the prisoner, to this effect: 'That if any man find himself aggrieved by the proceedings against him before any justices, let him write his exception, and desire the justices to set their seals to it.' 'This act was made [says Coke] that the party wronged might have a foundation for a legal process against the justices by a writ of error, having his exception tendered upon record in the Court where the injury is done, which, through the justices overruling it, they could not before procure, so the party grieved was without remedy; for whose relief this statute was made. The justices refusing to set their seals, the party grieved may have a writ grounded on this statute, commanding them to set their seals to his exception. This exception extends not only to all pleas dilatory and peremptory, &c., but to all challenges of any jurors, and any material evidence given to any jury, by which the Court is overruled.' As in this prisoner's case the testimony about falsifying of his hand to writing, &c. was, by what was offered to the jury by Justice Windham.

"Further, says Coke on this statute, 'if the justice [or justices] die, their executors or administrators may be proceeded against for the injury done: and if the judge [or judges] deny to seal the exception, the party wronged may, in the writ of error, take issue thereupon, if he can prove by witnesses the judge or judges denied to seal it.'

"Notwithstanding all this, the judges overruled this plea also, by such interpretation as themselves put upon that statute, to wit, that it was not allowable in criminal cases for life. This makes the law less careful for the preservation of a man's life, than any particulars of his estate, in controversies about which this statute is affirmed by them to hold. Whereas life is the greater, and innocent blood, when spilt, is irreversible, as to the matter, it cannot be gathered up again; the

estate is the lesser, and if an erroneous judgment pass about it, it is reversible upon traverse, writ of error, or otherwise.

"The reason they alledged for their pretended opinion was this, that if it be held in criminal cases for life, every felon in Newgate might plead the same, and so there would be no gaol delivery" (*o*).

That the end of this transaction might be consistent with every other part of it,—when Sir Henry Vane began to address the people from the scaffold, drummers and trumpeters, placed beforehand, were ordered to drown his voice. This did not disturb the calm and dignified self-possession of that illustrious man; "'What mean you, gentlemen? I had even done as to that point, (the bill of exceptions which the judges refused to seal); but seeing you cannot bear it, I shall only say this, that whereas the judges have refused to seal with their hands what they have done, I am content to seal with my blood what I have done'. . . . . Then lifting up his eyes, and extending his hands, he said, 'I do here appeal to the Great God of Heaven, and all this assembly, or any other persons, to shew wherein I have defiled my hands with any man's blood or estate, or that I have sought myself in any public capacity or place I have been in; THE CAUSE was three times stated; first, in the Remonstrance of the House of Commons; secondly, in the Covenant, the Solemn League and Covenant——' Upon this, the trumpets sounded, the sheriff caught at the paper in his hand, and Sir John Robinson (the Lieutenant of the Tower) furiously called for the writer's books," &c.

This Sir John Robinson was a fit agent of the patrons of Scroggs and Sawyer, of Saunders and Jeffreys. He it was who attempted to poison Colonel Hutchinson when he was in the Tower. In order to wring money from the miserable wretches placed in his custody, he deprived them of their food, and the shrieks extorted by the agonies of famished

(*o*) State Trials, vol. 6, p. 169.

prisoners, were heard, far beyond the precincts of the Tower, in the streets of London at midnight (*m*). Such was the tenure by which an Englishman, deceived by words and forms, and boasting of illusions, held his liberty and his life in the latter part of the seventeenth century. Such cruelties were never practised in the Tower of Segovia or the Bastille: worse never disgraced, even in our own times, the State Prisons of Austria, in which so many patriots and philosophers have perished.

The trial of John James, an obscure fanatic, took place before that of Sir Harry Vane. The government, in order to find an excuse for not keeping faith with the Presbyterians (who were now smarting for their intolerance), had laid hold of Venner's insurrection (*n*), in which a handful of men, drunk with enthusiastic zeal, had levied war against the monarchy. Charles wished to seize the opportunity of keeping on foot a standing army; but this was prevented by the interference, not of Clarendon, but of Southampton, who told Clarendon plainly that he would not look on and see the ruin of his country begun, and be silent,—a white staff should not bribe him (*o*). This tumult, in which several lives were lost, took place in January, 1661. In October, of the same year, John James was preaching to a congregation in Bulstrake Alley, and one Tipler heard him quote the Psalm, "Out of the mouths of babes and sucklings hast thou ordained strength, because of thine enemies, that thou mightest still the enemy and avenger." "Whereat the said Tipler taking offence, went to Justice Chard to acquaint him, but being an idle fellow, the justice took not much notice of what he said, till bringing a neighbour with him, he was provoked by him to regard his testimony." The poor man was seized in his pulpit, there

(*m*) Hutchinson's Memoirs, p. 343.

(*n*) Reresby, a cavalier, says of it, "In its very rise it was defeated by a party of the guards." Page 8. The number was about forty.

being no tumult or disturbance of any kind, and given to the custody of Sir T. Robinson, the miscreant whose name has been already mentioned. After several brutal insults he was sent to Newgate, and he was tried before Chief Justice Forster. His trial well illustrates the form of committing murder then employed in our Courts of justice, and his fate shews what regard is due to those writers who have endeavoured to palliate the perjuries, and corruptions, and indescribable baseness of Charles the Second, by the good nature which they have ascribed to the "merry monarch," who sold his country to France, allowed his friends Butler and Dryden, among others, to languish in distress, and employed Jeffreys to destroy his most illustrious enemies.

The Court refused to allow any friend to take notes for the prisoner (*p*). Words alone were imputed to him. He was asked how he would be tried. He answered, by the law of God; AT WHICH THE LAWYERS GAVE A GREAT HISS; and he was told, certainly with great truth, "that it was not a place or time to talk of the laws of God." The clerk bid John James hold up his hand; he did so: and the judge said, "Oh, ho! are you come?"

Tipler was called, who repeated what he said he had heard; and Alderman Chard, who could say nothing to the words spoken. He found James preaching to a congregation of thirty or forty people; he seized him, and pulled him out of the pulpit: "all those men who would not take the oath he committed,—the women he let go." "Another witness was a Yorkshire man, whose name we know not, who, coming into the Court, was commanded to look upon the prisoner at the bar, and declare what he heard him say; who answered, he was at Tipler's house, and heard very loud speaking, which caused him to come out and hearken, and he heard very dangerous words. The judge asked him, what those dan-

gerous words were. He said, he could remember no more than this, that one said, That the Lord had a great work to do for his people, and that they were the people that must do it. The judge asked him if he heard nothing concerning the King's cup of iniquity. To which he answered, No. And they bid him look upon the prisoner at the bar, and asked if that was the man. He answered, he could not say that he was the man" (*q*).

Bernard Osburn said, that John James had called King Charles a bloodthirsty, tyrannical King, and that the nobles were bloodthirsty; and many other seditious expressions. Then they asked him if those were the words. He said, he could not say they were the same words, but they were the same substance. The prisoner was then told to defend himself, and he called four witnesses, who gave in evidence that Osburn confessed to them he had sworn against John James he knew not what. One of them declared more largely that Osburn told her, "he did not only swear he knew not what, but had been affrighted into what he swore." He said, "that what he swore to was first sworn by another man, and then brought to him in writing." "The former witnesses declared, that they desired to know of Bernard Osburn what he had sworn against John James, and he told them he could not tell except he heard the words repeated." Then several witnesses were produced, who stated that James never did use the expressions imputed to him. In his defence the prisoner, after denying the use of the words, told the jury, with much elevation of sentiment and vigour of language, that the land was already in mourning for innocent blood, for the blood shed in the reign of Henry the Eighth and Queen Mary,—that though the poorest and meanest that ever was chosen for such a work, he yet had been called forth to declare that the Lord was not only the King of saints but the Ruler of nations.

(*q*) State Trials, vol. 6, p. 78.

"And when he had so spoke, the Chief Justice Forster interrupted him, saying, "Sirrah, you think you are in the conventicle in Whitechapel preaching;" and ordered the act for the preservation of the King's government to be read. James said, that statute did not reach his case. The judge told him it fully reached his case, and asked him if he had anything more to say. James said, "he had one word for the jury which he desired to lay before them; it was the 29th Isaiah, ver. 21, 'Woe unto them that make an offender for a word, and lay a snare for him that reproveth in the gate!'"

Whereupon the judge told him it was not to be borne, for he did inveigh against the Parliament. He replied, that he had no thought of Parliament, but he did it to let the jury know that there was no law of God to take away a man's life for words, "even if he were guilty of them, which he was not."

Glynne and Maynard (*q*), who were, as if to convince mankind that the profession of a barrister in that age was incompatible with common honour and humanity,—counsel against the prisoner, with the Attorney General, Sir Geofrey Palmer, a steady royalist in the worst of times, and Finch, the Solicitor General, addressed the jury against him. Then the Chief Justice, "further to incense the jury, told them that James was one of the same spirit with those that did endeavour heretofore to put the nation in a flame, and to set everyone one against the other; and said, no treason was comparable to that treason done with a pretence of religion." And in defiance of plain facts and clear law, he was found guilty of contriving and compassing the King's death. I will add some facts which complete the picture of cruelty and injustice. His wife went to the King. "With some difficulty she met him as he came out of the Park, where she presented him with a petition, on which was written the humble request

(*q*) "Did not the learned Glynne and Maynard,
To make good subjects traitors strain hard?"

of Elizabeth James, acquainting him who she was; to whom he held up his finger, and said, 'Oh! Mr. James; he is a sweet gentleman:' but following him for some farther answer, the door was shut against her. The next morning she came again to the same place, imploring an answer to her request, who (the King) then replied, 'that he was a rogue, and should be hanged.'" One of the Lords asked of whom she spoke, whereunto the King answered, "'Of John James, that rogue, he shall be hanged, he shall be hanged!'" Such was the exquisite good breeding of Charles towards a woman, imploring him to save her innocent husband (*r*) from a death of torture; such was the conduct of those to whom respectively the provinces of justice and mercy had been assigned by the law.

But there was another person, on whom, however ignoble, our Gothic legislators, relied as the great guardian of the commonwealth, and to whom, as the chief maintainer of social unity, they delegated most extensive powers,—I mean the hangman. This functionary was now not only one of the most respectable, but one of the most important instruments of government. His dealings with James are thus described: "The hangman also, the day before his execution, came to demand money that he might be favourable to him at his death. He, asking what would satisfy him, the hangman demanded twenty pounds; but John James pleading poverty, he fell to ten pounds; but in conclusion told him, if he would not give him five pounds *he would torture him exceedingly:* to which John James said, he must leave that to his mercy, for he had nothing to give him." Might it not be supposed, that this was an extract from the history of Tunis or of Abyssinia, instead of an account of the regular work of law under a people always boasting of their freedom and their institutions?

(*r*) State Trials, vol. 6, p. 87.

In Mary Moders's case (*s*), 1663, which deserves notice for the almost incredible proof it contains of the rooted and obstinate barbarity of our institutions, the Court observe, "Hearsays must condemn no man; what do you know of your own knowledge?" Yet in Colonel Turner's case, 1664, hearsay evidence was received over and over again, and when the case for the Crown had closed, Chief Justice Hyde said, "William Turner, what say you? You see what is laid to your charge; you are a person of loose life." This was a prosecution for burglary, and the guilt of the prisoner, a debauched and ranting cavalier, was manifest. It is not likely that the Chief Justice, who was assisted by Sir Orlando Bridgman, a tolerably conscientious and learned judge, had any desire to oppress the prisoner, who was convicted, as he deserved to be, on very sufficient evidence. And now I come to one trial from which I would gladly turn aside, if the infirmities and errors, as well as the virtues and services, of the wise and good were not intended for our instruction, and might not contribute to our improvement. I allude to the trial of Rose Cullender, and Amy Duny, for witchcraft, both of whom were tried for that imaginary offence in 1665, before Sir Matthew Hale, and both of whom were convicted of it and executed. When men of respectable

(*s*) The circumstance to which I allude is this. Mary Moders was indicted for bigamy. Bigamy belonged to a certain class of offences called clergyable, that is, all peers of Parliament, peeresses, and all *male* commoners who could read, were discharged in such felonies after a first conviction, if they were peers or clerks absolutely; if they were not, after burning in the hand. But *women*, not peeresses, had *no* benefit of clergy; therefore (so humane and enlightened were the laws of England), for the very same identical offence in law, and a much less one in morals, the woman was put to death, and the man escaped with a nominal punishment. And in this very case the judge told the jury to be careful, as the prisoner accused of *bigamy*, *because* she was a *woman*, would, if they found her guilty, be put to death. Nor was this altered till the 3 & 4 Wm. and M. c. 9. Such was the blessed effect of the maxim, "Nolumus leges Angliæ mutari." No parallel to the grave, solemn, premeditated absurdities of our law is to be found anywhere,—not in the law of the Burgundians or Franks.

abilities, (but far inferior morally and intellectually to the excellent man who fell into this grievous error), elated with the technical knowledge which they have sacrificed the noblest opportunities of study, and the highest qualities of their nature to attain, and full of that presumptuous arrogance which is the infallible mark of contracted studies and a narrow (though it may be an acute) intellect; when such men, on or off the Bench of Justice, feel themselves disposed to talk of legislation, as if their opinions were the dictates of inspired wisdom, and as if their view, admirable for what is within an inch of it (as the mole, within its range, can see better than the eagle), could not only inspect a mite, but comprehend the great universe of civil thought and action,—let them reflect on this sad event in the life of their illustrious predecessor, and if the thought chastens their presumption, and teaches them to suspect their prejudices; if it induces them, for one moment, to look elsewhere than to the little knot (*s*) of flatterers which every man rich or in office can among *us* command, for a true estimate of their abilities, and to pause before they lend their sanction to oppression and chicanery, aggravating the inequalites of society, increasing the advantages of wealth (*t*), and adding to the burdens of poverty,—the death of these unhappy women will contribute, and that in no inconsiderable degree, to the progress and lasting welfare of the community.

(*s*) "Pessimum inimicorum genus, laudantes."

(*t*) "Why," said one who, till the French Revolution overset his judgment, was a great thinker, and who was always an eloquent writer, "why should judges be thought exempted from the common lot of humanity? Why should they be deemed infallible more than other mortals? Believe me, THE WISDOM OF THE WHOLE NATION CAN SEE FARTHER THAN THE SAGES OF WESTMINSTER HALL. In a constitutional point like this, the collective knowledge and penetration of the people are more to be depended on than the discernment of the Bar. The reason is clear; their eyes are not dazzled with the prospect of interest; the Crown has no hue sufficiently tempting to make them forget themselves and the general good." Burke's Speech on Serjeant Glynn's motion, 1770.

This is only one among thousands of proofs, that to enlarge the views, and to cultivate the minds of those concerned in the administration of justice among us, is a matter of deep interest to every inhabitant of this country, however exalted, or however humble his condition.

The resistance of the judges long after this century had begun, and more humane notions prevailed among our neighbours to the mitigation of our savage laws, could never have been so unanimous and so long triumphant, if wide and enlarged habits of thought had not been an obstacle, and usually an insurmountable obstacle, to the success of every lawyer; nor could the petty, childish, and indescribably ridiculous proceedings, so absurdly called Law Reform, in 1830, and which will set the genuine littleness of the age in so clear a light with posterity, have taken place in any country where jurisprudence was not literally unknown, and where the merest and most mechanical empiricism was not paramount in the universities, and, as a necessary consequence, in the senate and at the bar. "This great and good man," Forster says of Hale with reference to this case, "was betrayed, notwithstanding the rectitude of his intentions, into a lamentable mistake, under the strong bias of early prejudice;" and the mistake was the more deplorable, as allowing what it requires some effort over one's self to suppose, that the belief of witches was not in the days of Hale confined to fanatics and the vulgar, enough transpired during the trial to shew the imposture of those who prosecuted the charge, and to awaken the vigilance of the judge (*u*).

"At first, during the time of the trial, there were some

(*u*) Finch's Law, Book 3, Chap. 26, p. 220 :—

"OF SORCERY.

"Sorcery is a consulting with devils, and containeth under it conjuring, necromancy, and such like."

experiments made with the persons afflicted, by bringing the persons to touch them; and it was observed, that when they were in the midst of their fits, to all men's apprehension wholly deprived of all sense and understanding, closing their fists in such manner as that the strongest man in the Court could not force them open, yet by the least touch of one of these supposed witches, Rose Cullender by name, they would suddenly shriek out, opening their hands, which accident would not happen by the touch of any other person.

"And lest they might privately see when they were touched by the said Rose Cullender, they were blinded with their own aprons, and the touching took the same effect as before.

"There was an ingenious person that objected there might be a great fallacy in this experiment, and there ought not to be any stress put upon this to convict the parties, for the children might counterfeit this their distemper, and perceiving what was done to them, they might in such manner suddenly alter the motion and gesture of their bodies, on purpose to induce persons to believe that they were not natural, but wrought strangely by the touch of the prisoners.

"Wherefore, to avoid this scruple, it was privately desired by the judge, that the Lord Cornwallis, Sir Edmund Bacon, and Mr. Serjeant Keeling, and some other gentlemen there in Court, would attend one of the distempered persons in the farther part of the Hall, whilst she was in her fits, and then to send for one of the witches, to try what would then happen, which they did accordingly; and Amy Duny was conveyed from the bar and brought to the maid: they put an apron before her eyes, and then one other person touched her hand, which produced the same effect as the touch of the witch did in the Court. Whereupon the gentlemen returned, openly protesting, that they did believe the whole transaction of this business was a mere imposture.

"This brought the Court and all persons into a stand" (*v*).

(*v*) State Trials, vol. 6, p. 697.

As a sample of the evidence, I quote the following witness—

"Margaret Arnold, sworn and examined, saith, that the said Elizabeth and Deborah Pacy came to her house about the thirtieth of November last; her brother acquainted her that he thought they were bewitched, for that they vomited pins; and farther informed her of the several passages which occurred at his own house. This deponent said, that she gave no credit to that which was related to her, conceiving possibly the children might use some deceit in putting pins in their mouths themselves. Wherefore this deponent unpinned all their clothes, and left not so much as one pin upon them, but sewed all the clothes they wore, instead of pinning of them. But this deponent saith, that notwithstanding all this care and circumspection of hers, the children afterwards raised at several times at least thirty pins in her presence, and had most fierce and violent fits upon them.

"The children would in their fits cry out against Rose Cullender and Amy Duny, affirming that they saw them, and they threatened to torment them ten times more if they complained of them. At some times the children [only] would see things run up and down the house in the appearance of mice; and one of them suddenly snapt one with the tongs, and threw it in the fire, and it screeched out like a rat.

"At another time, the younger child being out of her fits went out of doors to take a little fresh air, and presently a little thing like a bee flew upon her face, and would have gone into her mouth, whereupon the child ran in all haste to the door to get into the house again, screeking out in a most terrible manner; whereupon this deponent made haste to come to her, but before she could get to her, the child fell into her swooning fit, and at last with much pain, straining herself, she vomited up a twopenny nail with a broad head; and after that the child had raised up the nail she came to her understanding, and being demanded by this deponent how

she came by this nail, she answered, that the bee brought this nail, and forced it into her mouth" (*w*).

The first instance of a judge instructing the jury that they were to consider only the *act*, and not the intention,—in other words, that they were to find a man guilty without reference to his motives, has been partially noticed in the case of John Udall. He was indicted for a capital offence in the shape of a libel, and was not allowed to prove the purity of his intention, nor was the jury suffered to inquire into anything but the act of publication. A doctrine so convenient to tyrannical judges, and so revolting to common sense, could not fail of becoming a favourite tenet among our lawyers. Accordingly this judge-made law continued till it was abolished by act of Parliament. And in the case which I am now about to cite, of Keach, who was tried before Lord Chief Justice Hyde for having published certain Primmers that contained articles contrary to the Common Prayer, it shot up to a still greater height of absurdity and injustice. Udall was condemned through the artifice of a judge called Clarke; but his conduct was far surpassed by that of Chief Justice Hyde in the case to which I am referring, of which the following account has been transmitted to us (*x*):—

"The next assize holden for the said county was at Aylsbury, on the 8th and 9th of October, 1664, Lord Chief Justice Hyde being judge. On the first of which days, in the forenoon, Mr. Keach was called upon; who, answering to his name, was brought to the bar, and examined as follows:"

Judge.—"Did you write this book? [Holding out one of the Primmers in his hand]."

Keach.—"I writ most of it."

Judge.—"What have you to do to take other men's trades out of their hands? I believe you can preach as well as write

(*w*) State Trials, vol. 6, p. 693.
(*x*) State Trials, vol. 6, p. 701.

books. Thus it is to let you, and such as you are, have the Scripture to wrest to your own destruction. You have made in your book a new Creed: I have seen three Creeds before; but I never saw a fourth till you made one."

Keach.—"I have not made a Creed, but a confession of the Christian faith."

Judge.—"Well that is a Creed then."

Keach.—"Your Lordship said you had never seen but three Creeds; but thousands of Christians have made a confession of their faith."

"After this the judge observed to the Court several things which were written in the said book, concerning Baptism and the Ministers of the Gospel, which were contrary to the Liturgy of the Church of England, and so a breach of the Act of Uniformity."

Keach.—"My Lord, as to those things——"

Judge.—"You shall not preach here, nor give the reasons of your damnable doctrine, to seduce and infect his Majesty's subjects. These are not things for such as you are to meddle with, and to pretend to write books of divinity: but I will try you for it before I sleep."

"After this he gave directions to the clerk to draw up the indictment; and the witnesses were sworn, and ordered to stand by the clerk till the indictment was finished, and then to go with it to the grand inquest.

"Then the witnesses were sworn, who were Neal and Whitehall.

"Neal deposed: That Justice Strafford sent for him to his house; when he came there the justice sent him back again for his staff of authority; which being done, he went with the justice to one Moody's stall, and asked for some Primmers which he had; he answered, that he had none. That from thence they went to Mr. Keach's house, where first they saw his wife, who told them he was in an inward room. They asked her if there were not some Primmers in the house,

She said there was; and about thirty were brought forth and delivered to them.

"Then Justice Strafford himself was also examined: he said, that he found the Primmers now before the Court in Benj. Keach's house, and seized them; and that the prisoner at the bar had confessed before him that he writ and composed the said book.

"Then a copy of the prisoner's examination before the said justice, signed with his own hand, was produced and read; wherein was contained, that the prisoner being asked whether he was the author or writer of the said book, answered, Yes, he was. And further declared, that he delivered a part of the copy to one Oviat, a printer at London, since dead; and that the rest of the copy he sent up by another hand, but that he knew not who printed it: that about forty of them were sent down to him, of which he had dispersed about twelve, and that the price was fivepence each book.

"After this the judge called for a Common Prayer Book, and laid it before him, and ordered one of the Primmers to be given to the gentlemen of the jury, and bid them look on those parts where the leaves were turned down."

Judge.—"Clerk, read those sentences in the indictment which are taken out of the book, that the jury may turn to them, and see that the said positions are contained in the book."

Clerk.—"Q. Who are the right subjects of Baptism? A. Believers, or godly men and women only, who can make confession of their faith and repentance."

Judge.—"This is contrary to the Book of Common Prayer, for that appoints infants to be baptised as well as men and women. [Here he read several places in the Liturgy, wherein the baptising of infants is enjoined and directed]."

Clerk reads.—"Q. How shall it then go with the saints? A. Oh, very well! It is the day that they have longed for: then they shall hear that sentence, 'Come, ye blessed of my

Father, inherit the kingdom prepared for you:' and so shall they reign with Christ on earth a thousand years, &c."

Judge.—"This is contrary to the Creed in the Book of Common Prayer, and is an old heresy which was cast out of the Church a thousand years ago, and was likewise condemned by the Council of Constance about five hundred years ago, and hath laid dead ever since, till now this rascal hath revived it."

Clerk reads.—"Q. Why may not infants be received into the Church now, as they were under the law? A. Because the fleshly seed is cast out, &c. Q. What then is the state of infants? A. Infants that die are members of the Kingdom of Glory, though they be not members of the visible Church. Q. Do they then that bring in infants by a fleshly lineal way err from the trrth? A. Yea, they do; for they make not God's Holy Word their rule, but do presume to open a door that Christ hath shut, and none ought to open."

Judge.—"This also is contrary to the Book of Common Prayer, which appoints infants to be received into the Church, and directs the priest to say, when he hath sprinkled the child, 'We receive this child into the congregation of Christ's flock.' And whereas he says that infants that die are members of the Kingdom of Glory, though not of the visible Church, he speaks this of infants in general, *and so the child of a Turk or heathen is made equal with the child of a Christian. But the Church hath otherwise determined;* that is, if an infant die after baptism, and before it hath actually sinned, it is saved, because original sin is washed away in baptism. Read on."

Clerk.—"Also in another place thou hast wickedly and maliciously composed, 'A short Confession of Faith,' in which thou hast affirmed thus, concerning the second person in the blessed Trinity, in these plain English words; 'I also believe that he rose again the third day from the dead, and ascended into Heaven, and there now sitteth at the right hand of God

the Father; and from thence he shall come again at the appointed time of the Father, to reign personally upon the earth, and to be the Judge of the quick and the dead.'"

Judge.—"This is contrary to our Creed; for whereas he saith, 'from thence he shall come again at the appointed time of the Father, to reign personally upon the earth, and to be Judge both of the quick and the dead;' our Creed only saith, 'from thence he shall come to judge both the quick and the dead.'"

Clerk.—"And in another place thou hast wickedly and maliciously affirmed these things concerning true Gospel ministers, in these plain English words following: 'Christ hath not chosen the wise and prudent men after the flesh; not great doctors and rabbies; not many mighty and noble, saith Paul, are called,' &c., as above."

Judge.—"This also is contrary to the Book of Common Prayer: for whereas the position in the indictment saith, Christ hath not chosen great rabbies and doctors, but rather the poor and despised, and tradesmen; the Book of Common Prayer doth admit of such. [Here he read some passages concerning the qualification of ministers, and their manner of consecration]. Because Christ, when he was upon the earth, made choice of tradesmen to be his disciples; therefore this fellow would have ministers to be such now; taylors and pedlars and tinkers, and such fellows as he is: but it is otherwise now, as appears from the manner in which the Church has appointed them to be chosen, ordained, and consecrated."

"The judge having thus gone through the indictment, the prisoner began to speak in his defence."

Keach.—"As to the doctrines——"

Judge.—"You shall not speak here, except to the matter of fact: that is to say, whether you writ this book or not."

Keach.—"I desire liberty to speak to the particulars in my indictment, and those things that have——"

Judge.—"You shall not be suffered to give the reasons for your damnable doctrine here to seduce the King's subjects."

Keach.—"Is my religion so bad, that I may not be allowed to speak?"

Judge.—"I know your religion,—you are a Fifth Monarchy Man; and you can preach, as well as write books; and you will preach here, if I would let you; but I shall take such order as you shall do no more mischief."

Keach.—"I did not write all the book, for there is an epistle to it written by another hand; neither can it be proved that I writ all that is put into the indictment."

Judge.—"It is all one whether you writ it yourself, or dictated it to another to write it: but it appears by your examination under your own hand, that you wrote it all."

Keach.—"Because I writ the major part of it, I was contented to let it go with the word *all* in my examination before Justice Strafford; but I cannot in conscience say I wrote it all: nor is it proved that I published it."

Judge.—"Yes, you did; for Moody had six books of you."

Keach.—"I did neither sell them, nor deliver them to him."

Judge.—"He had them at your house, and it is not likely he should take them without your consent."

Keach.—"I do not say he had them without my consent."

Judge.—"It is all one, then, as if you delivered them."

"The jury being withdrawn, staid for some hours: at length one of the officers who attended them came in."

Officer.—"My Lord, the jury about the Primmers cannot agree."

Judge.—"But they must agree."

Officer.—"They desire to know whether one of them may not come and speak with your Lordship, about something whereof they are in doubt."

Judge.—"Yes, privately. [And then he ordered one to come to him on the Bench]."

"Then the officer called one, and he was set upon the clerk's table, and the judge and he whispered together a great while; and it was observed, THAT THE JUDGE HAVING HIS HANDS UPON HIS SHOULDERS, WOULD FREQUENTLY SHAKE HIM AS HE SPAKE TO HIM. Upon this person's returning, the whole jury *quickly* came in, and being according to custom called over by their names, the clerk proceeded."

Clerk.—"Are you agreed in your verdict?"

Jury.—"Yes, yes."

Clerk.—"Who shall speak for you?"

Jury.—"Our Foreman."

Clerk.—"How say you, is Benjamin Keach Guilty of the matters contained in the indictment against him, or Not Guilty?"

Foreman.—"Guilty in part."

Judge.—"Benjamin Keach, you are convicted of publishing and writing a scandalous and seditious book, for which the Court doth award, That you shall go to gaol for a fortnight; and next Saturday to stand upon the pillory at Ailesbury, from eleven to one, with a paper on your head, &c.; and the next Thursday, to stand in the same manner and for the same time, in the market at Winslow; and there your book shall be burnt openly by the common hangman; and you shall forfeit to the King the sum of twenty pounds, and remain in gaol until you find sureties for your good behaviour and appearance at the next assizes, there to renounce your doctrine and make such public submission as shall be enjoined you."

Keach.—"I hope I shall never renounce those truths which I have written in that book."

Thus were the promises of Charles and Clarendon for the indulgence of tender consciences observed. Such was the reward of the Dissenters; such was the mildest punishment inflicted by the supporters of a church without the shadow of a prescriptive claim, but founded exclusively on the right of private judgment and free discussion, on those who ventured

to doubt their infallibility; and this at a time when cavaliers were drinking healths to the Devil and haranguing stark naked in the public streets,—when the great work of Hobbes, dedicated to the Duke of Newcastle, leading, if its premises were admitted and intended to lead, by corollaries as infallible to atheism, as the political works of that great writer do to slavery, was the theme of the King and Court's avowed admiration,—when Sheldon (*z*), the Archbishop, took no pains to disguise his scorn for those who looked upon Christianity in any other light than as an engine of government,—when the prevailing love of mere downright, brutal, unredeemed obscenity, obliged our immortal Dryden (*a*) to pollute his pages with the most disgusting ribaldry,—when Congreve, and a host of inferior writers, were abusing wit and genius, or striving to atone for the want of them, not only by blasphemies and indecencies so incessant and shocking, that no modest woman could go to the play without a mask, but by inculcating on their audience all that was hard hearted, coarse, sensual, inhuman, and dishonourable. The printer of a Dissenters' Creed was hunted down by the Church and its emissaries; but Rochester's Poems were sold openly and without restraint. The Puritan system had its faults no doubt; but it was far better to talk through the nose about "sweet experiences," "seeking the Lord," and "crowning mercies;" to be called "Fight the Good Fight," and to christen one's child "Tribulation Zeal;" to wear straight hair and a buttonless coat; to practise an austere

(*z*) Milton has pointed out that state as the most depraved,—

"Where the priest"
"Turns atheist."

(*a*) "Unhappy Dryden! in all Charles's days,
Roscommon only boasts unspotted lays."

In his Preface to the Fables he says, in answer to Collier's just attack, "I shall say the less of Mr. Collier, because in many things he has taxed me justly, and I have pleaded guilty to all thoughts and expressions of mine which can be truly argued of obscenity, immorality, and profaneness, and retract them."

morality, and to make one's country revered throughout Europe as the guardian of civil and religious liberty, than to wear periwigs, lace, and embroidery, and to be infidel and blaspheming persecutors; to make the language, and sometimes the habits of the stews, familiar to the youth of both sexes from the cottage to the palace; to sneer at all that wore the air of disinterestedness in man (*b*), or of purity in woman, and to be the contented tools and pensioners of the common enemy of European independence.

Far more cruel, but less audaciously profligate, was the conduct of Hyde to a printer, John Twyn, who was hung, drawn, and quartered, for printing a seditious libel. Twyn was thus addressed, on his petitioning for counsel, by the Chief Justice: "Then I will tell you, we are bound to be of counsel with you, in point of law; that is, the Court, my brethren and myself, are to see that you suffer nothing for your want of knowledge in matter of law; I say, we are to be of counsel with you. But for this horrid crime, [I will hope in charity you are not guilty of it, but if you are], it is the most abominable and barbarous treason that ever I heard of, or any man else: the very title of the book [if there were no more] is as perfectly treason as possibly can be. The whole book through, all that is read in the indictment, not one sentence but is as absolute high treason as ever I yet heard of. A company of mad-brains, under pretence of the worship and service of God, to bring in all villainies and atheism [as is seen in this book]. What a horrid thing is this! But you shall have free liberty of defending yourself."

Evidence was brought to shew that the work was printed in Twyn's house; and L'Estrange, the most barbarous and most unprincipled writer of his time, added to his infamy by acknowledging that he had acted as a spy for government, and had endeavoured to entrap the prisoner by false hopes into a a confession. Hyde, from the Bench, suggested to Twyn, that if he would give up the author he might escape; but when Twyn

(*b*) See Grammont, *passim*.

nobly refused to redeem his life at such a price, he directed the jury to convict him, telling them, "that the publishing such a book as this was as high a treason as could be committed, *and the same as if the printer had raised an army*" to dethrone the King. One of the propositions insisted upon for this purpose was, "that the supreme magistrate is made accountable to the people." The sheets had been seized wet and in the printer's house; nor was there any satisfactory proof that they had been read by Twyn before his servants, who were examined, had printed them. No injury had been done, as the work had never been distributed. And there can be little doubt that the real object of the government was to discover the author. But though nobles and commoners, judges and prelates, and the Sovereign, were vying with each other in baseness, a poor mechanic was untainted, and had a soul that would not purchase life with infamy. And though Hyde, when he was convicted, told him he would not intercede for his father in such a case, and though the ordinary of Newgate pressed him to disclose the author, he steadily refused, saying, "that it was not his principle to betray the author," and that it was better for one to suffer than many. So he was put to death as a traitor, protesting to the last his innocence of all treasons and ignorance of the contents of the writing for which he suffered; and leaving behind him a name which deserves to be had in remembrance, as long as truth, honour, and constancy, are venerated among men.

Chief Justice Kelyng was a being so thoroughly contemptible, that the crimes he committed on the Bench, flagrant as they were, hardly raise him to the rank of a public enemy, (a public evil he undoubtedly was), or rescue his name from the obscurity, which in any free country but this would have been its portion. Yet in a discussion on evidence, the trial of Messenger, Beasley, and others, can hardly be passed over quite unnoticed. This it should be remembered, was the time when Charles and his party, including Lord Clarendon, were

eager to seize upon every rumour or pretext of insurrection, to excuse them from fulfilling their solemn engagements to the Presbyterians. A few city apprentices had collected together, according to custom, on Easter Monday, had made a considerable riot, and pulled down some brothels,—one man among them bearing a green apron on a pole, and another flourishing a sword. No lives were lost, no serious resistance was made; there was no proof of any scheme or deliberate preparation, or of the use of any weapon except the single sword; it was shewn that one of the prisoners struck at a constable, who admonished him to be quiet: and all the judges, except Hale, who dissented, agreed that these facts were proof of high treason and levying war against the King. This being a case where several lives were at stake, the Chief Justice began with the humane suggestion to the counsel for the prosecution, that they had made too many indictments, (there were four), because by this means the King's evidence would be broken; whereas had all the prisoners been included in one indictment, the evidence as to the main design would have been entire against all. Such being the tone of our judges, and such the manner in which they exemplified the favourite aphorism of the law, that the judge is counsel for the prisoner.

"The first witness stated, that on Easter Tuesday he saw Beasley at the head of four or five hundred persons, with a sword in his hand, which the witness took from him; he had also colours,—a green apron upon a pole. Some of the people cried, 'Down with the red-coats!' They said Beasley was their captain. The witness and his party fell on them, and then they ran away. Green was with the multitude, as well as Beasley; but the witness did not see them go along with the people.

"The second witness said, that when the constable charged the people to disperse themselves, they knocked him down:

the constable and assistants drove the people up a lane: that the people cried, 'Down with the brothels!' that Green shouted and threw up his hat.

"The third witness said only, that he saw Messenger come along with colours in his hand, and that he took him and carried him to prison: that he heard the cry, of 'Down with the brothels!' and he saw two of the prisoners among them. 'Aye,' said the Lord Chief Justice Kelyng, 'aye, that was the captain and the ensign' (*b*).

"The fourth witness gave this account:—I saw Beasley and Messenger in Moorfields pulling down houses on Monday, and on Tuesday, at the head of three hundred; and at that time we routed them. On Wednesday they came with four or five hundred, and cried, 'Down with the red-coats!'

"The last witness stated merely, that Beasley and Appletree were with about three hundred persons; that Beasley struck an ensign with his sword: that Appletree helped to pull down one house, and broke another.—This was the whole of the evidence on the part of the prosecution.

"The Lord Chief Justice Kelyng, then called on Beasley for his defence. Why did you gather this multitude together? What reason had you for it?"

Prisoner.—"I do not know the reason."

Lord Chief Justice.—"I speak to you, that you should give a reason. After all the trouble that we have had in this nation, it is a sad thing that a great number of giddy-headed people must gather together *under pretence of reformation, to disturb the peace of the nation again.* If you can say no more for yourself, there will be but little trouble with you."

Serjt. Wild.—"What was the meaning of your gathering together?"

Prisoner.—"We went to pull down brothels."

Lord Chief Justice.—"How did you know which were brothels? If you had known them, you might have indicted

(*b*) Phillipps's State Trials, vol. 1.

them, there is a law against them; but this is a strange kind of reformation, if a rabble come and say, this man is a papist, and this keeps a brothel, and would pull it down. This is a mad reformation."

Prisoner.—"My Lord, that man has sworn I was out on Tuesday; it was Wednesday before I came forth, but staid at home with my wife, because I would not be among them."

Lord Chief Justice.—"Did you not carry a green apron on a pole for your colours?"

Prisoner.—"My Lord, as I passed along by the rout, they flung a bottle at me, and had like to have knocked me down, and tore my apron off, and charged me to carry it on a pole; and I would fain have come away from them, and could not."

Lord Chief Justice.—"*Make this appear* (*c*), that you would fain have got away, and that they did force you to do what you did, and I shall be glad of it."

Prisoner.—"There is none of them here now, that were there then."

Lord Chief Justice.—"Then all that you say is of little use, for it is no great thing to make a lie to save one's life" (*d*).

In the course of his address to the jury, the judge said, "These people do pretend their design was against brothels. Now, for men to pull down BROTHELS, with a captain and an ensign (the green apron), and weapons (the single sword),—if this be endured, WHO IS SAFE? It is high treason, because it does betray the peace of the nation," &c. The jury brought in, as the judge directed, a special verdict, stating these facts, against Messenger, Beasley, Appletree, and Green. Hale delivered his opinion that it was not treason. "The reason that made the doubt to him who doubted," said that great judge, speaking of himself, "was, first, because it seemed but an unruly company of apprentices, among whom that custom

(*c*) Butler ridicules this expression in the dialogue with the lawyer, Hudibras, Canto 3,—

"Who put me into horrid fear,
"Fear of my life,"—"make that appear."

of pulling down brothels had long obtained, and they were usually repressed by officers, not punished as traitors; secondly, because the finding to pull down brothels might reasonably be intended two or three brothels, and the indefinite expression should not, *in materiâ odiosâ*, be construed either universally or generally; and, thirdly, because the statute 1 Mary, c. 12, makes assemblies of above twelve persons, and of as high a nature only, felony, and that not without a continuance for an hour after proclamation made." But *all* the judges were of a different opinion; and it was agreed by all, except Hale, that as to Messenger and Beasley in the first verdict, and as to Cotton in the second, and as to Limerick in the fourth special verdict, the matter, as it was found against the four, was high treason in them all, and they were executed. Shewing, certainly, that the law was indiscriminate in its cruelty, and impartial in its injustice; that the valley was not safer from its thunderbolts than the mountain top; and that if it struck down a pillar of state one day, it did not disdain the murder of an apprentice on the next.

In the case of Tonge and others, who were tried for high treason (1662), the Lord Chief Baron Hale gave it as his opinion, "that if a culpable person be promised his pardon on condition to give evidence against the rest, that disables him to be an evidence against the others, because he is bribed by saving his life to be a witness; making a difference where the promise of pardon is for disclosing treason, and where it is for giving evidence; but the other judges did not think the promise of pardon, if he gave evidence, did disable him: but they all advised no such promise should be made, or any threatenings made to them in case they did not give full evidence." Lord Hale says, in his Pleas of the Crown, "For my own part I have always thought that if a person have a promise of pardon, if he gives evidence against one of his own confederates, this disables his testimony if proved upon him." The prisoners were convicted on the evidence of accomplices,

In answer to a question put by Serjeant Glynne, whether their testimony ought to be received, Sir Orlando Bridgman, who assisted Forster, said, "Where you make exception against those who are guilty of the same crime, it is a mistake to say they are not witnesses in cases of treason; where there are works of darkness, there are things men will not do in daylight, but in darkness, and who can discover these works better than they that have to do with them, if God turn their hearts? It is true such persons as these are, if they had been convicted, are not witnesses. But though they are in the same fault it is frequent practice, and they are allowed in cases of felony." Tonge, on being pressed with his confession, said, "I confess I did confess it in the Tower, *being threatened with the rack.*" Ludlow tells us, that the whole charge was a scheme of the Court, which had incurred the hatred of the people by the sale of Dunkirk, and by their cruelty, immorality, and corruption, "to disarm their enemies and provide for their present safety." The prisoners were convicted on evidence which we should not think worth a moment's consideration, and were executed, asseverating their innocence to the last. How fairly they had been tried, I leave the reader to judge from the summing up of Chief Justice Forster, which was as follows:—

"My masters of the jury," (said that miserable creature), "I cannot speak loud to you, you understand the nature of this business, such as I think you have not had the like precedent in your time. My speech will not give me leave to discourse of it; for the witnesses, they are none but such as may satisfy all honest men. It is clear they all agreed to subvert the government, to destroy his Majesty; what can you have more? Two of the witnesses are without exception, but I do not see any way but their testimony is good. For the parties, they in themselves are very inconsiderable; these are but the out-boughs, and if such follows are not met withal, these kind of people are the fittest instruments to set up a

or else they will encourage others. You see one of their own company hath confessed the fact, out of remorse of his own conscience. But I leave the evidence to you: go together" (*d*).

"Lord Hale, in the First Part of his Pleas of the Crown, ch. 24, reports the matter thus (*e*):

(*d*) State Trials, vol. 6, p. 261.

(*e*) The law, as it now stands, is thus laid down, vol. 2, p. 960, of Mr. Greaves's able and learned edition of Russell on Crimes:—"It being established that an accomplice is a competent witness, the consequence is inevitable, that if credit be given to his evidence, it requires no confirmation from another witness; and, therefore, in strictness, if the jury believe the evidence of an accomplice, *they may legally convict a prisoner upon it*, though it stands totally uncorroborated. But from a consideration of the situation of an accomplice, this doctrine has been greatly modified in practice; and it has long been considered as a general rule of practice, that the testimony of an accomplice ought to receive confirmation, and that unless it be corroborated in some material part by unimpeachable evidence, the presiding judge ought to advise the jury to acquit the prisoner." 1 Phill. Ev. 32. "It is a practice," said one of the most acute men* that ever inhabited this country, "*which deserves all the reverence of law*, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in *my* opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused." Then why is it not law? Why is it left in this loose and slovenly manner? Why should not the person whose interest is affected by it have it in his power to turn to the "book where it is written," and insist upon its application? Another judge may take a different view of what is requisite. Let any one read Lord Cochrane's trial, and see if it is safe even in these days to rely implicitly on judges. I am old enough to recollect an instance where no controul of law or public opinion on the conduct of a judge, if he was trying a man who held different opinions from his own in politics, but especially in religion, would have been superfluous; and every legal reader will know the person to whom I allude, and that he is no longer on the Bench. A Code would be not *an infallible*, but a useful remedy in such cases. All Mr. Greaves's observations on this and every other subject he discusses, are most valuable. The general reader should not fail to study Windham's speech on the evidence in the inquiry concerning the Duke of York and Mrs. Clarke, and Cobbett's strictures upon it. As the law now stands, a judge may legally direct a jury to convict on insufficient evidence. This ought not to be.

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* Lord Abinger, Rex v. Farkes, 6 C. & P. 196.

"Dec, 10, 1662. Tonge, Philips, and others were indicted for treason for compassing the King's death; the question was, whether those that were parties in the compassing, which were not yet pardoned nor indicted, might be produced as witnesses, namely Riggs and others; and upon conference with all the judges these points were resolved:

"1. That the party to the treason, that confessed it, may be one of the two accusers or witnesses in case of treason, for the statute intended two such witnesses that were allowable witnesses at common law, and so may a *particeps criminis* be admitted as a witness, and was admitted, to give evidence to the jury; but the jury may, as in other cases, consider of the evidence and credit of the witnesses, but he is sufficient to satisfy the statute.

"2. That the confession before one of the privy council or a justice of the peace, being voluntarily made *without torture*, is sufficient as to the indictment or trial to satisfy the statute, and it is not necessary that it be a confession in Court; but the confession is sufficient if made before him that hath power to take an examination.

"3. The King having promised a pardon to Riggs, if he would discover the plot, he performed that part by his discovery; and this was held by all no impediment to his testimony, for the promise was not applied to witnessing against any other; but two justices [these were our author and J. Brown] held, that if the King promised a pardon upon condition that he would witness against any others, and that being acknowledged by Riggs when he took upon him to give evidence, &c., that will make him uncapable to give evidence, because he swears for himself; but in that point the greater number were of a contrary opinion, *ex libro Bridgman verbatim*, and I remember the consultation and resolution accordingly" (*f*).

Another act of scandalous intolerance, perhaps beyond any that Louis the Fourteenth, in the fulness of his arrogance and

under the influence of jesuits, committed, was accomplished by this abject Chief Justice Forster in the case of John Crook, a Quaker, who, with others, refused to take the oath of allegiance, on the ground (distinctly recognised at one time by the Canon Law (*g*) and the Roman Catholic Church) that oaths were prohibited by Scripture. For this single offence, "the law of England, which"—said Chief Justice Forster to the wretched prisoners—"is not only just but merciful," (State Trials, vol. 6, p. 225), provided the punishment thus announced by the judge: "The jury for the King do find that John Crook, John Bolton, and Isaac Grey are Guilty of refusing to take the Oath of Allegiance, for which you do incur a Premunire, which is the forfeiture of all your real estates during life, and your personal estates for ever, and you to be out of the King's protection, and to be imprisoned during his pleasure; and this is your sentence."

To such an extent had the legislator substituted his own pretended reason, the result, not of patient inquiry, but of selfish interest and superficial arrogance, in the place of the reason of individuals, at any rate free from all suspicion of a mercenary or ambitious bias, and applying itself in all sincerity and with all its force to the very object on which he had cast his scornful and unsteady glance. If the Church of Rome persecuted, she might plead in her defence the tradition and consent of centuries, the sanction of Councils, and the authority of names to which the world had long bowed down in implicit veneration. But what reason could the Church of England allege (except the authority of the English Parliament, which changed its creed four times in four successive reigns), to justify the persecution of Dissenters, that might not be wielded against herself with tenfold force by the Church from which she detached herself, in consequence of the refusal of the Pope to gratify the caprice and lust of an odious tyrant?

(*g*) When the judges went the circuit in old times, the prelates granted licences to them to administer oaths.

The 13 & 14 Car. 2, c. 17, provides, "that if any person or persons, who maintain that the taking an oath in any case, though before a lawful magistrate, is altogether unlawful and contrary to the word of God, shall after the 24th of March, 1661, obstinately and wilfully refuse to take an oath lawfully tendered, shall forfeit five pounds for the first offence, ten pounds for the second, and for the third shall abjure the realm, "otherwise it shall and may be lawful for his Majesty, &c., to cause him to be transported in any ship or ships to any of his Majesty's plantations beyond the seas." This act, of course, put every Quaker(*h*) at the mercy of the most abandoned of mankind: it was altered by 1 Wm. and M. c. 18: again by 7 & 8 Wm. 3, c. 34, and repealed 52 Geo. 3, c. 155. I know not that the Dragonades were more oppressive than this act of the Church party.

The next act was the 16 Car. 2, c. 4, called the Conventicle Act. This act declares the 35 Eliz., which condemns all persons refusing to come to Church after conviction to banishment, to be in full force, and in case of return, to death without benefit of clergy. It further enacts, "that if any person above the age of sixteen, after the 1st of July, 1664, shall be present at any meeting, under colour or pretence of an exercise of religion, in other manner than is allowed by the Liturgy or practice of the Church of England, where shall be five or more persons than the household, shall for the first offence suffer three months' imprisonment, upon record made upon oath under the hand and seal of a justice of peace; or pay a sum not exceeding five pounds: for the second offence six months' imprisonment, or ten pounds; and for the third offence the offender to be banished to some of the American plantations for seven years; or pay one hundred pounds, *except-*

(*h*) There is a fine passage in the "Guerras di Granada," describing the persecution of the Moors, and the power of informers against them. "In every neighbour they had an executioner." This describes the state of all who differed from the Church of England under these laws.

ing New England and Virginia (*h*); and in case they return, or make their escape, such persons are to be adjudged felons, and suffer death without benefit of clergy. Sheriffs or justices of peace, or others commissioned by them, are empowered to dissolve, dissipate, and break up all unlawful conventicles, and to take into custody such of their number as they think fit. They who suffer such conventicles in their houses or barns are liable to the same forfeitures as other offenders. The prosecution is to be within three months. Married women taken at conventicles are to be imprisoned for twelve months, unless their husbands pay forty shillings for their redemption."

To make this act quite worthy of its authors, the scourge was put into the hands of *a single justice of the peace*, without the verdict of a jury—the oath of the informer being sufficient. And to this the English submitted, while they affected to sneer at the servitude of the French: at any rate, among them tyranny was in fewer hands than among us. "The design of the Parliament," says Rapin, "was to drive the Dissenters to despair, and force them into crimes against the government." The gaols were soon filled with dissenting Protestants. This act was revived in 1670, with some more oppressive clauses. Baxter adhered to the narrow views of the Presbyterians, "I shall never be one who by any new pressures shall consent to petition for the papists' liberty." Part 3, p. 36. This act provided, if any persons upwards of sixteen shall be present at any conventicle or meeting, under colour or pretence of any exercise of religion, in any other manner than according to the Liturgy and practice of the Church of England, where there are five persons present besides those of the household, each offender was to pay five shillings for the first offence, and ten shillings for the second; and the preacher twenty pounds for the first, and forty for the second. They who knowingly suffer in their houses, barns, &c., any such meeting,

(*h*) Another instance of the low spite of the High Church party.

forfeit twenty pounds. Any justice of peace *may record* the offence, and the record shall be taken for a full and certain conviction. One-third of the sum levied is given to the informer (*i*). The justices may break open any house or place where they shall be informed of the conventicle, and take the persons assembled into custody. Any justice refusing to do his duty in the execution of the act forfeited five pounds; and a clause provided, "That all clauses in the act should be construed most largely and beneficially for suppressing conventicles, and for the justification and encouragement of all persons employed in execution thereof; no warrant to be cancelled or reversed for any default in form. If a person fled from one county or corporation to another, his goods and chattels were to be seizable anywhere. If the party offending was a wife, the fine, if the prosecution was instituted within three months, was to be levied on the goods and chattels of the husband." The consequences were such as were intended. Ward, Bishop of Salisbury, distinguished himself by his ferocity. Soldiers, under pretence of searching for conventicles, broke into farmers' houses, plundered their goods, and drove away their cattle. The bishops stimulated informers to the utmost. Archbishop Sheldon (May 7, 1670) sent a circular to all the bishops, urging all ecclesiastical judges and officers "to take notice of all Nonconformists, &c., especially of the preachers . . . ever keeping a more watchful eye," continues the insolent priest, "over the cities and greater towns, from whence the mischief is for the most part derived . . . and wherever they find offenders, then, with a hearty affection to the worship of God, they are to address themselves to the civil magistrate, justices, and others, according to the late act. My Lord," he proceeds, "I have this confidence under God, that if we do our parts, *by God's help and the assistance of the civil power*, considering the abundant cure the act contains,

(*i*) "Sic delatores genus hominum publico exitio repertum et ne pœnis

for an advantage, we shall in a few months see so great an alteration," &c. If every line of the Gospel had recommended persecution, and if he had believed the Gospel, could the Archbishop have said more.

The 17 Car. 2, c. 2, called the Five Mile Act, prescribed the following oath, which directly bound those who took it to servitude, and which the good Lord Southampton said no honest man could take:—

"I, A. B., do swear, THAT IT IS NOT LAWFUL, UPON ANY PRETENCE WHATSOEVER, TO TAKE ARMS AGAINST THE KING; and that I do abhor that traiterous position of taking arms by his authority against his person, or against those that are commissionated by him, in pursuance of such commissions; and that I will not at any time endeavour any alteration of government, either in Church or State.

"And all such person and persons as shall take upon them to preach in any unlawful assembly, conventicle, or meeting, under colour or pretence of any exercise of religion, contrary to the laws and statutes of this kingdom, shall not at any time from and after the four and twentieth day of March, which shall be in this present year of our Lord God one thousand six hundred sixty and five, unless only in passing upon the road, come or be within five miles of any city or town corporate, or borough that sends burgesses to the Parliament, within his Majesty's kingdom of England, principality of Wales, or of the town of Berwick-upon-Tweed, or within five miles of any parish, town, or place wherein he or they have, since the Act of Oblivion, been parson, vicar, curate, stipendary, or lecturer, or taken upon them to preach in any unlawful assembly, conventicle, or meeting, under colour or pretence of any exercise of religion, contrary to the laws and statute of this kingdom, before he or they have taken and subscribed the oath aforesaid."

They who read this will probably be of opinion, that if more blood has been shed for religion in other countries, no class of men ever understood the art of tormenting and petty persecu-

tion more thoroughly than the High Church party in this country. And it should be recollected, that at this time a sentence of imprisonment might be, at the will of the gaoler, a sentence of death. "A man"(*g*), said Jenkins, an eminent nonconformist divine, who was destroyed in this manner at the age of seventy-three, "may be as effectually murdered in Newgate as at Tyburn." Thompson (*h*), a famous preacher at Bristol, for refusing to take the oath, was destroyed by being flung into a noisome prison, and kept there in spite of the remonstrances of his physician, and a bond of 500*l.* offered to the sheriff for his security. "It was never known," said a Roman Catholic, "that Rome persecuted, as the bishops do (*i*), those who adhere to the same faith with themselves, and established an inquisition against professors of the strictest piety; and however the prelates complain of the persecution of Queen Mary, it is manifest that their persecution exceeds it, for under her there were not more than two or three hundred put to death, whereas under *their* persecution treble that number have been rifled, destroyed, and ruined in their estates, —those who lost lives and liberties being for the most men of the same spirit as those who suffered in Queen Mary's time." And if Rome persecuted, it was for doctrines which she held essential to salvation, whereas the bishops declared that the rites, ceremonies, and orders, for refusing to comply with which they filled the gaols with learned and virtuous men, and created a race of merciless informers to infest society, were in themselves indifferent (*k*).

(*g*) Neale, vol. 4, p. 529.

(*h*) Ibid. p. 475.

(*i*) Neale, vol. 4, p. 543.

(*k*) "Our ceremonies are not esteemed by our Church, either as Divine Worship, or as any necessary essential part of it, but only as circumstances and external appurtenances for the more decent performance of the worship." South, vol. 5, p. 547. An admirable justification of imprisonment, whipping, pillory, premunire, banishment, and death, in the church of Chillingworth, founded on the right of private judgment.

Such was the state of things in England and such the extent to which religious intolerance had been carried, when a trial took place which, thanks to the noble conduct of a juryman named Bushel, and to the intemperate precipitation of the profligate magistrates on the Bench, contributed mainly to the vindication of our civil liberties, and deserves to occupy a larger space than has hitherto been assigned to it in the history of our constitution. William Penn and William Mead were indicted in September, 1670, before the Mayor and Recorder of London, for having congregated, by preaching, a tumultuous assembly in Gracechurch Street. The very first event of the trial sufficiently shews the disposition of the tribunal before which they were summoned:

Clerk.—"Bring William Penn and William Mead to the bar."

Mayor [to the officer of the Court].—"Sirrah, who bid *you* put off their hats? Put on their hats again."

Observer.—"Whereupon one of the officers putting the prisoners hats upon their heads [pursuant to the order of the Court], brought them to the bar."

Recorder.—"Do you know where you are?"

Penn.—"Yes."

Recorder.—"Do not you know it is the King's Court?"

Penn.—"I know it to be a Court, and I suppose it to be the King's Court."

Recorder.—"Do you not know there is respect due to the Court?"

Penn.—"Yes."

Recorder.—"Why do you not pay it then?"

Penn.—"I do so."

Recorder.—"Why do you not pull off your hat then?"

Penn.—"Because I do not believe that to be any respect."

Recorder.—"Well, the Court sets forty marks a-piece upon your heads, as a fine for your contempt of the Court."

Penn.—"I desire it might be observed, that we came into

the Court with our hats off [that is, taken off]; and if they have been put on since, it was by order from the Bench, and therefore not we, but the Bench should be fined."

Mead.—"I have a question to ask the Recorder: am I fined also?"

Recorder.—"Yes."

Mead.—"I desire the jury and all people to take notice of this injustice of the Recorder. Who spake to me to pull off my hat? And yet hath he put a fine upon my head."

Robinson, the infamous Lieutenant of the Tower, endeavoured to prevent Bushel from serving on the jury, but in vain, and the trial then began.

The first witness said, that he saw Penn speaking to the people in Gracechurch Street, but could not hear what he said: that he endeavoured to take him into custody, but finding a difficulty in getting to the place where he stood, on account of the crowd, Mead said he would bring Penn to him, the witness.

The second witness said, that he saw Penn preaching: that he saw Mead speaking to the witness first called: that he could not tell what Penn said, or what Mead said.

Mead remarked on this; first, that if this witness did not hear what was said, he could not say that Penn was preaching; secondly, that he contradicted his deposition before the Mayor, when he said that he did not see Mead in Gracechurch Street: for the truth of this he appealed to the Mayor, on the Bench, who was silent.

The third witness said, "My Lord, I saw a great number of people, and Mr. Penn, I suppose, was speaking; I saw him make a motion with his hands, and heard some noise, but could not understand what he said; but for Captain Mead, I did not see him there."

Then the Recorder, in the true spirit of a judge of that day says, "What say you, Mr. Mead, were you there?" and receives a well merited rebuke:

Mead.—"It is a maxim of your own law, Nemo tenetur se ipsum prodere, which, if it be not true Latin, I am sure it is true English, 'That no man is bound to accuse himself.' And why dost thou offer to ensnare me with such a question? Doth not this shew thy malice? Is this like unto a judge, who ought to be counsel for the prisoner at the bar?"

Recorder.—"Sir, hold your tongue, I did not go about to ensnare you."

This was all the evidence.

The Recorder, who seems to have been as stupid as he was wicked, extricated himself from an altercation with the prisoners, during which he received some sharp castigation by placing both, first Penn, then Mead, in the bale dock, out of sight, and almost out of hearing of the jury. They expostulated in vain. The Recorder thus charged the jury: "You have heard what the indictment is, it is for preaching to the people, and drawing a tumultuous company after them, and Mr. Penn was speaking; if they should not be disturbed, you see they will go on; there are three or four witnesses that have proved this, that he did preach there; that Mr. Mead did allow of it: after this you have heard by substantial witnesses what is said against them; now we are upon the matter of fact, which you are to keep to, and observe, *as what hath been fully sworn at your peril.*"

After waiting for an hour and a half, the jury were sent for by the Court. "The Bench used many unworthy threats to the dissenting jurymen, and the Recorder, addressing Bushel, said, 'Sir, *you* are the cause of this disturbance, and manifestly shew yourself an abettor of faction: I shall set a mark upon you, Sir.'" Then the wretch who has been already mentioned, Robinson, insulted Bushel. A Sir Thomas Bloodworth said, "I said when I saw Mr. Bushel, what I see is come to pass, for I knew he would never yield: Mr. Bushel, we know what you are." *Mayor* (to Bushel).—"Sirrah, you are an impudent fellow: I will put a mark on you." They were again sent out, and returned again. The verdict thus brought in was, "That

William Penn was Guilty of speaking in Gracechurch Street:" —which was Not Guilty.

Court.—"Is that all?"

Foreman.—"That is all I have in commission."

Recorder.—"You had as good say nothing."

Mayor.—"Was it not an unlawful assembly? You mean he was speaking to a tumult of people there?"

Foreman.—"My Lord, this is all I have in commission."

Some of the jury shewed a disposition to give way, but Bushel, Hammond, and others, opposed themselves, and said they allowed no such word as unlawful assembly in their verdict: at which the Mayor, Robinson, and Bloodworth, took great occasion to vilify them with most opprobrious language.

Recorder.—"The law of England will not allow you to part till you have given your verdict."

Jury.—"We have given in our verdict, and we can give in no other."

Recorder.—"You have not given in your verdict; you had as good say nothing: therefore, go and consider it once more, that we may make an end of this troublesome business.

The Court adjourned; and the jury came back, after another interval, with a written verdict, "That Mead was Not Guilty; That Penn was Guilty of speaking or preaching to an assembly met together in Gracechurch Street."

This caused another explosion of impotent fury. *Mayor.*—"Will you be led by such a canting fellow as Bushel? You, a Foreman," &c.

Recorder.—"You shall not be dismissed till we have a verdict that the Court will accept; and you shall be locked up without meat, fire, or tobacco: we will have a verdict, or you shall starve for it."

Penn interfered with great spirit and dignity, calling on the clerk to take down the verdict, saying, that he did not make the tumult, but those who interrupted him. *Recorder.*—"Stop that prating fellow's mouth; put him out of Court." Penn,

with considerable address, flung in an argument as the jury were retiring, which must have rendered a recantation impossible for men of any spirit or regard to their reputation. "If the jury bring in another verdict contradictory to this, I say they are perjured men in law;" and looking upon the jury said, "You are Englishmen; mind your privilege; give not away your right." *Bushel.*—"Nor will we ever do it."

The jury were again dismissed, under the usual circumstances;—without meat, drink, fire, and also without *any other* accommodation (*k*): at seven the next morning they were summoned again before the Court, and the Foreman said, "William Penn is Guilty of speaking in Gracechurch Street."

Mayor.—"To an unlawful assembly?"

Bushel.—"No, my Lord, we give no other verdict than what we gave last night; we have no other verdict to give."

Mayor.—"You are a factious fellow: I'll take a course with you."

Bloodworth.—"I knew Mr. Bushel would never yield."

Bushel.—"Sir Thomas, I have done according to my conscience."

Mayor.—"That conscience of yours would cut my throat."

Bushel.—"No, my Lord, it never shall."

Mayor.—But I will cut yours so soon as I can."

Recorder.—"He has inspired the jury . . . . I will have a positive verdict, or you shall starve for it."

The Recorder, with frontless impudence, in answer to a question of Penn's, declared, that the verdict of Not Guilty as to Mead was no verdict.

Penn.—"If Not Guilty be no verdict, you make of Magna Charta and the jury but a mere nose of wax."

Mead.—"How is Not Guilty-no verdict?"

Recorder.—"No, it is no verdict."

(*k*) This grotesque but really terrible aggravation of the evils of their situation, during a confinement of two nights and almost three days, was one which cannot decently be repeated. There is an incident in Gulliver's Travels which may suggest it to the reader. It marks the intolerable

The jury withdrew again, and after an interval returned again, and delivered the same verdict.

The Recorder was furious. Speaking to Bushel he said, "You are a factious fellow. I will set a mark upon you; and while I have anything to do in the city, I will have an eye upon you."

Mayor.—"Have you no more wit than to be led by such a pitiful fellow. I will *cut his nose*" (*l*).

Penn.—"It is intolerable that my jury should be thus menaced . . . What hope is there of having justice done when juries are threatened and their verdicts rejected. I am concerned to speak, and grieved to see such arbitrary proceedings. *Did not the Lieutenant of the Tower* (Robinson) *render one of them worse than a felon?*" &c.

Recorder.—"My Lord, you must take a course with that same fellow."

Mayor.—"Stop his mouth, gaoler, bring fetters; stake him to the ground."

Penn.—"Do your pleasure; I matter not your fetters."

(*l*) Shewing as a loyal subject his desire dutifully to imitate his "most religious and gracious King*," who had ordered assassins to commit that outrage on Sir John Coventry, on account of words used in the Parliament "at that time assembled." If Oliver Cromwell had perpetrated such an act of cowardly revenge! Hume is as usual servile: "The King received not the raillery with the GOOD HUMOUR THAT MIGHT HAVE BEEN EXPECTED! . . . . . Sands O'Brian, and other officers of the guards, were ordered to waylay him, and set a mark upon him. He defended himself with bravery, and was disarmed with difficulty. THEY CUT HIS NOSE TO THE BONE." This is certainly a proceeding which might disappoint the most modest expectations of good humour, and is, indeed, hardly consistent with what is more important in a King, common honour and humanity. Many a man was hanged at every assizes for a slighter offence, down to the year 1830. Louis 14 never was guilty of so infamous an outrage. When Lauzun told him he had broken his word (a far more grievous insult to Louis than Coventry had offered to Charles), he flung his cane out of window, lest he should be tempted to strike a gentleman. "La plus belle action de sa vie," St. Simon calls it.

And then the Recorder made a speech, the most infamous perhaps that ever came from the lips of an English judge, and whichclearly shewed the principles which the advocates of the Stuarts would fain have planted in our soil:

"TILL NOW I NEVER UNDERSTOOD THE REASON OF THE POLICY AND PRUDENCE OF THE SPANIARDS IN SUFFERING THE INQUISITION AMONG THEM: AND CERTAINLY IT NEVER WILL BE WELL WITH US TILL SOMETHING LIKE THE SPANISH INQUISITION BE IN ENGLAND."

Such was the language to which, within ten years from the return of the Stuarts, the countrymen of Hampden and the contemporaries of Sydney were obliged to listen, in the metropolis which had once been the citadel of freedom, from the Bench of justice.

The Recorder then told the jury that they should bring in another verdict or starve, and "I will have you carted about the city as in Edward the Third's time."

Foreman.—"We have given a verdict, and all agreed to it; if we give another, it will be to save our lives."

Mayor.—"Take them up."

Officer.—"My Lord, they will not go up."

The Court adjourned till seven next morning, and the jury then brought in both prisoners Not Guilty, "to the great satisfaction of the assembly."

The character of Penn has been of late much attacked in an eloquent and elaborate history; and I do not possess sufficient knowledge of the details of his life to pronounce upon the justice of the accusations brought against him. On this occasion his conduct undoubtedly entitles him to our good opinion. But still more patriotic, and still more deserving the imperishable gratitude of Englishmen, is the conduct of Bushel, the juryman by whom he was delivered from the fury of his malignant enemies. Bushel's demeanour exhibits all the simplicity, all the courage, all the resolution by which the real English character, when cast into its happiest mould, is

ennobled, which make its anger terrible and its affections lasting, which distinguish its homeliness from vulgarity, and redeem its patience from contempt. There he sat,—earnest, sedate, respectful to those in authority over him, bearing the reproof of the scorner with modest silence, or refuting it with laconic brevity, but inflexible, resolved to before he would yield one iota of his birthright, or his obvious duty:

"Sic fortis Etruria crevit,
Scilicet, et rerum facta est pulcherrima Roma."

Amid the dreary waste of crime and folly which our judicial annals at this period present, it is delightful to find a resting place on which one's thoughts, weary of horrours and sickened with meanness, may repose, and whence we may proceed over the barren desert on all sides of us, with fresh hope and invigorated confidence in the final triumph of what is good.

Bushel, though comparatively little spoken of, deserves a place among the greatest benefactors of his country. But for him, in all probability, trial by jury would have continued an empty sound: and a statue to commemorate this peaceful victory, won in the cause of freedom, at that most critical period of our history, by this unpretending citizen, would be far better deserved, and could hardly be worse executed, than any one of those numerous proofs of adulation, bad taste, and contempt of public opinion, by which this metropolis is crowded and disgraced.

Let us follow this memorable struggle to its close. The Recorder imposed on each of the jury a fine of forty marks for their contumacy. Bushel refused to pay this, and was imprisoned. He sued out a writ of *habeas corpus*, whereby the sheriffs were ordered to have the body of Edward Bushel, with the day and cause of his detention, before the Court.

The sheriffs of London returned, that Bushel was committed to Newgate by virtue of a certain order made at the Court of

Sessions, which they set out, stating that it was for a fine imposed on him and the other jurors for acquitting Penn and Mead against the law of England, against full and manifest evidence, and the direction of the Court in matter of law; to the contempt of our Lord, the obstruction of justice, and the bad example of all other jurors in like case offending. Chief Justice Vaughan, in a judgment replete with masculine sense, luminous argument, and profound historical research, declared the return insufficient, and discharged the prisoner:

"The Court," said that great judge, "hath no knowledge by this return, whether the evidence given were full and manifest, or doubtful, lame, and dark, or, indeed, evidence at all material to the issue, because it is not returned what evidence in particular, and as it was delivered, was given. For it is not possible to judge of that rightly, which is not exposed to a man's consideration. But here the evidence given to the jury is not exposed at all to this Court, but the judgment of the Court of Sessions upon that evidence is only exposed to us; who tell us it was full and manifest. But our judgment ought to be grounded upon our own inferences and understandings, and not upon theirs.

"It was said by a learned judge, 'If the jury might be fined for finding against manifest evidence, the return was good, though it did not express what the evidence particularly was, whereby the Court might judge of it, because returning all the evidence would be too long.' A strange reason. For if the law allow me remedy for wrong imprisonment, and that must be by judging whether the cause of it were good, or not, —to say the cause is too long to be made known, is to say the law gives a remedy which it will not let me have, or, I must be wrongfully imprisoned still, because it is too long to know that I ought to be freed! What is necessary to an end, the law allows is never too long. 'Non sunt longa quibus nihil est quod demere possis,' is as true as any axiom in Euclid.

Besides, one manifest evidence returned had sufficed, without returning all the evidence. But the other judges were not of his mind (*m*). . . . . .

"I would know whether anything be more common, than for two men, students, barristers, or judges, to deduce contrary and opposite conclusions out of the same case in law? And is there any difference that two men should infer distinct conclusions from the same testimony? Is anything more known than that the same author, and place in that author, is forcibly urged to maintain contrary conclusions, and the decision hard, which is in the right? Is anything more frequent in the controversies of religion, than to press the same text for opposite tenets? How then comes it to pass that two persons may not apprehend with reason and honesty, what a witness, or many, say, to prove in the understanding of one plainly one thing, but in the apprehension of the other clearly the contrary thing? Must therefore one of these merit fine and imprisonment, because he doth that which he cannot otherwise do preserving his oath and integrity? And this often is the case of the judge and jury.

"I conclude therefore, that this return, charging the prisoners to have acquitted Penn and Mead against full and manifest evidence, first, and next, without saying that they did know and believe that evidence to be full and manifest against the indicted persons, is no cause of fine or imprisonment.

"And by the way I must here note, that the verdict of a jury, and evidence of a witness, are very different things, in the truth and falsehoods of them. A witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a juryman swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after, which differs nothing in the reason, though

(*m*) State Trials, vol. 6, p. 1002.

much in the punishment, from what a judge, out of various cases considered by him, infers to be the law in the question before him (*n*). . . . . .

"That Decantatum in our books, 'Ad quæstionem facti non respondent judices ad quæstionem legis non respondent juratores,' literally taken, is true; for if it be demanded, What is the fact? the judge cannot answer it; if it be asked, What is the law in the case? the jury cannot answer it.

"Therefore the parties agree the fact by their pleading upon demurrer, and ask the judgment of the Court for the law.

"In special verdicts the jury inform the naked fact, and the Court deliver the law; and so is it in demurrers upon evidence, in arrest of judgments upon challenges, and often upon the judge's opinion of the evidence given in Court, the plaintiff becomes nonsuit, when, if the matter had been left to the jury, they might well have found for the plaintiff.

"But upon all general issues; as upon not culpable pleaded in trespass, 'nil debet' in debt, 'nul tort, nul disseisin' in assize, 'ne disturba pas' in 'quare impedit,' and the like; though it be matter of law whether the defendant be a trespasser, a debtor, disseisor, or disturber in the particular cases in issue; yet the jury find not [as in a special verdict] the fact of every case by itself, leaving the law to the Court, but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately, and not the fact by itself, so as though they answer not singly to the question what is the law, yet they determine the law in all matters, where issue is joined and tried in the principal case, but where the verdict is special" (*o*).

I have cited these extracts from the judgment of Vaughan, and I wish that my limits would have allowed me to quote from it at much greater length, as both for the manliness of its principles, and the constitutional integrity of its language, it

(*n*) State Trials, vol. 6, p. 1005.

is one which deserves the attention of the general reader, and forms a marked contrast with those which many of our modern reporters have sometimes been obliged to encourage litigation by perpetuating. There is one point on which he rests his argument that is purely of a technical nature, it is this: If, he says, "the jury find against the direction of the Court in matter of law, it will not follow they are therefore finable, for *if an attaint* (*p*) will lie upon the verdict so given by them, they ought not to be fined and imprisoned by the judge for that verdict . . . . . for if an attaint be brought upon that verdict it may be *affirmed*, and found upon the attaint a true verdict; and the same verdict cannot be a false verdict, though the jury are fined for it as such by the judge, and yet no false verdict, because affirmed upon the attaint." This reasoning is conclusive; but in order to understand it, the reader should understand what an "attaint" was. This I shall endeavour to describe, and when the reader knows that a proceeding so utterly barbarous existed among us in its primitive state, not only down to the reign of Henry the Seventh, but continued to be law in its first shape, and in a shape very little mitigated, down to the year 1826 (*q*), he will (unless, indeed, he happen to have read any of the subtle ingenious judgments on points of special pleading in Meeson and Welsby) be utterly confounded at the perverse and curious industry with which the framers of our law contrived to block up every avenue to justice, and to common sense. A writ of attaint then was a writ which issued to inquire whether a jury of twelve men gave a false verdict; at the common law it lay upon one species of action, but by the 34 Edw. 3, c. 3, it was extended to all pleas whatever, except a writ of right. The jury who were to try this false verdict consisted of twenty-four men, and if they found the verdict they were convened to

(*p*) It was admitted, that where there was *no* attaint, the jury were not finable.

(*q*) It was abolished by 6 Geo. 4, c. 50, s. 60.

inquire into a false one, that is, if they drew a different conclusion from the evidence than the first jury (an event which, as every body knows, happens three or four times in almost every assizes); the first jurors (*s*) lost their "liberam legem," and became for ever infamous, forfeited their goods, and the profits of their lands, were imprisoned themselves, and their wives and children driven out of doors, their houses were razed, their trees cut down, and their meadows ploughed up; so tender of personal liberty, so wise, moderate, humane, and effectual were the laws of England (*t*), so fully did they deserve the panegyrics of the Fortescues and Cokes and Blackstones, and so justly did those who lived under their beneficial influence boast of the superiority of their condition to that of those who lived where the Roman law had altogether overcome, or in any way controuled, the usages of the Franks and Scandinavians.

By the statute 11 Henry 7, made perpetual by the 13 Eliz., a certain remedy concurrent with this law (*u*), (which, indeed, seems hardly compatible with society) was introduced, and in

(*s*) "For the judgment against them (the jurors convicted on attaint), was,—1. *Quod amodo amittant liberam legem inperpetuum.* 2. *Non trahantur in testimonium veritatis.* 3. *Bona et catalla sua forisfaciant regi.* 4. *Terræ et tenementa sua capiantur in manus regis.* 5. *Quod uxores et liberi sui amodo amoveantur.* 6. *Quod terræ et tenementa sua extirpentur, &c.* 7. *Quod capiantur, et in gaolam detrudantur.*" Coke, Inst. 3, p. 163. Lord Coke, in his Commentary on Littleton, sect. 368, which is, "Also in such case where the enquest may give their verdict at large, if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge; as in the case aforesaid they may well say, that the lessor did not disseise the lessee, if they will," &c., says,—"Although the juries, if they will take upon them [as Littleton here saith] the knowledge of the law, may give a generall verdict, yet it is dangerous for them so to doe, for if they doe mistake the law, they runne into the danger of an attaint; therefore to find the speciall matter is the safest way where the case is dobtfull."

(*t*) "The judgment in the writ of attaint is fearful and penal." Coke, Inst. 2, p. 130.

the words of Blackstone, "*a more moderate punishment* was inflicted upon attainted jurors," (who, be it observed, deserved no punishment at all) this more moderate punishment being "*perpetual infamy*," and a forfeiture of 20*l.* a piece, or 5*l.* a-piece by each of the jurors, according to the value of the property on which they decided. "So," Blackstone gravely, without smile or sneer, continues, "a man may now bring an attaint *either* upon the statute (the second form), or at common law, at his election"!!!

Now, in most cases, where a new trial is granted, or a verdict set aside upon motion, which is the preliminary business that exclusively occupies the three Courts of Westminster during the first four days of every term, and for which those four days are not always sufficient, a writ of attaint (*v*) might have been sued out, or proceedings had at common law, such as have been described, by the much boasted law of this country down to the year 1826. Such are the proofs of foresight, public spirit, and capacity in our legislators, the legislators of a free country, which the English law exhibits.

There is one other point closely connected with, perhaps I ought to say quite inseparable from, the main question on which Vaughan insists, and which has added great celebrity to his judgment. The judges had in the last century encroached so completely on the province of the jury in questions of libel, that they would allow the jury only to decide upon the fact of the publication of certain words, and withdrew from their notice in spite of absolute demonstration of the flagrant absurdity and injustice of such a course, all inquiry as to the guilt or innocence of the author, so that if a man had been indicted for a libel for publishing the Bible, the jury, according to settled law, must have found him guilty, leaving it to the Court to act afterwards as they thought proper. And when this

(*v*) I own that the infamous verdict constantly given by Oxford tradesmen make one wish that the writ of attaint was not obsolete. In one case they found, on their oath, that *two extra hunters* were necessaries

egregious instance of the usurpations to which Englishmen, it certain words and forms are employed, will sometimes submit, (though freedom of the press was the boast of every Briton, while men of learning and eloquence sometimes languishing in pestilential dungeons, sometimes exposed on the pillory to the caprice of the brutal ruffians of whom a London mob consists, for writings often innocent and laudable, had smarted under its oppression, unpitied and unnoticed,) at length, because a man of some quality was concerned, excited the tardy resentment of the public, and was finally repressed by an act of Parliament, this judgment was much quoted and relied upon; nor do I think, though Erskine was the commentator, that the eloquent amplifications of the great advocate, added much to the close and irresistible reasoning of the text.

"The words that the jury did acquit against the direction of the Court in matter of law literally taken are insignificant, and not intelligible, for no issue can be joined of matter in law, no jury can be charged with the trial of matter in law merely, no evidence ever was or ever can be given to a jury of what is law or not, nor no such vote can be given to or taken by a jury to try matter of law, therefore we must take off this veil and colour of words which *make a show of being something and are nothing.*

"If the meaning of those words, 'finding against the direction of the Court in matter of law,' be, that if the judge having heard the evidence given in Court, for he knows no other, shall tell the jury, 'upon this evidence, the law is for the plaintiff or the defendant, and you are under pain of fine and imprisonment,' or (as the Mansfields and Bullers said of perjury) 'to find accordingly,' *every man sees that a jury is but a troublesome delay, great charge, and of no use in determining right and wrong* (*w*) . . . . For if the judge from the evidence shall, by his own judgment, first resolve, upon any trial, what the fact is, and so knowing the fact, shall then resolve what the

(*w*) A very exact description of a jury in most civil cases.

law is, and order the jury penally to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue trials by them at all? But if the jury be not obliged in all trials to follow such directions, if given, but only in some sort of trials [as, for instance, in trials for criminal matters upon indictments or appeals], why then the consequence will be, though not in all, yet in criminal trials, the jury [as of no material use] ought to be either omitted or abolished, which were the greater mischief to the people, than to abolish them in civil trials.

"And how the jury should, in any other manner, according to the course of trials used, find against the direction of the Court in matter of law, is really not conceptible.

"True it is, if it fall out upon some special trial, that the jury being ready to give their verdict, and before it is given the judge shall ask, whether they find such a particular thing propounded by them? or whether they find the matter of fact to be as such a witness, or witnesses, have deposed? and the jury answer, they find the matter of fact to be so; if then the judge shall declare, The matter of fact being by you so found to be, the law is for the plaintiff, and you are to find accordingly for him:

"If notwithstanding they find for the defendant, this may be thought a finding in matter of law against the direction of the Court, for in that case the jury first declare the fact, as it is found by themselves, to which fact the judge declares how the law is consequent.

"And this is ordinary, when the jury find unexpectedly for the plaintiff or defendant, the judge will ask, how do you find such a fact in particular? and upon their answer he will say, then it is for the defendant, though they found for the plaintiff, or *e contrario*, and thereupon they rectify their verdict.

"And in these cases the jury, and not the judge, resolve and find what the fact is.

(*w*) See the argument of Messrs. Hill, Falconer, Roebuck and Fry, in

"Wherefore always in discreet and lawful assistance of the jury, the judge his discretion is hypothetical, and upon supposition, and not positive, and upon coercion, *viz.*, If you find the fact thus, [leaving it to them what to find], then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant" (*w*).

From the time (*x*) when this sound and luminous judgment was delivered, no attempt has ever been made to renew the practice of punishing juries for their verdicts. How it happened that the conduct of the Recorder so completely escaped all punishment, it is difficult to comprehend, but like many other of his most profligate contemporaries, he contributed to the support of the freedom which he laboured, according to the measure of his faculties, to overthrow. Though in cases of libel the judges contrived to obtain exorbitant powers; in all other cases where the quality of an act done, and, therefore, where the intention of the person doing it was to be determined, this question was reserved exclusively for the jury, unless in cases where the law interferes with a presumption of its own, and draws from admitted facts its own conclusion, and where, therefore, *if* the jury believe the witnesses, they cannot, without a violation of their duty, ascribe any other motive than that which the law has pointed out (*y*).

(*w*) State Trials, vol. 6, p. 1009.

(*x*) Hallam's Const. Hist. vol. 2, p. 168.

(*y*) "6. But in my opinion fines set upon grand inquests by justices of the peace, oyer and terminer of gaol delivery, for concealments or non-presentments in any other manner, are not warrantable by law; and though the late practice hath been for such justices to set fines arbitrarily, yea, not only upon grand inquests, but also upon the petit jury in criminal causes, if they find not according to their directions, it weighs not much with me for these reasons: 1. Because I have seen arbitrary practice still go from one thing to another,—the fines set upon grand inquests began, then they set fines upon the petit juries for not finding according to the directions of the Court; then afterwards the judges of *nisi prius* proceeded to fine jurors in civil causes, if they gave not a verdict according to direction even to points of fact; this was done by a judge of assize [Justice Hyde, at Oxford, Vaugh. 145] in Oxfordshire, and the

The trial of Count Königsmark, Charles Boroski, Christopher Vratz, and John Stern, for the murder of Mr. Thynn, throws another light on the picture of judicial depravity. Powerful to destroy for imputed or imaginary offences, the strange mass of uncouth absurdities, called law by the Cokes, Norths and Saunders's, was impotent to cope with avowed protected crime. Swift to shed the blood of the innocent and to make a man an offender for a word, our judges were slow to punish the guilty, even when the foulest crimes were proved against him, if the Crown exhibited any sympathy for them, or sheltered them with its protection. That the law was inadequate to protect innocence, every day brought convincing proof; it was now to be shewn that when guilt was to be punished, the buckler it held before the assassin was impenetrable.

Though the iniquity in this case, as it consisted not in procuring a Dissenter to be condemned, but in enabling a murderer to escape, is less shocking than that of which our Courts of justice were at this time usually the scene, it clearly shews that justice in England was at this time a perfect mockery. The principal murderer, Count Königsmark, a foreign nobleman of high rank and illustrious extraction, was

fine estreated; but I, by the advice of most of the judges of England, staid process upon that fine: the like was done by the same judge in a case of burglary, the fine was estreated into the Exchequer; but by the like advice I stayed process; and in the case of Wagstaff [Vaugh. 153] and other jurors fined at the Old Bailey, for giving a verdict contrary to direction, by the advice of all the judges of England [only one dissenting], it was ruled to be against law; but of this hereafter [c. 42]. 2. My second reason is, because the statute of 3 H. 7, c. 1, prescribes a way for their finding, which would not have been if they had been arbitrarily subject to a fine before. 3. It is of very ill consequence, for the privilege of an Englishman is, that his life shall not be drawn in danger without due presentment or indictment, and this would be but a slender screen or safeguard, if every justice of peace, or commissioner of oyer and terminer or gaol delivery, may make the grand jury present what he pleases, or otherwise fine them; and there is no parity of reason or example between inferior judges and the Court of King's Bench, which is the supreme ordinary Court of justice in such cases." Hale's P. C. vol. 2, p. 158.

dismissed with impunity by the special contrivance of the Chief Justices North and Pemberton, who were in perpetual communication with the Court; and his agents, far less guilty than their employer, were put to death. They who recollected the fate of Don Pantaleon Sa, whom no solicitations or motives of political interest could induce Cromwell to withdraw from the stroke of justice, must have felt a bitter sense of national degradation. Thomas Thynn, the man murdered in cold blood in the streets of London in open day, was the great partizan of the Duke of Monmouth; and Dryden has preserved his memory, in his immortal poem, under the name of "Issachar." Speaking of the progress of the Duke in the West, he says:—

> "From east to west his glories he displays,
> And like the sun the promised land surveys;
> Fame runs before him like the morning star,
> And shouts of joy salute him from afar.
> Each home receives him as a guardian god,
> And consecrates the place of his abode;
> But hospitable treats did most commend,
> Wise Issachar, his wealthy western friend." (*z*)

This Mr. Thynn was a man of large estate, and, says Sir John Reresby (who, by the way, calls this transaction the "most barbarous and audacious murder that had almost ever

(*z*) Such was the "verve" and spirit, incredible as it may appear to *us* now, with which Englishmen once wrote verses. There was inequality no doubt in their composition, but no paltry trick; they were free from that affectation which of all things most betrays the absence of real genius, and from the mere cant of pompous circumlocution which disgusts us so often now. The very negligence of Dryden is better than the laboured nothings in prose and verse of those whose understandings have never recovered the "cramming" of their youth. Those who are Roscius's when boys, come to be scene shifters when men. Truly may it be said of the school of Dryden and our own, that the gleanings of Ephraim are better than the vintage of Abiezer. It is quite worthy of us, that a committee of *taste* (Heaven save the mark!) should have divided on the question of assigning Dryden a place among our poets!

been heard of in England"), "lately married to the Lady Ogle, who, repenting herself of the match, fled from him into Holland before they were bedded (*a*),—was set upon by three ruffians, who shot him as he was going along the streets in his coach" (*b*). Though there is no reason to ascribe the crime to the Court, as the personal resentment of Königsmark, a disappointed suitor of Lady Ogle, was probably the sole cause of its perpetration, the King was much alarmed lest it should be attributed to his instigation. A strict inquiry was set on foot, and the prisoners were apprehended—Königsmark in disguise, and in the very act of embarking on board a Swedish vessel. The first act of the judges was to overrule a petition of the Count's, that he might be tried separately from his accomplices. If the suppression of the truth had not been their object, they would have insisted upon the mode of trial for which Königsmark petitioned, or have received one of the accomplices as King's evidence, in which case the conviction of Königsmark would have been inevitable, as they would not have dared, at a time when party ran so high, and the minds of men were so much inflamed, openly and in defiance of the evidence to have directed his acquittal. But by contriving that all the prisoners, the agents and the principal, or, in legal language, the accessory before the fact, should be tried together, the statements of the agents became of course evidence against themselves only. The extreme anxiety with which the judges enforce this principle, and the tender humanity they display to prevent Königsmark from being injured by the statement of his associates, are most striking, and prove that the princi-

(*a*) Hence the epitaph,—

"Here lies Tom Thynn of Longleat Hall,
Who never would have miscarried,
Had he married the woman he lay withal,
Or lay with the woman he married."

Lady Ogle was the daughter and sole heiress of the Earl of Northumberland.

(*b*) Reresby's Memoirs, p. 135.

ples of the Law of Evidence, so repeatedly violated in the trials of those whom it was the object of the Court to destroy, were at this time known and ascertained. But the judges went farther, for so anxious were they not to let anything transpire which might injure the murderer whom they had it in charge to preserve, that they actually refrained from calling upon two of the accomplices (the Captain Vratz and the Polander Boroski) to address the jury, lest they should in any way prove that Königsmark was the author of their guilt. With all this artifice, however, the evidence against Königsmark was very strong. It was proved that Vratz, who managed the assassination, a man of tried and desperate courage, had never any quarrel or intercourse of any kind with Thynn; that he associated with the Count, and was his intimate friend and dependant, and had been incessantly with him till the day of the murder; that the Count had declared his intention of calling Thynn to account for the business with Lady Ogle; that on his last coming to England he had lived in secrecy, skulking and shifting his lodging from place to place; —this, Königsmark accounted for, by saying that he was labouring under a distemper which he was unwilling should be known. But no sooner is the murder committed than he flies away privately, goes to Rotherhithe, gets into a boat, where he remains for several days together till he came to Gravesend, where he was arrested. Farther than this, it was admitted that he had said, on being arrested, to one Gibbons, who reproached him with the murder, "I don't think they would have done the Duke of Monmouth" (he had been in the coach with Thynn (*c*), but left it before the murder) "any injury: it

(*c*) "I think fit (says a lawyer of that day) to remember in the same reign, though before this time, one case, to shew how the Courts of justice were remiss or violent, according to the subject-matter.

"All will agree that the murder of Mr. Thynne was one of the most barbarous and impudent murders that ever was committed; and of that murder Count Coningsmark, though he escaped punishment, was the most guilty.

is a stain upon my blood, but one good action in the wars, or a lodging upon the counterscarp, will wash away all that."

Notwithstanding this evidence, the jury, after an artful summing up from Pemberton, acquitted Königsmark and found his instruments guilty, "I," says Reresby, "was the first that carried the news of this to the King, who seemed to be not at all displeased at it. But the Duke of Monmouth's

"I do not complain that in that trial the Chief Justice directed the prisoner the way to make the King's counsel shew the cause of challenge against the persons called on the jury, and challenged for the King, without any reason: it was his duty so to do, and he ought to have directed Fitzharris the same method, which he did not; but he was blameable that he did not ask the lieutenant and Polander what they had to say for themselves, which was always done before and since that time, and ought to be, which was an injustice; and therefore two of the prisoners, at the time of their sentences, said they were never tried, though I believe no great injury to them, because they had little or nothing to have said for themselves.

"But if they had been asked, they would have said, as they did before their trials to the justice of peace who committed them, and as they did after their condemnations, that Count Coningsmark put them upon doing what they did, which might have influenced the jury to have found the Count guilty, which was contrary to the design of the Court; and it was for the same reason the Chief Justice would not permit the justice of peace to read the examination of Stern and Boroski.

"I do agree, that what they said before the justice of peace was not evidence against the Count; I agree, that the Count being indicted and tried as accessory, at the same time the principals were indicted and tried, the principals could not be good witnesses against the Count, because properly a principal ought to be convicted before the accessory be tried; and, therefore, though for expedition, both are tried together, yet the verdict always is, and ought to be given against the principal before that of the accessory.

"But I deny what was in that trial laid down for law, that the accessory being in the same indictment with the principal, must be tried at the same time. It is true, the Count desired his trial might be put off for two or three days, which the Court, knowing what was best for the Count, denied, and not for the above pretended reasons; for an indictment against many may be joint, and yet the trials may be several; the result is in such cases, the indictment is joint and several."

party . . . . were extremely dissatisfied that the Count had so escaped" (*d*).

I now approach those trials which, for the sake of England, and, indeed, of human nature, I wish could be buried in perpetual oblivion,—I mean the trials for the Popish Plot (*e*); which, if we consider that King, Lords, and Commons,—that every rank of Englishmen, participated in their infamy, are a deep and lasting stain on the character of the nation. If, by the Popish Plot, anything be meant in any degree resembling the story repeated by Oates, and Bedloe, and Dugdale; if it be meant that there was any foundation of any kind for the monstrous fabric which they raised on the mangled bodies, and

(*d*) Memoirs, p. 143. Reresby says, Königsmark "was a fine person of a man, with the longest hair I think I ever saw . . . . . Being at the King's couchée (*sic*) the night after, I perceived by his Majesty's discourse that he was willing the Count should get off." Ib. 142.

(*e*) Mr. Fox quotes some lines from the Absalom and Achitophel, to prove that Dryden did not absolutely reject all belief in the Popish Plot. But if that illustrious man had recollected the following passage in Dryden's finest poem, when he could say what he thought without restraint, he would have allowed that Dryden's expression of doubt was a concession to the prejudices of his readers :—

"What more could you have done than now you do,
Had Oates and Bedlow, and their plot, been true?
Some specious reasons for those wrongs were found;
Their dire magicians threw their mists around,
And wise men walk'd as on enchanted ground:
But now, when Time has made th'imposture plain,
[Late tho' he follow'd Truth, and limping held her train]
What new delusion charms your cheated eyes again?
The painted harlot might a while bewitch,
But why the hag uncas'd, and all obscene with itch?"
Hind and Panther, Part 3, p. 717.

And before, in one of the noblest passages of the same poem, he says,—

"What wonder is't that black detraction thrives,
The homicide of names is less than lives,
And yet the PERJURED MURDERER* survives."

* Titus Oates.

cemented with the blood of the innocent, not only must every reader of history at this day pronounce it an absurd invention, but it is clear (frightful as is the amount of deliberate wickedness of which such a statement involves the proof) that many of those who counterfeited belief in it for political purposes, inflamed the minds of the people, and hurried their victims to the scaffold, were never even for a moment the dupes of a fiction so gross and so extravagant. But if it be meant that the King and his brother were, with Louis the Fourteenth, engaged in a confederacy to extirpate the Protestant Faith and civil liberty in England, and that some at least of the King's ministers were privy to this infamous scheme,—it is historically true that such a purpose existed, and was at one time apparently not very far removed from its accomplishment. Eighteen years of misgovernment had produced some effect even upon the most besotted loyalists. Cavaliers as they were, they could not altogether stifle the instincts of the race from which they sprung. The elements of suspicion, disappointment, fear, and discontent gathered themselves together into one cloud, which, after it had overcast the political horizon for some time, burst all at once, and descended in a deluge of blood. The death of Godfrey, and the fragments of Coleman's papers (*e*) which were discovered, changed doubt to certainty, and exasperated fear to madness. Burnet tells us, that serious apprehensions of a general massacre of the Catholics were entertained; and deplorable as such a catastrophe would have been, the sudden revenge of an infuriated populace would have been less discreditable to the English nation than the series of murders, applauded by the weak, connived at by the crafty, and committed by men of station and sober habit, in conjunction with the great magis-

(*e*) "The discovery of Coleman's papers made as much noise in and about London, as if the very Cabinet of Hell had been laid open." North's Examen, p. 177.

trates of the land, under the veil of the law, and after the mockery of judicial deliberation.

These murders began with the condemnation of William Stayley, a Roman Catholic banker. Serjeant Maynard and Sir W. Jones, the Attorney General, were the prosecuting counsel; Scroggs was the judge. Serjeant Maynard, who must have been perfectly aware that every word of the evidence was obviously false, and that he was therefore about to assist, though with more decency than some of his brethren, in the perpetration of murder, told the jury that the offence was as great as could be, and would be proved as clear as could be. The offence imputed to the prisoner was one created by the 13 Car. 2, c. 1, a statute which, in the short sighted, self-stultifying spirit of English legislation, was to exist during the king's life only, and which provided, among other things, that if any person should compass the King's death, or bodily harm leading to his death, or the restraint or imprisonment of his person, and such compassings and imaginings should express, &c., by printing, writing, preaching, or malicious and *advised speaking* (*e*), every such person being convicted thereof on the oath of two credible witnesses, should suffer death as a traitor. The witnesses were Carstairs and Sutherland, Carstairs had already covered himself with infamy in Scotland, and shortly after this trial died in agonies (*f*) of remorse, telling those around him to cast his body into a ditch, as he did not deserve Christian burial. These two witnesses swore that Stayley, a prudent man of sober habits, had said in a public tavern, in the hearing of total strangers, "that the King was the greatest heretic in the world, and that he, Stayley, would kill him." Carstairs said, that the prisoner's phrase was, "I would kill him myself;" Sutherland, that it was, "I would do it myself;" a third witness was called, who said, "that Carstairs had given

(*e*) A bad precedent.

(*f*) "In great horrour," is Burnet's phrase.

the same account of the transaction to him"—evidence that would not now be received, though I must own that when you are inquiring whether what a witness has said is true, to shut out evidence that he has always told the same story, is, as it appears to me, to shut out what may be very material. The evidence may be worth much, or little, or nothing at all; but admitted, subject to such remarks as it deserves, it ought undoubtedly to be; and as our law allows evidence to be given that the witness has given a different account of the transaction, it seems inconsistent that it should not allow you to prove that he has always given the same. It is true that such proof does not *add* to the value of the character of the witness, as it is very possible that a false witness may adhere to the same story, but it certainly prevents that character from being impeached in that particular respect, if you shew that to whatever credit a witness is entitled who tells the same story always, that ingredient of credit is possessed by the witness in question. It is not sufficient of itself, and unsupported by other circumstances, much less when contradicted by them to constitute a credible witness; but it is a part of the whole, it is an element in the credibility of a witness, and ought to be received. The English legislator, (with the want of discrimination which usually belongs to him), says, because it is not every thing it shall be nothing. These three witnesses were all called by the prosecution. The prisoner made a very conclusive defence in spite of the repeated interruptions of Scroggs, and called a witness to prove his loyalty. The witness said, that on several occasions the prisoner had expressed himself in terms of loyalty and affection to the King; "That was," observed the wicked judge, "when he spoke to a Protestant." Scroggs said to the jury, "The Parliament thought it reasonable even to make desperate words to be treason, that is, such words as if the thing done had been treason, the speaking it is treason; when we come to observe the manner of this speaking, methinks there is no great difficulty to satisfy the jury that

they were spoke advisedly and maliciously . . . . . So you cannot have a plainer proof in the world than this . . . . . Excuse me," the miscreant continues, "if I am a little warm . . . . . it is better to be warm here than in Smithfield." "When a papist hath once made a man a heretic there is no scruple to murder him. Whoever is not of their persuasion are heretics, and whoever are heretics may be murdered . . . . . Therefore discharge your consciences as you ought to do . . . and you shall do well to begin with this man, for perchance it may be a terror to the rest." The man protesting his innocence was found guilty. Scroggs passed sentence on him, telling him that the matter, manner, and all the circumstances of it made it plain; that he seemed rather to be obstinate than sorrowful; that he might harden his heart as much as he would, and lift up his eyes. Stayley was put to death in tortures within five days from the trial. To such a state had love of form, and submission to routine, phrases about the constitution, and the panegyrics of lawyers on the absurd and cruel proceedings in our Courts of justice, and the heap of almost unmixed, and certainly never equalled, nonsense, administered as law among us, brought Englishmen towards the close of the seventeenth century. There was no civilized country in Europe where (unless the sovereign was provoked) liberty and life were not more secure, or where, if he was provoked, the destruction of the offender was more inevitable. Such, under the Stuarts, was our law, and such our constitution. Burnet's account of these proceedings shews the consummate wickedness of Shaftesbury, a man of whom it is difficult to speak in terms of sufficient abhorrence—it seems that Burnet, knowing the infamous character of Carstairs and Sutherland, sent intelligence of it to the Chancellor and the Attorney General. The Attorney General, as was to be expected from a man trained to legal murder, "took it ill of me that I should disparage the King's witnesses." He then applied to the whig leaders; some were shocked, but the Earl of Shaftesbury

could not bear the discourse, he said, "*we must support the evidence*, and that all those who undermined the credit of the witnesses, were to be looked upon as public enemies."

This was the morality of public men in England; there is nothing in the history of the most execrable villains in times of the greatest horrour that shews more flagitious cruelty. Robespierre, wretch as he was, has hardly more to answer for, and far more to plead in his defence, than the men, statesmen, lawyers and juries, who were the instruments, accomplices, abettors and movers of Carstairs, Praunce, Oates, Dugdale, Dangerfield, and Bedloe; and in this list, to the shame of England, almost every active public man (Algernon Sidney excepted) must be included. To the scenes of infamy which now occurred in England, and which continued almost without interruption till the Revolution, the history of no free country can find a parallel; nor should it be forgotten that the worst of them were applauded by the House of Commons, and that all of them took place in our Courts of justice. Indeed, nothing but the integrity and the wisdom of the judge, an integrity and wisdom by no means so much a matter of course, as it has been the fashion to suppose, has prevented the English law from being as convenient an instrument of oppression as ever was devised by the wit of man, in all civil cases, down to our own time, and in criminal cases, down to a very recent period. But in the days of Scroggs and Jeffreys, when the prisoner was refused a copy of the indictment, which was read aloud to him in barbarous Latin, and was also refused a counsel, the workman, the instrument, and the work, were exactly fitted to each other. Coleman was the next victim. He was a fanatical Roman Catholic, Secretary to the Duchess of York—in his case the rules of evidence shared the same fate as the rules of probability and the maxims of natural justice. Oates gave at considerable length evidence of the contents of a letter, which he said had been written by Coleman to the Rector of St. Omers, and of another written

to Père la Chaise. After saying that he had delivered a letter to Père la Chaise, Scroggs said, "Père la Chaise asked you after a gentleman with a French name. Whom meant he by that name?" *Oates.*—"I understood him to mean Coleman." *Scroggs.*—"Did he know him by that name? What said you?" *Oates.*—"I could say little to this." *Lord Chief Justice.*—"Could you guess whom he meant? Did you hear Fenwick speak to Mr. Coleman to write for him?" *Oates.*—"Strange told me he had spoke to him." Oates then stated that Coleman had been active in contriving the plan to destroy the King. The Chief Justice asks him, how he came, when he mentioned Wakeman to the council, who was to receive 15,000*l.* for poisoning the King, which, or a large portion of which, Coleman was to give him, not to mention Coleman's name at all to the Privy Council, Coleman being so desperate a man, when he charged the others? *Oates.*—"For want of memory."

Coleman then proved that he had not been able to recognise him at the Privy Council. The Chief Justice put the question—were you asked, did you know Mr. Coleman? Oates gave so rambling and evasive an answer that even Scroggs was ashamed of him:

"Answer the question, Mr. Oates, short, and without confounding it with length. Were you asked if you knew Mr. Coleman (*h*)?"

Oates.—"Not to my knowledge."

Prisoner.—"He said he did not know me." Sir Thomas Dolman then proved what ought to have ended the case, that Oates had said he did not well know Coleman, thereby completely disproving all he had said. Coleman also proved that he was in Warwickshire during the time that Oates had described his repeated interviews with him in London. Scroggs summed up with great eloquence and abominable wickedness. In his charge he did what very few Chief

(*h*) North's Examen, p. 181, 4to.

Justices, from his days to Lord Denman's (exclusively), could have done, for he quoted Lucretius(*i*):

(*i*) Scroggs expressed himself with great vigour, ease, and purity, as the following extract from a judgment he passed on Raylett for libelling himself will shew :—

"First, I would have all men know, that I am not so revengeful in my nature, nor so nettled with this aspersion, but that I could have passed by this and more; but that the many scandalous libels that are abroad, and which reflect upon public justice, as well as upon my private self, make it the duty of my place to defend one, and the duty I owe to my reputation to vindicate the other.

"And having this opportunity, I think this the properest place for both. If once our Courts of justice come to be awed or swayed by vulgar noise, and if judges and juries should manage themselves so as would best comply with the humour of times, it is falsely said, that men are tried for their lives or fortunes; they live by chance, and enjoy what they have as the wind blows, and with the same certainty; the giddy multitude have constancy, who condemn or acquit always before the trial, and without proof.

"Such a base, fearful compliance made Felix, willing to please the people, leave Paul bound, who was apt to tremble, but not to follow his conscience. The people ought to be pleased with public justice, and not justice seek to please the people. *Justice should flow like a mighty stream; and if the rabble, like an unruly wind, blow against it, it may make it rough, but the stream will keep its course.* Neither, for my part, do I think we live in so corrupted an age, that no man can with safety be just and follow his conscience; if it be otherwise, we must hazard our safety to preserve our integrity.

"And to speak more particularly as to Sir George Wakeman's trial, which I am neither afraid nor ashamed to mention, I know that all honest and understanding men in the kingdom [speaking generally] are thoroughly satisfied with the impartial proceedings of that trial, taking it as it is printed, which was done without the perusal of one line by me, or any friend of mine. Though, by the way, I wonder by what authority that arbitrary power was assumed, to forbid any friend of mine the seeing of it before it was put out. However, as it is, I will appeal to all sober and understanding men, and to the long robe more especially, who are the best and properest judges in such cases, as to the fairness and equality of that trial.

"For these hireling scribblers that traduce it, who write to eat, and lie for bread, I intend to meet with them another way, for they are only safe whilst they can be secret; but so are vermin, so long only as they can hide themselves. And let their brokers, those printers and booksellers, by

"I do acknowledge, many of the popish priests formerly were learned men, and may be so still, beyond the seas: but I could never yet meet with any here, that had other learning or ability, but artificial only, to delude weak women, and weaker men. They have, indeed, way of conversion, and conviction, by enlightening our understandings with a faggot, and by the powerful and irresistible arguments of a dagger: but these are such wicked solecisms in their religion, that they seem to have left them neither natural sense, nor natural conscience; not natural sense, by their absurdity, in so unreasonable a belief, as of the wine turned into blood: not natural conscience, by their cruelty, who make the Protestants' blood as wine, and these priests thirst after it; 'Tantum religio potuit suadere malorum?'

"Mr. Coleman, in one of his letters, speaks of routing out 'our religion and party;' and he is in the right, for they can never root out the Protestant religion, but they must kill the Protestants. But let him and them know, if ever they shall endeavour to bring popery in, by destroying of the King, they shall find, that the papists will thereby bring destruction upon themselves, so that not a man of them would escape; 'Ne catulus quidem relinquendus.' Our execution shall be as quick as their gunpowder, but more effectual. And so, gentlemen, I shall leave it to you, to consider, what his letters prove him guilty of directly, and what by consequence; what he plainly would have done, and then, how he would have done it; and whether you think his fiery zeal had so much cold blood in it as to spare any others? For the other part of the evidence, which is by the testimony of the present wit-

whom they vend their false and braded ware, look to it; some will be found, and they shall know that the law wants not power to punish a libellous and licentious press, nor I a resolution to execute it."

Very few of his successors to the time of Lord Tenterden, who could not put two sentences together, could have expressed themselves so well. Jeffreys was a mere savage, with no more eloquence than probity.

nesses, you have heard them. I will not detain you longer now, the day is going out."

Mr. Justice Jones.—"You must find the prisoner guilty, or bring in two persons perjured (*k*)."

Soon after the murder of Coleman,—Green, Berry, and Hill, were indicted for the murder of Sir Edmundbury Godfrey. They were convicted on the uncorroborated testimony of Praunce and Bedloe, who described themselves as accomplices in the murder. Hill proved, by an unshaken witness, (a lady of condition), the falsehood of what had been stated concerning himself. Scroggs, finding she was not to be confused, said to her, "You told me just now you were not upon confession, and I tell you now you are not." Other witnesses, who, in spite of the indecent interference of Scroggs and Dolben, (a judge apparently as bad as Scroggs, but without his talents), shewed the falsehood of Praunce's evidence. It was proved, that Praunce had told, with regard to this very transaction, falsehood after falsehood. The sentinel at Somerset House, where Praunce had laid the scene, named Trollop, proved the statement of Praunce untrue in that respect. Another witness proved, that he had heard Praunce deny all that he had sworn. One woman, Mrs. Hill, distinguished herself by her courage and humanity: "He (Praunce) knows," she said, "all these things are false as God is true; and you will see it declared hereafter, when it is too late;"—a prediction that was literally verified, when, in seven years, Praunce pleaded guilty to perjury committed on this very trial. Scroggs, in summing up, surpassed his former efforts in wickedness and ability:—after a most unfair recapitulation of the evidence, he told the jury, "that for my own part, I must put it in the Litany, that God would deliver me from the delusion of popery, and the tyranny of the Pope; for it is a yoke which

(*k*) State Trials, vol. 7, p. 69.

we have known freedom cannot endure, and a burden, which none but the beast that was made for burden will bear; so I leave it to your consideration." Before this he had told the jury, "It is no argument in the world against Mr. Praunce, that he should not be believed, because he was a party to the crime, or because he after denied what he first said." He then goes on, "It is not a good argument to say, that he is not to be believed because he denied what he once said, for he tells you he had not his pardon . . . . . But how short was his denial, and how quick was his recantation, for he denied it before the King, not upon oath; he swore it upon oath, he denies it upon his word only!!! . . . . . And these two men, Praunce and Bedloe, had not any confederacy together, *for* they both swear they never had any converse at all . . . . And I see nothing incoherent in Praunce's testimony: I would not urge this so, if I were not satisfied in my own conscience that his relation is true." "Your priests," he said, addressing the prisoners in his charge, "though they preach up freedom of will, allow none to the understanding." The jury speedily brought in a verdict of guilty. "Gentlemen," said Scroggs, "you have found the same verdict that I would have found if I had been one with you; and if it were the last word I were to speak in this world, I should have pronounced them guilty;"—"at which words the whole assembly gave a great shout of applause." Such was the love of fair play peculiar to this country, and such the humanity, wisdom, candour, and justice of the ancestors to whom, in this practical nation, we are so fond on all occasions of appealing. There can be no stronger proof, that our civilization was then most superficial, and that one of our greatest writers was right in saying, that we were "the latest barbarous, and the last civilized or polished people in Europe."

The prisoners were executed, calling upon God and angels to witness their innocence,—and in the year 1687,

Praunce admitted (*l*), before a Court of justice, that they were innocent, and that every syllable of the evidence on which they were convicted was false. Among other peculiarities of this trial, was the evidence of Titus Oates. "My Lord," said the Attorney General, "I call this gentleman to prove what examinations Sir E. Godfrey had taken, and what

(*l*) "An account of the proceeding to sentence against Miles Praunce for wilful perjury, who was sentenced in the Court of King's Bench, Westminster, upon a conviction by his own confession, on the 15th of June, 1686, in wilfully forswearing himself at the trials of Robert Green, Lawrence Hill, and Henry Berry, &c., in relation to the murder of Sir Edmundbury Godfrey.

"Miles Praunce, a silversmith, having been, the last Easter Term, arrainged upon an information of wilful perjury, exhibited against him in the Court of King's Bench, for wilfully forswearing himself against Robert Green, Lawrence Hill, and Henry Berry, &c., in relation to their murdering Sir Edmundbury Godfrey, and for which, upon his oath, &c., they were executed for the said murder at Tyburn; and he confessing himself guilty of the perjury specified in the same information, was, on Tuesday, the 15th of this instant June, again brought to the Court of King's Bench, to receive his sentence. The Court having a while considered the heinousness of the crime, and putting him in mind of it, told him, it was well he was so sensible of his offence, it being so great a one, as to extend to the taking away the lives of innocent persons, which did aggravate it; though one that had before him been found guilty of two notorious perjuries in that Court, continued obstinate to the last, and, for aught appears, has not hitherto shewn any remorse. Yet seeing he [meaning the prisoner] was sensible of his crime, and had confessed it, the Court had considered, and would have some compassion on a true penitent. The sentence of the Court was, 'that he should pay a fine of 100*l.* to the King; that he should appear before each Court in Westminster Hall, &c., with a paper upon his forehead, expressing his crime; that on Monday next he should stand at Westminster in the pillory, between the hours of eleven and one, for the space of one hour; on Wednesday the like, before the Exchange, and on the following Monday at Charing Cross; and he was likewise sentenced to be whipped from Newgate to Tyburn, and he to continue in prison until all was performed.'

"Praunce, upon the aforementioned exhortation, declared, that his last confession was the truth, and that he was very sensible of, and sorry for what he had done; upon which the Court desired God to continue him so."

was his own opinion of himself about them;"—evidence that was clearly inadmissible. *Lord Chief Justice.*—"Mr. Attorney, I suppose the use you make of it is this, to shew that that (the taking these examinations) might be one of the motives to these persons to do this act, because he was forward in the discovery of the plot."

Att. Gen.—"It is so, my Lord."

Lord Chief Justice.—"Come, Mr. Oates, pray tell your knowledge?"

Oates then proceeded to give a long, rambling history of conversations between Godfrey and himself.

Att. Gen.—"Did he (Godfrey) tell you he was dogged?"

Oates.—"Yes, he did. I did then ask him," &c.

The prothonotary, Mr. Robinson, was next sworn, to tell the jury "what discourse he had with Godfrey;" and he accordingly gave a long detail of Godfrey's conversation with him.

Att. Gen.—"Did he tell you, Sir, that he did believe he should be the first martyr?"

Robinson.—"Yes, he did say upon his conscience he did believe he should be the first martyr."

The only possible object of such evidence must have been to exasperate the jury.

The next victims were, Thomas Whitebread, John Fenwick, William Harcourt, John Gavan, Antony Turner, and James Corker,—all Roman Catholic priests.

Scroggs and North were the Chief Judges, and Sir Cresswell Levinz the chief prosecuting counsel. Oates appeared again, and told a series of obvious falsehoods; on cross-examination he began to flounder, but was upheld by the Court,—North, *who did not believe one word* (*m*) of what Oates said, desiring

(*m*) His brother tells us, that North "was not a little concerned to see men noised out of their lives as the twelve priests were;" and yet he took an active part in the murder of these very men. Is there on record any instance in any country of such infamy in *all* those in any way concerned

the prisoners, whose lives depended on proving the falsehood of Oates's statement, "not to give the King's witnesses ill words." The prisoners proved, by twenty-four irreproachable witnesses, that Oates was at St. Omers during the time, three or four months, that he had sworn he was in England watching the plot. "Our witnesses," said Gavan, "are to be regarded for their number and their innocency, especially since those against us give no reason nor convincing arguments for what they affirm." Scroggs summed up in his usual strain. His first observation was a powerful one, and applied to a remark of one of the prisoners, who had said, weakly enough, that there was nothing against them but talking and swearing. "Mr. Fenwick says to all this, Here is nothing against us but talking and swearing. But for this he has been told, (if it were possible for him to learn), all testimony is but talking and swearing. For all things, all men's lives and fortunes, are determined by an oath, and an oath is by talking, kissing the book, and calling God to witness the truth of what is said . . . therefore what a vain thing is it in Mr. Fenwick to seem to triumph by saying, 'there is nothing against us but talking and swearing.' There is nothing against them but evidence and proof of men upon oath, and their reasons, the truth is, are very trifles; they defend their lives as they do their religion—with weak arguments and fallacious reasons." He then, after repeating Oates's evidence, says, "But, say they, this is but talking and swearing—very fine! and the St.

in the administration of justice? In this case North browbeats and interrupts the prisoners, whom he knew to be innocent, and encourages the perjured murderer, who was endeavouring to take away their lives. Do not the worst ruffians and the blackest crimes, openly committed in heat of blood or under strong temptation, bleach before such cold blooded, cowardly, calculating, selfish wickedness? And, to complete his character, this is the man who was so much annoyed at the story, that he had ridden a rhinoceros to Westminster Hall. If he had done nothing worse, he would not have been on a level with some of the worst characters in history.

Omer youths' (who had given evidence for the prisoners) is talking but not swearing (*n*): ay, but then their numbers are not so many. That, gentlemen, I leave to you, *for both cannot be true*,—the testimony of Mr. Oates and the witnesses that he had to back himself withal, and to prove himself inconsistent with what the young men say, that he was at St. Omers." "I am glad to see a gentleman here whose face I never saw before, and that is Mr. Dugdale." And then to inflame the prejudices of those he was addressing, "I will challenge all the papists in England to satisfy any man that hears me of one piece of evidence, which will turn every man's heart against the papists; if so be they murdered Sir Edmundbury Godfrey, the plot, even by that, is in a great measure proved upon them by that bare murder." Here one of the prisoners remarks, "It is not alleged against us." *C. J. Scroggs.*—"It is evidence of the plot in general." The Chief Justice then repeats and insists on the murder of Godfrey, which had no more to do with the case, against those whom he was trying, than the murder of Thomas à Beckett.

The following passage from his charge is more like what (*mutatis mutandis*) might have been bellowed by some raving priest, in the days of the League, from a pulpit in Paris, than what should have been uttered by a judge assisting a jury to distinguish between truth and falsehood (*o*):—

"We have a testimony that, for promoting your cause, you would not stick at the Protestants' blood. You began with Sir E. Godfrey, but who knows where you would have made an end? It was this one man you killed in his person, but

(*n*) Because the witnesses for the prisoner could not be sworn in this practical country.

(*o*) And it should be recollected, that all these murders were committed by Scroggs, and assented to by North, solely for the sake of place and profit. Scroggs was not blinded by fanaticism; North, as his brother tells us, disbelieved the witnesses.

in effigy the whole nation. It was in one man's blood your hands are embrued; but your souls were dipt in the blood of us all. This was a handsel only of what was to follow; and so long as we are convinced you killed him, we cannot but believe you would also kill the King. We cannot but believe you would make all of us away that stand in the way of your religion,—a religion which, according to what it is, you would bring in upon us, by a conversion of us with blood, and by a baptism with fire. God keep our land from the one, and our city from the other!"

He consummates his iniquity by reminding the jury, that other juries had convicted on the same evidence, and that to acquit the prisoners would be to falsify former verdicts. The prisoners shared the fate of their predecessors, and were all convicted. All the infamy of this proceeding does not rest upon Scroggs or the juries; the people claim their share. In Langham's trial, which followed these, Lord Castlemain (who afterwards escaped so narrowly himself) thus addressed the Bench, "My Lord, I come to wait upon your Lordship and the Court, to give you an account that some of the witnesses that were summoned for the prisoners are so beaten and abused without that they dare not come to give evidence, for fear of being killed." The judges, of course, professed the greatest indignation, and went on with the work of death. Oates had been detected on another point. He had sworn that fifty people had met together in a room in a particular tavern. The mistress of the tavern stated that there was not a room in it that would hold twenty people, and that she had never seen Oates in her life. Langham again attacked Oates on the evidence he had given at Ireland's trial: North, Scroggs, Pemberton, all interfered. *North.*—"It is not fit he should be examined about it." *Pemberton.*—"This is a foreign matter; it cannot be here." *Scroggs.*—"He has given you no occassion to ask this question

at this trial . . . Do you think it reasonable that Mr. Oates should be examined in your trial concerning what he said of Ireland being here in August." Now all this eagerness was shewn to prevent the manifest perjuries of Oates from being brought home to the recollection of the jury. Langham attempted again to shew that Oates must have perjured himself when he swore that he had been out of purse six or seven hundred pounds. Scroggs again prevents him, "Look you, he gives you an answer to which he is not the least bound; he says he is out seven hundred pounds: that is not any evidence, nor is the jury to notice it. Would you have him give us an account how he came by that money?" "My Lord," said the prisoner, "I ask the question for this reason, if he was so indigent, it cannot be imagined that any man would trust him with such a sum unless to give evidence." Langham offered to prove that Bedloe had perjured himself, by the Journal of the House of Lords: this evidence was rejected. *North.*—"Can you think that can be used as evidence here?"

Scroggs puts questions to Langham during his defence; and when he insists on the witnesses whom he had brought to prove the perjury of Oates, North (who seems hitherto to have escaped much of the infamy that is his due), in order to destroy the life of a man whom he knew to be innocent, interrupts him with the remark, "They are all papists, and speak in a general cause;" an observation that shews that humanity did not prevent him from taking as active a part as Scroggs in the murders that were every day committed. Scroggs sums up, replying upon every point of the prisoner; telling the jury that Catholics were not to be believed,—but admitting that, if they could be believed, Langham was innocent: "It is true, if we were certain that what these young men spoke, were indeed so as they say, it is impossible for Mr. Oates's testimony to be believed. If I were satisfied that

really and truly Mr. Oates was not here, I could no longer confide in the man, nor find Mr. Langham guilty." After this he says, "God defend that innocent blood should be shed! but God defend us from popery and from popish plots, and from the bloody principles of papists! For I must tell you the plot is proved as plain as the day, and that by Oates; and, further, Oates's testimony is confirmed by that which never can be answered." North then interfered to strengthen the testimony of Oates, which he knew to be false, by putting in a document which he knew was not evidence. This was a letter, in the hand of a Mr. Petre, found among another man's papers, not addressed to any one, and never sent. Where is the moral difference between North and a man committing murder for hire? Langham was found guilty, and Jeffreys, then Recorder, passed sentence on him and Whitehead, and the rest. Jeffreys was a man far inferior in ability to Scroggs, and owed his importance to nothing but a wickedness unrivalled even in that age, which makes him an exception to the common course of nature and humanity.

Hitherto the triumph of Oates and his accomplices had not been interrupted. But the tide was soon about to turn. Scroggs had received a hint (*p*) that his activity in procuring convictions was by no means likely to secure the favour of his Sovereign; and the protestations of innocence from so many dying victims, as well as the gross improbabilities and obvious contradiction in Oates's story, began to produce some effect, even upon the obtuse understandings of the English vulgar—a word that included then, as it does now (*q*), many of the great as well as of the small among us. The first check that Oates and Bedloe met

(*p*) North's Examen, p. 568. "The occasion of his (Scroggs) conversion was this. Scroggs asked, North, as they were coming together from Windsor, if Shaftesbury had really any interest with the King? No more, said North, than your footman has with you. This sunk into the man, and quite altered the ferment, so he was from that time an altered man."

with was on the trial of Sir George Wakeman, the Queen's Physician. It is true that Oates outdid himself in the falsehoods which he attested on that occasion. He swore that the poor Queen had conspired to destroy her husband, and had smiled upon him (Oates), supposing him leagued with the assassins while he was waiting in her antechamber. He contradicted himself repeatedly as to his knowledge of Wakeman's handwriting; and it was proved by the evidence of a Protestant witness, Sir Philip Lloyd, that Oates had said, long after the time when he described himself as privy to the plot, before the Privy Council, "God forbid I should accuse Sir George, for I know nothing against him." When called upon to explain this language he accounted for it by saying, that he was quite exhausted with fatigue. This answer had served his purpose before, but now it was unavailing. The jury acquitted Sir George Wakeman. Sir Thomas Gascoigne, an aged gentleman of Yorkshire, also escaped, in spite of the savage efforts of Serjeant Maynard, and of three judges, Jones, Dolben and Pemberton, to take away his life. The Earl of Castlemaine was next acquitted, and his trial contains a decision, to the grotesque absurdity of which (though surpassed by another case which I shall quote presently) Rabelais, in his wildest mood, has never reached, nay, even the gravity of those whom Meeson and Welsby have made immortal, has but seldom attained to such a height. A wretch called Dangerfield, who had been whipped, pilloried, convicted of passing false coin, and of other felonies, was produced against Lord Castlemaine. The prisoner objected that his evidence could not be received. "My exception is, that he was convicted of felony, that he broke prison, and was outlawed; besides this, he is a stigmatick, has stood in the pillory, and was burnt in the hand." The facts were not denied or disputed by the opposite counsel, but they produced a pardon for some offences, and his burning in the hand as an answer to others, and contended that the parchment and wax of the one, and the mark made by the

other, removed the moral objection to his evidence. How the King's arms, and the burning, produced veracity, the counsel did not state. Even Scroggs seemed a little scandalized. "A pardon does not make a man an honest man; it takes off reproaches." The point was about to be argued, when Scroggs, who wished the prisoner to escape, and thought that delay might injure him, suggested that he should object to the credibility of Dangerfield, and not to his admissibility as a witness, and his remark shews the kind of witness employed without scruple by the Maynards and the Jones's, "if he be capable of being a witness, supposing it so, yet I must say you may give in the evidence of every record of conviction of any sort of crimes that he has been guilty of, and they shall be read. They say, last day (he had given evidence before), THERE WERE SIXTEEN; if they were an hundred they should be read against him, and they shall all go to invalidate the credit that is to be given to any thing he can swear." Then followed a discussion which Hottentots or Samoyedes might blush to read in their judicial annals as to the effect of a pardon. Justice Jones makes a remark quite worthy of the argument, "a pardon makes him liber et legalis homo, for if a man may *wage battel!* (A.D. 1680) he is liber et legalis homo." Jeffreys, the Recorder, whose thirst for innocent blood was awakened, remarks, "My Lord Hobart says (*q*), a pardon takes away the *guilt*;" Scroggs exclaims, with much reason, "It takes away *guilt*, so *far as he shall never be questioned*, but it does not set a man as if he had never offended. It cannot in reason be said a man guilty of perjury is as if he had never been perjured." Then another of the judges returns

(*q*) This was the sage who remarked, that special demurrers, that is, objections that *ex vi termini* have nothing to do with the merits of a case, and that may ruin the most honest suitor without any fault of his, "exist that the law may be an art;" which is, perhaps, the reason why they were so anxiously preserved by the Law Reformers, 1830, who, I suppose,

to the favourite cant, "no man can wage battel but he that is liber et legalis homo." The Solicitor General exclaims, in great delight, "here is a book that says he shall wage battel." In the mean time, Scroggs made some very severe remarks on the witnesses. Brother Raymond was sent to consult the Court of Common Pleas,—the result, than which Moliere has described nothing more exquisitely ridiculous, was thus announced. I quote it at length, as it shews (for it continued substantially to be the law to our own time), what is the effect of allowing attornies to make judges and judges to make law.

Lord Chief Justice.—"I will tell you what my brethren's opinions are; he hath put to them on both accounts, that he was convicted of felony, and burnt in the hand for it; that he was outlawed for felony, and hath a general pardon. They say they are of opinion, that a general pardon would not restore him to be a witness after an outlawry for felony, because of the interest that the King's subjects have in him. But they say further, that where a man comes to be burnt in the hand, there they look upon that as a kind of a more general discharge than the pardon alone would amount to, if he had not been burnt in the hand. *They say, if he had been convicted of felony,* AND NOT BURNT IN THE HAND, *the pardon would* NOT *have set him upright; but being convicted* AND BURNT IN THE HAND, *they suppose he* IS *a witness.*" (*s*)

Who can help exclaiming with the great orator, "tame and feeble Cervantes!" and this principle would be law now had not Lord Denman by an act of Parliament, which adds to the many claims he has upon the gratitude and admiration of the country, put an end to a doctrine so revolting to common sense. The reader will not, I hope, suppose that the absurdity on which I insist, is that of excluding or admitting the witness—arguments may be urged on either side—I own that, in my opinion, the argument that admits the evidence outweighs

very much those by which it was excluded. But to say that the question whether the witness is to be depended on or not, turns upon the single point of whether a red hot poker has been applied to a particular part of his body is such preternatural folly that whatever may have been argued among schoolmen, nobody but an English lawyer could in civil life have been found so insensible to ridicule, as to defend or act upon it (*t*).

Castlemaine was acquitted. The judges gave him clearly to understand before the summing up that he was safe. Scroggs told the jury that two witnesses were necessary to establish the charge, and that if they did not believe Dangerfield there would be but one. "I am of opinion," he said, "(but if my brother's opinions are otherwise, I would willingly be contradicted in this matter), that there is but one witness, if you only believe one, and I am sure one is not sufficient." With regard to Oates, he told the jury, "that they were to weigh matters among themselves, as they carry probability or not, or else the confidence of a swearer shall take away any man's life." He then points out the improbabilities of what Oates had said, ending with "how far this oath is to be taken or not I leave to your consideration," "nothing infamous is proved against Mr. Oates." As to Dangerfield, "they have produced against him six enormous crimes. Had Dangerfield only been concerned in this treason, and so come in as a witness, I should have thought him a very competent witness, but they prove crimes of another sort and nature, and whether the man of a sudden be become a saint by being made a witness, I leave that to you to consider." Such a summing up would have saved many an innocent victim.

Meanwhile, how completely the most ordinary dictates of good nature, good sense, and probity, were trampled on by the

(*t*) 6 & 7 Vict. c. 87. The doctrine stated in the text was firmly established by Lord Holt, Crosby's case. See Phillipps and Amos,

public men of that day, may be judged of from the anecdote (*v*) Sir W. Temple relates of Halifax, who, though I think an eloquent writer has exaggerated his merits, was undoubtedly a man far superior in virtue and talent to most of his contemporaries: "Lord Halifax and I had so sharp a debate at Lord Sunderland's lodgings, that he told me if I would not concur in points necessary, he would tell everybody I was a papist; and upon his affirming that the *plot must be handled as if it were true*, whether it were so or not, in those points that were so generally believed by city and country, as well as both Houses, I replied with some heat, that . . . . . I would have nothing to do with it; in other things I would be content to join them." Now, the cause of dispute was this; there was a law (*w*) of

(*v*) Memoirs, p. 506; Works, vol. 2, 8vo. ed., 1770. He is Pope's Bufo and Dryden's Adriel. Pope says of his conduct to Dryden,—

"Dryden alone, what wonder, came not nigh,
Dryden alone escaped his judging eye;
Yet still the great have kindness in reserve,
He helped to bury whom he helped to starve."

(*w*) "And be it further enacted by the authority aforesaid, that it shall not be lawful to or for any jesuit, seminary priest, or other such priest, deacon, or religious or ecclesiastical person whatsoever, being born within this realm, or any other her Highness dominions, and heretofore since the said feast of the nativity of St. John Baptist, in the first year of her Majesty's reign, made, ordained, or professed, or hereafter to be made, ordained, or professed, by any authority, or jurisdiction derived, challenged, or pretended from the see of Rome, by or of what name, title, or degree soever the same shall be called or known, to come into, be, or remain in any part of this realm, or any other her Highness dominions, after the end of the same forty days, other than in such special cases, and upon such special occasions only, and for such time only, as is expressed in this act; and if he do, that then every such offence shall be taken and adjudged to be high treason; and every person so offending shall for his offence be adjudged a traytor, and shall suffer, lose, and forfeit, as in case of high treason." 27 Eliz. c. 2.

This is an admirable commentary on Mr. Southey's grave declaration, that "the Church of England is clear of persecution as regards the Romanists." This continued to be the law till the 31 Geo. 3, c. 32,—a curious monument of legislative wisdom for a *practical* people. East's Pleas of the Crown: Burke's Speech at Bristol.

Elizabeth, passed in a time of real conspiracies and most imminent danger, by which every native Roman Catholic priest in England was liable to death as a traitor. This law had never been abrogated, but it had been suffered to sleep in a country where the King's mother, the King's brother, and the King's wife were known Catholics. It was proposed by Halifax, in order to gain popularity for the government, that the Roman Catholic priests, who were living in full security, should be, without notice or warning of any kind, seized and punished under that law. Temple, accustomed to despotic governments, was shocked at such enormous cruelty, which no heathen emperor, in struggling against what he considered a dangerous innovation, ever surpassed, and which it was now proposed to exercise against the teachers of a religion still professed by the majority of Christian Europe, and not much more than a century ago (*w*), the Creed of England itself. Temple said, "that such a measure was wholly unjust, without giving the priests public notice by proclamation to be gone, or expect the penalties of the law, within a certain time." Much of his life had been passed abroad, and he was, though by no means a man of romantic virtue, confounded at the brutality, wickedness, and reckless injustice of English proceedings. But his proposal was rejected (*x*), and several

(*w*) "Her house not antient, whatso'er pretence
Her clergy heralds make in her defence;
A second century not half way run,
Since the new honours of her blood begun."

(*x*) In consequence of this infernal policy, a persecution was set on foot against the Catholics. Charles Herne was tried at Hereford Assizes for being a popish priest, under the 27 Eliz. c. 2. No other charge was brought or proved against him. Scroggs summed up fairly enough, saying, "I would not shed innocent blood, neither would I let a popish priest escape." He was acquitted. David Lewis was tried for the same offence before Judge Atkyns, at Monmouth. Atkyns is the man who received so severe a rebuke from Lord Stafford; and on this occasion he conducted himself to the prisoner with the greatest brutality. Lewis proved that two of the witnesses against him had said they would wash their hands in his blood, and make a pottage of his head. He was con-

priests were executed as traitors simply for performing Christian rites. When such was the conduct of the accomplished Halifax, who could not plead the study of the law as his excuse, can we wonder at the acts of the bestial Scroggs, and the earthworm North? they were not so criminal as he: the ruling motive of all alike was that selfishness which is, and has ever been, in this island as it was in Carthage, the bane of private and public life, which most public men profess, and some write moral treatises to defend, and each pursued according to the faculties that God had given him, with more or less regard to decency, the objects which that selfishness pointed out.

The English reign of terror was not yet over; the public thirst of blood was not yet slaked; one more victim was still to fall a martyr to the barbarous delusion of some, and to the unexampled wickedness of others. Hitherto juries had been the chief instruments employed, but that every class might participate in the crime, that the infamy might in the fullest sense of the word be national, the peers were those, who, sent to the scaffold, on evidence quite as absurd as any on which the mobs of Paris acted during the Revolution, not false only, but self-destructive and ridiculous, and completely refuted, a man whom any assembly might have been proud to number among its members. This was Lord Stafford. The fate of this nobleman illustrates most entirely the assertion, that in no despotic country of Europe, was innocence a more impotent defence than in England during the reign of the Stuarts, and under the doctrines of the English law. Lord Stafford, on the 25th of October, 1678, informed the House of Peers, that

and William Atkyns were convicted at Stafford of being priests, and executed. So was William Plessington, at Chester. So was Francis Johnson, at Worcester, 1679. Lionel Anderson, William Russel, Charles Parry, Henry Starkey, James Corker, William Marshal, Alexander Launden, suffered for the same offence, 1680. State Trials, vol. 7, p. 871. But how can one wonder at the cruelty and profligacy of the lawyers in

having heard of a warrant issued for his apprehension, he thought it right to surrender himself for trial. Nearly two years after his imprisonment began, (April 7, 1680), Lord Russell, and other members of the House of Commons, presented articles of impeachment against him. The charge against him was the same that had been brought against the other victims of Oates,—a traitorous conspiracy to destroy the government and to murder the King.

His trial began before the whole body of the House of Peers, of whom the Earl of Nottingham was Lord High Steward, on the 30th of November, 1680. Maynard (*y*) opened the case on behalf of the Commons, in an unfair and wicked speech. He was followed by Sir Francis Winnington and Treby. The managers divided the evidence into two branches; that relating to the general plot, and that relating to the plot in which Lord Stafford was supposed to be more immediately concerned. The witnesses called were, Smith, Dugdale, Praunce, Dennis, Tennison, Oates, and Turberville. Every law and rule of evidence was violated during a great part of their examination, as is shewn by the admission of the documentary evidence, namely, the records of the conviction of Coleman, Ireland, Perkins, Grove, and others, for high treason, other convictions for the murder of Godfrey, a copy of a conviction for endeavouring to suborn Bedloe to retract his evidence, and of another conviction of two persons for conspiring to asperse Oates and Bedloe; of course on the principles, then well understood, of our law, none of these documents should have been admitted. Jeffreys, though his coarseness was greater, seldom carried out the genuine brutality of the English bar of that day farther than Jones and Maynard. When the aged prisoner, whom the humanity of the English law deprived of counsel, except on matters of law, requested that his counsel might stand near him, to argue any point that might arise, these men, worthy of the school of Coke, insisted that they should

stand within hearing, not within prompting, lest they might suggest anything beneficial to the prisoner. "When there is cause," said the High Steward, "take the exception." Lord Stafford, at the close of the first day, asked for the depositions of Oates, Dugdale, and Turberville, that he might compare them with the evidence they had given. This simple request, founded on the plainest justice, was opposed by Maynard and his colleagues. Lord Stafford, much exhausted by his labours, requested the respite of a day to refresh his strength and to examine his papers. This was opposed by the managers for the Commons, and ultimately refused by the Court. Condemnation without trial would have been quite as just a proceeding.

Dugdale was contradicted, and his character proved infamous, by the most unexceptionable testimony. Sir Walter Bagot, a county member, the bearer of a name as ancient as the oaks on his estate, in whose blood affection to the English Church has run pure to the present age, proved that Dugdale had, when brought before him as a magistrate at Stafford, long after the time when he described himself conscious of the prisoner's guilt, utterly denied all knowledge of the plot. Similar testimony was brought against the other witnesses. But their evidence was such an affront to reason that no reasonable and honest man would attend to it, and on those who did attend to it demonstration of its falsehood would be flung away. The conduct of the audience was in keeping with the rest of the scene. The spectators shouted, and assaulted the witnesses for the prisoner, and interrupted the proceedings with yells of applause and laughter. The Lord Steward remonstrated. Lord Stafford said, "I thought I was in a Court of justice, and not at a cock-pit or in a theatre." The managers persevered in their insolent and brutal conduct. The prisoner made an admirable defence. A judge, one Atkyns, remarked, in giving his opinion on a point of law, that he gave it in that way lest, if Lord Stafford was acquitted, the verdicts already given, on the evidence of

Oates, Dugdale, and others, should seem erroneous. "The consequence would be, my Lords," said this true specimen of a lawyer of those days, "that those persons who were executed on those judgments have suffered illegally." He received from the aged prisoner a grave and dignified rebuke; "I hear a strange position; I never heard the like before. It is an argument which I hope will not weigh with your Lordships; for it is better that a thousand persons who are guilty should escape, than that one innocent person should suffer,—much more, then, that it should not be declared that such a judgment was not well given. I say nothing as to the rest, but this struck with me. I am sorry to hear a judge say any such thing, and though I am in such a weak and disturbed condition, I assure your Lordships my blood rises at it." More injustice was yet to be done; and the annals of the first Court of England were to be sullied by an act of brutality, of which the ruffians, who sent their victims to the guillotine in cartloads, would have been ashamed, and of which they were certainly never guilty. The prisoner, almost sinking under his many years and trying difficulties, with many apologies, saying that the shoutings and hootings of the rabble had so disordered him that he hardly knew what he said or did, asked that the clerk might read a paper while he rested for a short time. His request was opposed by those who represented an English House of Commons, and refused by an English House of Lords. Lord Stafford was obliged to read the paper himself. He was convicted of high treason. And when the horrible and torturing part of the sentence was remitted, so deep and wide was the stain of infamy inflicted on the collective English nation by every part of the proceeding, that Lord Russell questioned, in the House of Commons, this exercise of the prerogative; and the sheriffs raised obstacles to a compliance with it: at last, the House of Commons declared, that it would be "content" with the simple decapitation of a man, about whose innocence no doubt whatever

could have existed in the minds of the great majority of their body; and the evisceration of his living body was dispensed with. The populace, however, were more humane than their leaders. Easily misled they were, and always have been, but they had not, like Jones and Maynard, seared their souls to every generous emotion—by pedantry and the love of gain, by the incessant study and practice of the law, and the constant habit of committing in cold blood, and for reasons altogether arbitrary, the most atrocious murders. They were not governed by the fiendish calculations of Shaftesbury; nor were they, like Russell, exposed to the temptations which a far stronger intellect than he possessed, can alone enable a party leader to overcome. When the venerable and noble old man appeared on the scaffold, and repeated his protestations of innocency, instead of abuse and scurrility, expressions of sympathy and compunction– God bless you, my Lord! We believe you, my Lord!—burst on all sides from the repenting crowd around him, as many a rude voice faltered with emotion, and many a rugged cheek was wet with tears. The multitude, for once, was awed and softened by the sight of its own injustice; and the death of Stafford was fatal to the popish plot.

Even at this distance of time, it is difficult for anyone to read his trial without being affected, and impossible for any Englishman to think of it without being ashamed. There is something peculiarly exasperating to a generous nature in the cold blooded, pedantic, pusillanimous, and unmanly persecutions of the English law. To oblige counsel to stand at a distance from the prisoner, whom they were to assist in defending his life; to deny the prisoner a copy of the charge against him; to refuse an old man, sinking under fatigue, the voice of a clerk to read what he had written for his vindication; to compel him to go on with his defence the next day, in spite of his entreaties for a respite,—these are crimes which stamp a character of meanness and littleness on the law that

sanctions, and the men who commit, and the nation which endures them; and from which at any rate a country, convulsed by the ambition of the Guises and Colignis, the Richelieus and Mirabeaus, is always free. It is again characteristic of the principles on which the government of this country has been carried on, that though the injustice of the sentence passed on Stafford was soon universally admitted, the work of perjury was suffered to remain: and as national honour only, and not party interest, was concerned in its reversal, the attainder of Stafford was left untouched till the reign of George the Fourth. Amid the many execrable murders which disgrace the reign of Charles the Second, none, if every thing be considered,—the station of the judges, the gross and palpable perjury on which they acted, the innocence and touching conduct of the prisoner, the savage virulence of the managers for the Commons, the partiality of the Lord High Steward, the ill treatment of the witnesses, the yells of the spectators during the defence of the prisoner, the opposition made in Parliament to prevent the good and venerable old man's entrails from being torn out of his living body, and the tardy reversal of a sentence admitted to be unjust,—are more eminently and completely disgraceful to the whole English nation than that of Viscount Stafford.

Before I proceed to give an account of the blood judicially shed in retaliation for the popish plot, I will mention two trials,—the first, that of Plunket, the titular Primate of Ireland; the second, that of Sir Miles Stapleton. The execution of Plunket puts the character of the merry monarch, and his urbanity, in their true light. Plunket was an excellent, high minded, and moderate Roman Catholic. Lord Essex told Burnet he was a wise and sober man, averse to the violence of the Talbots (*w*). He was convicted on the evidence of priests, whom he had censured for misconduct as their ecclesiastical

superior, on a charge utterly ridiculous. He was offered his life if he would join in the accusation against others: this he indignantly refused to do. "The witnesses against him," says Bishop Burnet, who here at least is a witness without exception, "were brutal and profligate men, yet the Earl of Shaftesbury caressed them much." Dolben, who seems never to have lost an occasion of displaying wickedness and folly,—Jones, and Pemberton were his judges. I cannot help thinking, that if a late noble Biographer of the Chief Justices had attended to this trial, he would have spoken of Pemberton in terms of greater abhorrence than he has done. Plunket was convicted. Charles knew, beyond all doubt, that he was innocent; yet, after the dissolution of Parliament, when he was under no apprehensions of any kind from his enemies, and the danger of the popish plot had passed away, the good natured monarch did not think it worth his while to save the life of Plunket (*x*).

Sir Miles Stapleton was tried in Yorkshire for high treason as a conspirator in the popish plot. Sir Thomas Stringer, in opening the case for the Crown, made a speech of transcendant absurdity. The evidence was ridiculous. Yet so anxious were the judges, Dolben and Gregory, to shed blood that they exerted themselves to obtain a conviction,—Baron Gregory assuring the jury "that there was full evidence against the prisoner." The jury, however, found their neighbour not guilty.

Another trial which deserves to be mentioned, as it shews the measure of the liberty which England then enjoyed, is

(*x*) Or rather did think it worth while to sacrifice him. "The very witnesses which had been imported from Ireland to confirm the popish plot, all at once made a short turn, and swore high treason against their importers. *And that they might open their evidence with so much the more credit*, Plunket, the titular Primate of Ireland, *was executed* at Tyburn for high treason, *at the very crisis* that Rouse, Colledge, and the Earl of Shaftesbury were committed. For the two former were committed June 29; Plunket was executed July 1; and his Lordship was committed July 2, 1681." Somers's Tracts, vol. 1, p. 134.

that of Henry Carr. He was indicted for publishing a certain false, scandalous, and malicious book, "The Weekly Packet of Advice from Rome." The nature of the evidence, and the manner in which it was elicited, may be judged of from the following extract. The object was to prove that Carr was the author. Sir Francis Winnington and Williams were counsel for the defendant. Jeffreys, the Recorder, led the prosecution.

Stevens, the printer, was called:

L. C. J. Scroggs.—"Did Mr. Carr own he writ the packet; had you any from him?"

Printer.—"I had several from him."

L. C. J.—"Of whom else had you any?"

Recorder.—"Besides Carr?"

L. C. J.—"You are upon your oath: from whom ever had you any besides?"

Sir F. Winnington.—"Will your Lordship give me leave to ask him one question? Can you swear that any that came from him contained the matter in that book? Was it the matter or words?"

Recorder.—"Do you believe it?"

Sir F. Winnington.—"Good Mr. Recorder, let me alone. Can you say it is the very matter contained in that paper?"

Printer.—"I can't say that."

L. C. J.—"It is not an easy matter for a man to remember the matter of a paper that is writ on all sides. He swears that they had several; and that they had none, though he printed them, from any but him or his order. This question Sir Francis Winnington asks, Had you this particular paper from him? He cannot swear it was the same he had from him; but he does swear all the Weekly Intelligences were from him or his order: he does not swear for the matter of this book, which no man will do; but he does swear that these papers were always by him or his orders, and that several were received from him."

Mr. Williams.—"Had you ever a paper from Carr's hand, or no?"

Printer.—"We had few from his own hand."

Mr. Williams.—"Had you any?"

Printer.—"I can't remember."

L. C. J.—"Had you any? You are upon your oath."

Printer.—"My Lord, I can't remember."

L. C. J.—"Had you one, or two?"

L. C. J.—"Have you talked with Carr?"

Printer.—"Yes, my Lord."

L. C. J.—"Now I shall have you; for I do believe you are an honest man. Did Carr ever own himself to you to be the author of this book, or any of these papers?"

Printer.—"My Lord, as I said in the other case, so I say in this; I had no occasion to dispute it, I took it for granted."

L. C. J.—"Have you ever heard him own it?"

Printer.—"I have heard him deny it."

L. C. J.—"How did you come to take it for granted that he was the author, when he did once deny, but never owned it? Answer me that question, and thou shalt be a brave man."

Printer.—"My Lord, there was never occasion for that discourse."

L. C. J.—"Look you, Sir, you must answer me in a way agreeable to common reason and understanding. Why did you say just now, you took it for granted that he was the author, and yet you say he hath denied it and never owned it? Why should you then believe he was the author?"

Printer.—"I don't say, my Lord, he never owned it."

L. C. J.—"What tricks we have in this world!"

. . . . .

L. C. J.—"It is hard to find the author; it is not hard to find the printer: but one author found is better than twenty printers found."

Mr. Williams.—"My lord, I will ask this man a question. Upon your oath, who brought you that writing?"

Printer.—"What writing?"

Mr. Williams. — "That by which it was printed: who brought you that paper?"

Printer. —"I don't remember particularly I had any of Mr. Carr himself."

Mr. Williams.—"Can you name the person that brought this paper, or any one person that brought any one paper?"

Printer.—"There was a little boy."

L. C. J.—"He says he was Carr's boy, and that he came from him; this I speak to the jury: and I promise you this, if my life and fortune were at stake, I would be tried by this jury at the bar, and would do in this as in all cases. Mr. Carr is looked upon as the author of this book; that it either came from him or by his order, his boy [he can remember nobody else] did bring it. This is now remaining only: are you sure Mr. Carr sent him? Saith he, we talked with Mr. Carr several times."

Mr. Williams.—"Did Carr at any time deny he was author or publisher of it?"

Printer.—"He hath at some times."

Mr. Williams.—"What did he deny?"

Printer.—"That he was the author."

Mr. Williams.—"Of what book?"

Printer.—"Of the Packet."

L. C. J.—"Did he deny he was the author of this particular book for this week, or deny it in general? Did he deny it in general that he was the author of that book that is called 'The Packet of Advice?'"

Printer.—"I have heard him say sometimes that he was not the author."

Recorder.—"And sometimes what?"

Printer.—"I have heard him say some time or other that he was not the author."

Recorder.—And what else?"

. . . . .

Mr. Williams.—"Who directed you to print them? Did

Man.—"I can't tell; I am a servant in the house."

L. C. J.—"I will assure you, a 'non est factum' can't pass at this rate."

Justice Jones (*x*).—"WHO DID YOU TAKE TO BE THE MAN THAT SENT YOU ALL THE PACKETS?"

Man.—"I very seldom took any, because I was not always in sight."

L. C. J.—"Who did you understand?"

Man.—"I understood they came from Mr. Carr."

L. C. J.—"Have you any more? Read the words in the information."

. . . . .

L. C. J.—"Really, gentlemen, I thought not that this had been a cause of that moment that now I find it. For their very disturbance hath altered it from Mr. Carr's to a public concern.

"But then, is he the author and publisher of this particular book? I had rather Mr. Carr, with all his faults about him, and his hummers, should go away with applause, and have him found not guilty, than do him wrong in one circumstance; for I come to try causes according to the truth of fact; I come

(*x*) This seems to have been the model adopted by the military judges in a late court martial. The object being to know, whether a particular purpose was or was not communicated to Captain Douglas, the witness, a boor of extreme stupidity, and speaking a barbarous patois, was asked by the Court a leading question: Did you ask Captain Douglas whether he knew if there had been ball firing on the 5th? Ans. I asked him if he knew who had done it. Question—[by the gentleman in the guards, who, unhappily I must say for Captain Douglas, supplied, on this trial, the place of the privy councillor and experienced lawyer, filling then the lucrative and important office of Judge Advocate]—*Done it! what did you mean by had done it?!!!!* This question was objected to, and deliberately allowed by the Court; which, doubtless, would have looked on a civilian, who (relying on the light of nature) should give an opinion on the evolutions of a regiment at a review (not quite so difficult a matter as to decide a point of law), as insane. Thus ignorance may be as mischievous as corruption; for in *this* trial neither Jones nor Scroggs put any question that was worse, or indeed so bad.

not to plead on one side nor another; not to condemn men that are innocent, nor to acquit them if they be guilty. Now it remains for you to consider what proofs you have as to this particular book against which the information lies; and that is the printer himself, who is one of the best sorts of evidence that can be had: for you very well know that evidences of fact are to be expected according to the nature of the thing; that is, forgery is not to be proved so plainly, as to expect witnesses as you do at the sealing of a bond; for men do not call witnesses when they forge a thing. Therefore, in things of that nature, we are fain to retreat to such probable and conjectural evidence as the matter will bear. I believe some of you have been of juries at the Old Bailey, and that even for men's lives have very often not a direct proof of the fact, of the act, or of the actual killing; but yet you have such evidence by presumption as seems reasonable to conscience. If there be a known case in men's lives, certainly that should govern in offences, and especially when offences are of a nature that reflect upon the government.

"When, by the King's command, we were to give in our opinion what was to be done in point of the regulation of the press, WE DID ALL SUBSCRIBE, THAT TO PRINT OR PUBLISH ANY NEWS-BOOKS OR PAMPHLETS OF NEWS WHATSOEVER IS ILLEGAL; THAT IT IS A MANIFEST INTENT TO THE BREACH OF THE PEACE, AND THEY MAY BE PROCEEDED AGAINST BY LAW FOR AN ILLEGAL THING. Suppose now that this thing is not scandalous, what then? If there had been no reflection in this book at all, yet it is *illicite*, and the author ought to be convicted for it. And that is for a public notice to all people, and especially printers and booksellers, that they ought to print no book or pamphlet of news whatsoever without authority" (*y*).

The prisoner was convicted.

This was the evidence thought sufficient by juries, and this

(*y*) State Trials, vol. 7, p. 1127.

the constitutional law promulgated by the Bench. These were the *practical results of the theory*, that instead of a code *or written law*, it is better to trust to the unwritten law, which the judge (no matter who) may think proper to pronounce, and which then becomes the common law of England. No longer contented, like their predecessors, in the time of Charles the First, to deceive the understandings of the people and to supplant their freedom, Scroggs and Jeffreys held up (such was the abject condition of the multitude) the intended chains and fetters, and declared the resolution to enslave.

As a sort of isthmus which connects the blood shed on account of the Popish, with the blood shed for the Rye House Plot, the trial of Fitzharris deserves attention—it is one of those instances, which it is to be wished were more numerous, where a villain is "hoisted with his own petard," and caught in the meshes of the snare he laid for others. What the real intentions of Fitzharris were, it requires, amid the mist of falsehood in which almost every transaction of that age is involved, some penetration to discover. But the story paints the age. Fitzharris met Everard, a Scotch spy, and engaged him to write a libel against the King and the Duke. The courtiers said, that his intention was to make a merit of discovering the libel to the King; if this be true, he ought not to have been executed for treason, as this intention, however execrable, was not treasonable, and the libel was not treason in itself, but only evidence from which the jury might infer a traitorous intention. The Whigs said, that it was a scheme laid by the King to destroy his adversaries—that the libel was to be circulated among, and placed in the houses of the leaders of the opposition, who were to be seized while it was in their possession, when it would be evidence against them. Whichever of these schemes was the true one, it was prevented by the treachery and cunning of the Scotch spy, who outwitted his employer.

When Fitzharris brought his sketch of the libel with him to

Everard, Everard had posted Sir William Waller, a justice of the peace, and two persons more, behind the hangings of his room—"haud minus turpi latebrâ quam detestandâ fraude"—to witness what took place. Fitzharris, after some conversation, settled the libel, and left it, with his instructions, in keeping with Everard. A warrant was then obtained for the arrest of Fitzharris, who, finding himself in jeopardy, turned round to the popular party. He declared that the Court had employed him to write the libel, to send copies of it to the leaders of the Whigs, who were to be arrested the moment they received them, and to be arraigned for a conspiracy, of which the libel was to be evidence. Meanwhile the King sent him to the Tower, and ordered him to be proceeded against for treason: in order to prevent his trial the Commons sent up an impeachment against him to the Lords. The Lords (*y*) most unjustifiably rejected the impeachment, on the ground that Fitzharris was a commoner. The Commons voted this a denial of justice, and a breach of the constitution; they also voted that all who concurred in trying Fitzharris in any other Court were betrayers of the liberty of their country. The King, with great judgment, seized upon this opportunity to dissolve the Parliament. Fitzharris's trial was carried on. Scroggs had been disgraced, and Pemberton, a corrupt judge, but not quite insensible to shame, sat as Chief Justice, to try the cause. The scruples of the grand jury, who were staggered by the vote of the House of Commons, having been overcome, and a true bill found, the prisoner insisted on his right to plead to the jurisdiction of the Court. He was remanded, and an order made that his counsel, assigned to argue points of law in his behalf, should be allowed to see him. But the cruelty and injustice of the common law, as derived from that inexhaustible reservoir of folly and wickedness, the breasts of

(*y*) Blackstone's position, that a commoner can not be impeached for a capital offence, is untenable. Vol. 4, Ch. 19; Hallam's Const. Hist. vol. 2, p. 140.

Plantagenet, Tudor, and Stuart judges, were again exhibited. The counsel, Winnington and Williams, who were to object to the indictment, or to see if any objections would be taken to it, asked for a copy of it. *Winnington.*—"The indictment I have not seen that we are to plead to; and truly I think the course is to have a copy of the indictment."

L. C. J.—"We deny that, Sir Francis Winnington."

Pollexfen.—"If your Lordship please under these considerations to GIVE US LEAVE TO SEE the indictment WE ARE TO PLEAD TO, we may be better enabled to do our duty."

Winnington.—"Really, my lord, without a copy of the indictment, I know not how we shall plead as we should do."

Williams.—"My Lord, I move not for Fitzharris, but my own reputation. I cannot put my hand to a plea of this consequence unless I can see the indictment."

L. C. J.—"Why, gentlemen, see what you ask"—(as if it had been the most extravagant and unreasonable of all requests, that a prisoner should see the charge on the answer to which his life depended)—"I think you can shew us no precedent that ever a copy of the indictment was granted in high treason."

Sir F. Winnington.—"I present it to your consideration whether or no, when you have been pleased to admit a special plea, you will not *let us see that which we are to plead to.*" [The reductio ad absurdum could hardly be more complete.]

L. C. J.—"No, it was never thought of, surely."

Justice Dolben.—"No, it has been constantly denied in cases of felony and treason. But I will tell you what has *been done sometimes*" (accurate and humane law for a practical nation to live under) "*they have granted some heads out of the indictment* that should enable the party to fit his plea to the charge, and that was done in Whittypole's case. They gave him the times and some other circumstances to fit his plea to his case, but never was there a copy of the indictment granted."

Wallop argues for a copy.

L. C. J. – "So, then, Mr. Wallop, you take it that we are bound, when a man is indicted of felony, treason, or any capital crime, to grant him a copy of the indictment? If you think so, the Court and you are not of the same opinion."

It is difficult to say whether one ought most to wonder at the inaccuracy, the absurdity, or manifest injustice of this manner of conducting a trial for a capital offence. But for the jargon contrived by the lawyers to destroy the benefit of publicity, it never could have been asserted in the face of day. In the first place, it is obviously in the breast of the judge, whether he will give or deny the "heads" of the indictment to the prisoner, who is to plead to it. What one judge granted, another might, and often did, refuse. The prisoner can turn to no law and insist upon its provisions. In the second place, the absurd and frivolous objections, multiplied by the pedantry of lawyers, and encouraged on all occasions by the judges, would, probably, have rendered a valid indictment almost impossible, if the prisoner's counsel had been allowed time for its perusal; and this is an exact specimen of the system (*z*).

Because the law allowed the prisoner a number of ridiculous evasions and subterfuges, it deprived him of an incontestable right, a right which, by the law of nature, every accused person ought to have. Because form was held to be substance —substance was held to be form; and so, in this country, while the English law hung men by scores, sometimes for stealing sheep (after the price of bread had been raised artificially by the Legislature), the judges pronounced panegyrics on its humanity, for allowing criminals, on account of some ludicrous and insignificant error in the indictment, to escape without any punishment at all. The ferocity of the law was remedied by making it useless. Its errors were precedents, its humanity an accident, its reason was to be found only in

(*z*) Only the other day a learned judge *took time* to consider, whether a statement that a crime was committed "in the year of our Lord 1847,"

places that had escaped the particular notice of those who created it.

The King's counsel, by their obstinacy in refusing to act upon the hints flung out by the Court, embarrassed the judges extremely: "Of three bad ways, they chose the worst." In vain did the Court exhort them to take time to consider what course they would take; "they were hasty, as they always were, when they were resolved to carry a matter, right or wrong (*a*)." They might have taken issue on the record, and have argued that the impeachment and indictment were not for the same treason; or they might have applied the order of the House of Lords for trying the prisoner in the King's Bench. But they chose to demur, thus confessing the truth of the plea, and rested their case on a point of constitutional law, in which it was obvious that they were on the wrong side. They objected also to the defects of form; but when they were asked to specify those defects of form, they were unable to point them out. The Chief Justice made a specious offer to the prisoner's counsel, that they might amend their plea if they could; which they, seeing, as Hawles said, that it was a catch, and not a favour, refused to do. The Court took time to consider, and, on the 11th of May, there being a great audience to know how the judges would contrive to decide in favour of the Court, "the Chief Justice, *without any reason*, delivered the opinion of the Court; that three of the judges, Raymond, Jones, and himself, were against the defendant, and thought his plea insufficient, and that the other, Brother Dolben, doubted; therefore it was awarded that the prisoner should plead to the indictment" (*b*). This conduct was wholly without precedent, and though not forbidden (as few enormities were) by any positive law, did diametrically contradict the spirit and usage of the constitution. There was no example to be found where a case had been thought of such importance as to require argument and deliberation, where judgment had

(*a*) Hawles' Reflections.

been given without reasons, and this in a country where the common law is supposed to dwell in the breast of the judge, and to be promulgated by the Bench. If it was not promulgated, how would it be known? "I think," says Hawles, "this may be called the first mute judgment given in Westminster Hall" (*b*).

Another iniquity practised by Pemberton, was that of not instructing the prisoner how to oblige the Crown to shew a reason for its challenge of the jurors. In Conigsmark's case, this same judge carefully explained the proper course to the prisoner. "They were different practices tending to different ends, and, accordingly, Fitzharris was convicted and the Count acquitted."

The publication of the libel, and the instructions given by Fitzharris to Everard, were clearly proved.

Everard being pressed, injudiciously for his purpose, by the Attorney General, allowed that Fitzharris told him "the use of the libel was to disperse copies of it, and put them on the Nonconformists." Thus corroborating the prisoner's story.

Oates gave evidence for the prisoner, and attributed certain statements to the same effect to Everard. Everard, though present, was not called to contradict him. "There cannot," says Hawles, "be shewn any precedent where a witness contradicts a witness who went before him, by hearsay from that witness, but the first witness is asked what he says to it."

Serjt. Jeffreys.—"Pray what religion is Mr. Fitzharris of?"

Everard.—"He was always looked upon as a papist."

Evidence of writing, not produced, was given without objection or comment.

(*b*) "At the notorious case of Fitzharris, my Lord (Russell) was present, for which Serjeant Pemberton (he was displaced afterwards, and when this pamphlet was written was Serjeant Pemberton), can give the best reasons, *because he reserved them at that time*, and no doubt they are improved by this; and brought up a fashion, *which we do not find in the Year Books, for judges to give no reasons for their judgments!*" Notes on the Phœnix edition of the Pastoral Letter, by Samuel Johnson (Julian Johnson), p. 68, printed 1694.

Waller said that Everard had written him a letter.

Justice Dolben.—"Read it, Sir."

The libel was clearly proved to be in the handwriting of Fitzharris.

It certainly is a most suspicious circumstance, that Fitzharris should have received, through the Duchess of Portsmouth, money from the King, and that he should have had interviews with him,—both of which facts were established at the trial. Another curious piece of evidence was this; Sir William Waller told Colonel Mansel, in the presence of Hunt and others, that when he told the King how he had detected the libel, by concealing himself in Everard's chamber, the King thanked him extremely for the service; but that he (Waller) was afterwards assured, by two persons who were present, that after his departure the King expressed the greatest anger against Waller, said that he had broken all his measures, and that one way or other he would have him (Waller) taken off. This was confirmed by Mr. Hunt, who added, that the King said the design was to contrive those papers into the hands of the people, and make them proofs of rebellion; that it was a design against the Protestants and the Protestant party. Hunt appealed to Sir William Waller, who was present, for the truth of this statement: Waller never was called to contradict him.

Altogether, I think, it is difficult to escape from the conclusion, that the King was privy to the plot with Fitzharris; that the cunning of the Scotchman, and the zeal of Waller, "broke," in the King's words, "his measures;" that Fitzharris, finding himself baffled, abandoned himself to despair, and flung himself at once on the opposite party; that the King then turned the evidence he was preparing for others against himself, and so got rid of a dangerous and troublesome accomplice (*b*). It is remarkable that Fitzharris put to all the witnesses (except Waller, who was not in the plot) the question, "Do you believe I meant treason?" and that none of them answered the ques-

(*b*) Hallam's Const. Hist. vol. 2, p. 140; State Tracts, vol. 2, p. 10. Hume misrepresents every thing.

tion directly in the affirmative; that he had seen the King, and that the King had given him money, was proved by the Duchess of Portsmouth, and her maid, Mrs. Wall, and by Sheriff Cornish. A clergyman, named Hawkins, published an account of this case, full of falsehoods, and was in consequence made "most dirty Dean" (*c*) of Chichester. I think, that no one who reads the trial impartially, can avoid the conviction that it bears traces of contrivance and collusion (*d*), and that there was much concealed that it would by no means have been for the King's honour to disclose. It is plain that the intention of the libel was uncertain, and that the conviction of Fitzharris was illegal. "Quo animo, a thing is done, in all overt acts of a design, is one of the main questions" (*e*).

The Whigs were now odious to the public.

The law was a weapon in the hands of their most bitter enemies, and it was wielded by men who never knew remorse or scruple.

Scroggs was disgraced, and Jeffreys became the chief agent of the government. The English law has, indeed, in all ages produced its full share of pedants, hypocrites, and slaves to power; but it would be libelling any pursuit followed by beings in human shape, to suppose that it could furnish many men as thoroughly execrable as this consummate villain—"donanda vitia non portenta." He was the "superior fiend," a prodigy of wickedness, a fury of debauchery and blood. The French Court, in a former age, had endeavoured to get rid of its enemies after a treacherous peace by one widespreading massacre. With far less danger to the great principles which hold mankind together, Catholics had encountered Protestants, and Protestants Catholics, in the open field. A deluge of blood had been

(*c*) "Look in thy breast, most dirty Dean; be fair." Pope.

(*d*) Serjeant Maynard, after having voted the prosecution of Fitzharris illegal, on account of his impeachment, and those who concurred in it public enemies, appeared as one of the counsel against him.

(*e*) Hawles.

shed to quench the flames of civil war. But it exemplifies the formal and prosaic genius of the English, that a series of murders, as horrible as ever were committed under the most raging tyrannies, were perpetrated by those who pretended to keep within the limits of the law. Cooped up within those narrow boundaries each party aimed the most deadly blows at the other with the same weapons and with the same effect. The lawyers were the ready accomplices of both. Instead of Monluc, Adrets, Montmorency, Coligni, Catherine de Medicis, and the Princes of the House of Lorraine, we had North, Williams, Maynard, Scroggs, Pemberton and Jeffreys; instead of Poltrot, Jacques Clement, and Ravaillac, we had the common law, our system of pleading, the rules of evidence (*c*), Titus Oates and his gang; instead of battles, captain's levies, and unscrupulous partizans, we had "forward sheriffs, bold witnesses, willing juries, and mercenary judges." Perjury on one side was avenged by perjury on the other. The slaughters perpetrated by a packed jury of Whigs were balanced by other slaughters perpetrated by a packed jury of Tories. The instruments of death, spies, suborners, informers, barristers, serjeants, judges, were the same, and the judicial murders of Coleman, Stayley, and Stafford, were redressed by the judicial murders of College, Russell, and Algernon Sydney. If it were not for the tragical nature of these scenes, and the disgrace they stamped on our national character, an observer might be amused at the identity of form and ceremonious usage employed first by one party, and then by its adversaries; at the monotonous uniformity in crime, the want of invention in wickedness, in which the English innovation-hating vulgar, who would have been scared by the least departure from precedent, and would have thought their constitution at an end, if the judge had appeared in Court out of his robes, were well contented to acquiesce.

(*c*) That is, whatever the judge on the Bench chose to call law, and in criminal cases there was no appeal.

The Tories received (*c*) with open arms the whole gang of miscreants who had destroyed their friends, and were now

(*c*) Butler, loyalist as he was, has described the age with his inimitable wit :

"Twice have men turned the world (that silly blockhead)
The wrong side outward, like a juggler's pocket,
Shook out hypocrisy as fast and loose
As e'er the Devil could teach, or sinners use ;
And on the other side at once put in,
As impotent iniquity and sin.

. . . . .

For those who heretofore sought private holes
Securely in the dark to damn their souls,
Wore vizards of hypocrisy—to steal
And slink away in masquerade to Hell,
Now bring their crimes into the open sun,
For all mankind to gaze their worst upon,
As if the laws of Nature had been made
On purpose only to be disobeyed."

And then follow some noble lines which the reader will, I hope, thank me for quoting, which pay that homage to Greece and Rome which the truly great have always been ready to bestow, and shew how much better use the old philosophers made of their fantastic mythology than the northern nations have been able to do of the sublime precepts of Christian morality .

"So simple were those times—when a grave sage
Could, with an old wife's tale, instruct the age,
Teach virtue more fantastick ways and nice
Than ours will now endure t' improve in vice,
Made a *dull sentence* and a *moral fable*
Do more than all our holdings forth are able,
A forced, obscure mythology convince
Beyond our worst inflictions upon sins ;
When an *old proverb* or an *end of verse*
Could more than all our penal laws coerce,
And keep men honester than all the furies
Of jailors, judges, constables, and juries."

Compare the morality of Plato with that of Laud and his priests. The former drew all that was great in public, and good in private life from the mythology of his age ; the latter made the Gospel itself a pretext for passive obedience and active persecution. The one turned darkness into

ready to destroy their enemies. College, a London joiner, notorious for his religious zeal, was the first object of their machinations. He had, with hundreds of his countrymen, been in Oxford, armed with sword and pistol, during the last Parliament, and this was the foundation of the charge against him. It was pretended that a conspiracy had been entered into to detain the King in custody until he should make the concessions demanded of him. The bill was first preferred before a London grand jury; they ignored the bill; another bill, to the same effect, was preferred in Oxfordshire, where Lord Norris, a courtier, was high sheriff. They returned it. College was in the Tower when the bill was found. The Oxford gaoler, Morrell, and a messenger, Sewell, were sent to bring him down to Oxford (*d*). After they had taken him out of the Tower they "run him into a house," and there deprived him of all the notes and papers which he had drawn up for his defence, by order of the King's counsel. North was the instrument selected by the government to commit murder on this occasion, and he fulfilled the task assigned to him with more discretion than Scroggs, and equal punctuality. In vain did College, when brought before a packed jury and the servile bench, petition that his papers might be restored to him—in vain did he prove, by testimony clear as the noonday light, the perjury of each separate witness who was brought against him—in vain, though repeatedly, and most cruelly interrupted by Mr. Justice Jones (*e*), did he address the jury with spirit unbroken, and with reasons unanswerable. He was convicted, and when the verdict was brought in, the

light, and the other light into darkness. Heathen Greece (so glorious were the faculties of its inhabitants) produced Socrates and Phocion; Christian Europe produced bishops like Wren, politicians like Shaftesbury, judges like North.

(*d*) State Trials, vol. 8; State Tracts, vol. 2.

(*e*) He was, Roger North says, of "Welsh extraction," and subject to fits of passion, which displayed themselves, says that affected writer, "in a rubor of the face."

Oxford spectators, as savage on one side, as the London spectators had been on the other, set up a shout of applause. "The truth is," said Sir John Hawles, afterwards Solicitor General, "what College said was true; they took away all helps from him for defending himself, and, therefore, might as well have condemned him without a trial, notwithstanding all which the courage of the man never fainted; but after he was condemned, he boldly asked where he was to be executed." "He had, from the 18th of August, 1681, on which he was condemned, to the 31st, on which he was executed, a much longer time than was allowed my Lord Russell and many others, and the true reason of so long a reprieve was to see how the nation would digest the matter, and whether the man, by the terror of death, would be prevailed upon to become a tool to destroy other innocents; but when it was found that the people were quiet, and that the prisoner could not be prevailed upon to do an ill thing to save his life, his execution was ordered."

This was the lot of College, far more to be envied in his prison, unless the hope of the patriot is a dream, and the tools of the waster, created like the Emperor Nicholas to destroy, have chosen rightly,—not only than those who bore false witness against him, and who speedily became the objects of universal execration and contempt, but than North, the more exalted agent of iniquity, who died with his mask on, amid the glare of wealth, covered with the trappings of those disgraceful honours, which he had bought with the blood of the innocent, and transmitting a name tainted with corruption to posterity. College did his duty to England, and to mankind; he is one of our murdered patriots, and though the patrician descent of Lord Russell, and the splendid qualities of Algernon Sydney, have cast his name into the shade, the Englishman who recollects that our liberties are owing far more to the stubborn resistance and fortitude of the many than to the genius or

the noble army of our state martyrs has been preserved with those of its leaders from oblivion, and will dwell gratefully on the page that commemorates the services of the single-minded and magnanimous artizan.

College preserved his firmness to the last; after addressing the spectators, he called "for his dear child," and after "kissing him several times with great passion," and asking for the prayers of those around him, underwent his sentence. "He wanted nothing but quality" (*e*), says a contemporary writer, "to make him great living and dying." Of all the victims of the Rye House Plot, he made, with the exception of Algernon Sydney, the best defence. Though he was condemned by a profligate jury, he broke down the credit of the witnesses produced against him so effectually, that they could never again be produced in a Court of justice. The gallant demeanour of the poor joiner, saved the life of many a noble prisoner already within the meshes of the Court. "It was not their innocence that saved Lord Fairfax, Sir John Brooks, and many others, but College's baffling that crew of witnesses, and so plainly detecting their falsehood, that the King's counsel durst never *play* them at any other person." It was laid down at his trial, that "any man who advised a prisoner charged with treason, was guilty of a high misdemeanour." The King's counsel having got possession (so humane and impartial were the laws of England) of the notes of the prisoner's defence, and found how he intended to make the witnesses contradict each other, confined each witness to distinct matter. Evidence perfectly irrelevant was received against College,—that he had said "Charles the First had begun the war against his Parliament." "Only," North said to him, "to shew your principles." "I was then a child," said College. *North.*—"You should not have justified such things." Justice Jones, and Justice Levinz, follow in the same track.

College.—"Pray, my Lord, let me ask you one question:

(*e*) Let us hope that this want may be forgiven.

Whether the statute Edw. 3 does not require two witnesses to treason?"

Chief Justice.—"Well, I will tell you, there must be two witnesses in the case; but one witness to one fact at one time, and another at another, are sufficient."

College.—"What lies before these gentlemen as done at Oxon, is on a single testimony."

Justice Levinz.—"Nay, Mr. Dugdale and Mr. Turberville both swear the same thing, your design to seize the King at Oxon; and it would be the most difficult thing in the world to prove treason if the law were not so," &c.

College.—"My Lord, you say the King is not safe on those terms, and no private man is safe the other way."

Judges.—"The law is so."

College.—"There is nothing of fact proved against me but a pair of pistols, a horse, and a sword."

North.—"We have told you the law."

College.—"But if the law be so, all society and conversation must be ruined by it."

Justice Jones.—"Pray go on; when do you think we shall have done else?"

I conclude with the following extract from Sir John Hawles' remarks on College's trial, (State Tracts, p. 19), "*The truth is, when I consider the practice of late times, and the manner of usage of the prisoners, it is so very much like, or rather worse than the practice of the Inquisition, as I have read it,* that I sometimes think it was in order to introduce popery, and make the Inquisition, which is the most terrible thing in that religion, and which all nations dread, *seem easy in respect of it.* I will, therefore, recount some undeniable circumstances of the late practice: A man is, by a messenger, without any indictment precedent, which, by the common law ought to precede, or any accuser or accusation that he knows of, clapt up in close prison, and neither friend or relation must come to him; he must have neither pen, ink, or paper, or know of what, or by whom

he was accused; he must divine all, and provide himself of a counter-evidence, without knowing what the evidence is against him. If any person advise or sollicite for him, unless assign'd by the Court by which he is try'd, they are punishable; he is try'd as soon as he comes into the Court, and, therefore, of a solicitor there is no occasion or use; if the prisoner desires counsel upon a point of law, as was done in my Lord Russell's trial, the counsel nam'd must be ready to argue presently, and the Court deliver their judgment presently, without any consideration. The prisoner, indeed, hath liberty to except to thirty-five of the jury peremptorily, and as many more as he hath cause to except to, but he must not know beforehand who the jury are; but the King's counsel must have a copy of them: he must hear all the witnesses produc'd to prove him guilty together, without answering each as he comes, for that is breaking in upon the King's evidence, as it is called; though it hold many hours, as it happen'd in most of the trials; he must not have any person to mind him what hath been sworn against him, and forgotten by him to answer; for if that were allow'd, the prisoner, perhaps, may escape hanging, and that is against the King; there is a proclamation to call in all persons to swear against him, none is permitted to swear for him; all the impertinent evidence that can be given is permitted against him, none for him; as many counsel as can be hir'd are allow'd to be against him, none for him. Let any person consider truly these circumstances, and it is a wonder how any person escapes; it is downright tying a man's hands behind him, and baiting him to death, as in truth was practis'd in all these cases. The trial of ordeal, of walking between hot iron bars blindfold, which was abolish'd for the unreasonableness of it, though it had its saying for it too; 'That God would lead the blind so as not to be burnt if he were innocent,' was a much more advantageous trial for the suspected than what of late was practis'd, where it was ten to one that the accus'd did not escape."

The strong man being bound, the spoiling at once began. No man worth reasoning with will dispute, that resistance had at this time become a simple question of expediency (*f*): "When bad men conspire," says Mr. Burke, in one of his writings, "the good must associate, or they will fall unpitied victims in a contemptible struggle." No better elucidation of this maxim can be conceived, than the trials I am about to investigate; such, however, was the condition to which the imprudence, and I must say the cruelty, of the Whigs had reduced their party; that the Whigs were obliged, instead of combining, to conspire: profligate and needy men pretended to embrace their cause, invited them to meetings, discussed in their absence the most criminal projects, such as the assassination of the King, and then betrayed them to the government, imputing to the Russells and Sydneys their own cowardly and detestable projects, in aggravation of their guilt. Thus were Rumbold an extraordinary man, Walcot, and Hone brought to their deaths. I call attention to Walcot's case (*g*), because, after all the pedantry, absurdities, and fantastic tricks of the English law, which have been noticed, a proceeding to which this attainder gave rise, may really make the lay reader doubt whether he is not reading the caricature of some sarcastic novelist, instead of an account of what actually took place among civilized men. Walcot was convicted and executed. AFTER HE (Walcot) WAS HANGED, a writ of error was brought, and it was moved that the sentence should be reversed, not because he had been unfairly tried, nor because the evidence was insufficient, nor because his crime did not amount to treason; none of which objections could have been so taken; but because in the judgment on him, written in the barbarous

(*f*) The proper charge against the Whigs is, that they did too little, not too much,—

"Detegit imbelles animos nil fortiter ausa
Seditio, tantumque fugam meditata juventus."

(*g*) State Trials, vol. 9.

gibberish, restored so eagerly by the sages of the law, it was not stated that his entrails should be burnt while he was alive, "ipso vivente comburentur;" and, on this ground, twelve years after the man had been embowelled, the attainder was actually reversed, and the sentence declared erroneous, A. D. 1696. Was it possible for Swift (*g*) himself, I will not say to exaggerate, but to do more than describe the stupid barbarity of our law, and the ridiculous arguments of its practitioners (*h*).

(*g*) Gulliver's Travels. This continued to be the law till 54 Geo. 3, c. 146, when, in spite of Lord Eldon, it was altered.

(*h*) The reader may judge of the arguments of the oracle of English law from this extract on the punishment for treason:—

"And all these severall punishments are found for treason in Holy Scripture,—

"1 Reg. 2. 25, &c. *Joab tractus, &c.*

"Esther, 2. 22. 23. *Bithan suspensus, &c.*

"Acts, 1. 18. *Judas suspensus crepuit medius, et diffusa sunt viscera ejus.*

"2 Sam. 18. 14, 15. *Infixit tres lanceas in corde Absolon cum adhuc palpitaret, &c.*

"2 Sam. 20. 22. *Abscissum caput Sheba filii Bichri.*

"2 Sam. 4. 11, 12. *Interfecerunt Baanam et Rechab, et supenderunt manus et pedes eorum super piscinam in Hebron.*

"Corruption of blood, and that the children of a traitor should not inherite, appeareth also by Holy Scripture,—

"Psal. 109. 9, 10, 11, 12, 13. *Mutantes transferantur filii ejus, et mendicent, et ejiciantur de habitationibus suis, et diripient alieni labores ejus, et dispereat de terro memoria ejus.*

"The judgment of a woman for high treason is to be drawn and burnt." (He does not quote any authority or case for this punishment from Scripture). Coke, Inst. 3, p. 212.

"Quod interiora sua extra ventrem suum capiuntur," says Hawkins, vol. 4, p. 469, "without," observes this grave writer, "any allusion to the *ἀιδοῖον*, but S. P. C. is express about the *ἀιδοῖον*." It seems, however, a very doubtful point of English jurisprudence. There is a precedent, quite as applicable as those quoted by my Lord Coke, in the Odyssey, Book 18, 85, in the time of King Echétus, who treated strangers as Laud did dissenters:

εἰς ἔχετον βασιλῆα βροτῶν δηλήμονα πάντων,

I now come to the trial of Russell and Sydney. Russell was tried by Pemberton. The charge against him was compassing the death of the King, and the overt act by which it was sought to prove a compassing, was a conspiracy to raise an insurrection. There can be no doubt that such a conspiracy, if established, was legitimate evidence of the traitorous design; and, therefore, one ground of the reversal of Lord Russell's attainder, assigned in the act of Parliament, *viz.*, "his wrongful conviction by partial and unjust construction of law," cannot be supported by an impartial reasoner. But Lord Russell was unjustly condemned; first, because the evidence, such as it was, did not bear out the charge; secondly, because a great deal of that evidence was hearsay, and elicited by the most unfair examination in chief; thirdly, because it was given by uncorroborated accomplices; fourthly, because it was misrepresented by the judge. Rumsey, Shepherd, and Lord Howard, men whose lives, if their own story was to be depended on, were in the hands of the Crown, were the sole witnesses against Russell: it was proved by irresistible evidence, that Lord Howard had said what was totally inconsistent with the evidence he gave against the prisoner. As specimens of Lord Howard's evidence, take the following extract:

"The witness (*i*) set off with a long and rambling hearsay account of consultations and meetings, which he had received from Walcot. He then gave an account of what Lord Shaftsbury had said to him at a private interview, in which that nobleman complained of Lord Russell for having deserted him, and boasted of his ten thousand brisk boys, who were all ready at the holding up of his finger, and in twenty-four hours would be multiplied into five times that number, then sally out, possess the gates of the enemy, beat the guards, and take Whitehall by storm. The witness told Lord Shaftsbury this was a fair thing, but might be fatal, if not deeply laid, and

well considered. Lord Shaftsbury replied, that he was sure to succeed, but was disappointed by the failure of the Duke of Monmouth and Lord Russell. The witness desired to consult them, before he disclosed his own intentions. Accordingly he went to the Duke of Monmouth, and told him what Lord Shaftsbury had said. The Duke of Monmouth answered, that he thought Lord Shaftsbury mad; that so far from giving him any encouragement, he had told him from the beginning, and so had Lord Russell, that nothing could be done in the country at that time. The witness reported this to Lord Shaftsbury: 'It is false,' said he, 'they did encourage me, but now they are afraid to own it.'

"The witness then gave an account, which he had received from Walcot, respecting Lord Shaftsbury's movements, and which was to this effect:—That Walcot informed him, that Lord Shaftsbury had withdrawn, adding, that in about eight or ten days there would be a rising; that the witness informed the Duke of Monmouth of this, and, as he believed, the Duke informed Lord Russell. 'We believed,' said the witness, 'his phrenzy was now grown to such a height, that he would rise immediately; so we endeavoured to prevent it. Upon which, Lord Russell, [I was told,] and the Duke of Monmouth, did force their way to Lord Shaftsbury, and persuaded him to put off the day of his rendezvous. I had not this from Lord Russell; for I had not spoken a word to him; but the Duke told me, that Lord Russell had been with him, [I had, indeed, an intimation that he had been with him] and the Duke said, that he himself had not been with Lord Shaftsbury, but that Lord Russell was with him, having been conveyed by Colonel Rumsey.'

"'After this day was put off,' continued the witness, 'it seems it was put off with this condition, that these Lords, and divers others, should be in readiness to raise the country about that day fortnight or thereabouts: for there was not above a fortnight's time given: and, says the Duke of Monmouth,

we have put it off, but now me must be in action, for there is no holding it off any longer. And, says he, I have been at Wapping all night, and I never saw a company of bolder and brisker fellows in my life: and, says he, I have round the Tower, and seen the avenues of it; and I do not think it will be hard, in a little time, to possess ourselves of it; but, says he, they are in the wrong way: yet we are engaged to be ready for them in a fortnight, and, therefore, says he, now we must apply ourselves to it as well as we can. And thereupon I believe they did send into the country; and the Duke of Monmouth told me, he spoke to Mr. Trenchard, who was to take particular care of Somersetshire, with this circumstance; says he, I thought Mr. Trenchard had been a brisker fellow; for when I told him of it, he looked so pale, I thought he would have swooned, when I brought him to the brink of action, and said, I pray go and do what you can among your acquaintances; and truly, I thought he would have come then to action; but I went the next day to him, and he said it was impossible; they could not get the gentlemen of the country to stir yet.'

Lord Russell.—"My Lord, I think I have very hard measure; here is a great deal of evidence by hearsay."

L. C. J.—"This is nothing against you; I declare it to the jury."

Att. Gen.—"If you please, my Lord, [addressing himself to the witness,] go on, in the method of time. This is nothing against you, [turning to the prisoner,] but it is coming to you, if your Lordship will have patience, I assure you."

"The witness was then permitted to continue, at great length, the hearsay reports which he had received from Walcot, on the subject of several designs for a rising, which had not been carried into effect. He spoke of another intended rising, fixed for the 17th of November, but spoke of it only from report.

"It was next determined, said the witness, [which was the last alarm and news I had of it,] to be done upon the 17th of

November. He remembered the day, from a particular reason, which he mentioned. This design also was disappointed; and Lord Shaftsbury, being told that things were not ripe in the country, took shipping and got away.

"After this mass of hearsay,—which was calculated to excite the most fatal and unjust prejudices against Lord Russell, and which was utterly inadmissible,—followed some of the most important evidence in the case: 'Now, Sir,' said the witness, 'after this, we all began to lie under the same sense and apprehensions that my Lord Shaftsbury did, and we had gone so far, and communicated it to so many, that it was unsafe to make a retreat; and this being considered, it was also considered, that so great an affair as that was, consisting of such infinite particulars, to be managed with so much firmness, and to have so many parts, it would be necessary, that there should be some general council, which should take upon them the care of the whole. Upon these thoughts we resolved to erect a little cabal among ourselves, which did consist of six persons; and these persons were, the Duke of Monmouth, my Lord Essex, my Lord Russell, Mr. Hampden, jun., Algernon Sydney, and myself.'

"Their first meeting, said the witness, was about the middle of January, preceding the trial, at the house of Hampden. At that meeting they agreed, that their peculiar province was to superintend certain arrangements of a general nature, which could not be so well conducted by individuals. The points, which principally challenged their care, were these: First, Whether the insurrection would be most properly begun in London, or in the country, or in both at the same time? Upon this point, the Duke of Monmouth advised, that it should not be in the city. Another point, which they debated, was, what counties and towns were most disposed to action? A third point was, what arms were necessary, and how they might be disposed of? A fourth point was, as to the necessity

the occasions of such an undertaking. The last, and greatest of all matters under consideration, was, how Scotland could be drawn in to concur; for they thought it necessary that a diversion should be made. Nothing was done, [said the witness,] but these things were offered for their consideration, and they were to contribute their joint advice. About ten days afterwards, the same party had another meeting at Lord Russell's; when they came to a resolution to dispatch some persons to Scotland, for the purpose of making an arrangement with Lord Argyle, and to invite into England some who were perfectly well acquainted with the state of Scotland. They accordingly directed a person to be sent, Aaron Smith. Algernon Sydney was intrusted with the care of this business; and the witness was afterwards informed by him, that he had sent Smith. The party agreed not to meet again till the return of the messenger, believing that the meeting, which had taken place, might have occasioned some observation."

Att. Gen.—"You are sure my Lord Russell was there?"

Lord H.—"Yes, Sir: I wish I could say, he was not."

Att. Gen.—"Did he sit there as a cypher? What did my Lord say?"

Lord H.—"Every one knows, my Lord Russell is a person of great judgment, and not very lavish in discourse."

Serjt. Jeffreys.—"But he did consent?"

Lord H.—"We did not put it to the vote; but it went without contradiction, and I took it that all there gave their consent."

"The last witness, West, was then called. The first question put to him by the Attorney General was, whether, by his management of the plot, he understood that any, and which, of the Lords were concerned? The witness, in answer, said, that he never had any conversation with Lord Russell; but that, in the insurrection in November, he heard from Ferguson and Rumsey, that Lord Russell intended to go down and take his post in the West, when Trenchard had failed there."

Att. Gen.—"We have proved my Lord privy to the consults; now we go about to prove, that the under-actors did know it."

"Here again the witness, without a question, began, 'They always said, my Lord Russell was the man they most depended upon, because he was a person looked upon as of great sobriety.'

Lord Russell.—"Can I hinder people from making use of my name? To hear this brought to influence the gentlemen of the jury, and inflame them against me, is hard."

Rumsey's evidence was elicited by the grossest leading questions. "Surely, Colonel Rumsey," said Jeffreys, "you need not be pumped by so many questions." Nothing can be more vague than his statement; "It was discoursed by all the company:" he cites no particular expression of Lord Russell.

"Whose were the words?" (about surprising the guards), said the Chief Justice.

Rumsey.—"My Lord, the discourse was that *some* should."

Chief Justice.—"Who made that discourse?"

Rumsey.—"My Lord, I think Sir Thomas Armstrong began it, and Mr. Ferguson."

Att. Gen. (the infamous Sawyer).—"*Was it discoursed among all the company?*"

Rumsey.—"All the company did debate it."

Serjt. Jeffreys.—"But pray, Colonel Rumsey, this you are very able to know, what the debates were, and need not be pumped with so many questions. Was there a debate about the rising?"

Rumsey.—"There was no debate."

Serjt. Jeffreys.—"*But did they not take an account of the rising?* Give us an account of it."

Rumsey.—"I have done it twice."

Att. Gen. (*i*)—"Was the prisoner at the bar present at the debate?"

Rumsey.—"Yes."

(*i*) Lord Campbell ascribes this question to Jeffreys.

Serjt. Jeffreys.—"Did you find him averse to it, or agreeing to it?"

Rumsay.—"Agreeing to it."

The admission of the following evidence was obviously quite unjustifiable:

Serjt. Jeffreys.—"Do you remember any writings or papers read at that time?"

Sheppard.—"None that I saw."

Serjt. Jeffreys.—"Or that you heard of?"

Sheppard.—"Yes, now I recollect myself, I do remember one paper was read."

Serjt. Jeffreys.—"To what purpose was it?"

Sheppard.—"It was somewhat in the nature of a declaration; it was read by Mr. Ferguson, who was present at the reading; I cannot say whether they were all present or not. The purport of it was setting forth the grievances of the nation, but truly what particulars I can't tell. It was a pretty large paper."

Att. Gen.—"But can you tell the effect of it, when was that to be set out?"

Sheppard.—"It was not discoursed, it was shewn only, I suppose for approbation."

Att. Gen.—"Who was it shewed to?"

Sheppard.—"Sir Thomas Armstrong."

Serjt. Jeffreys.—"Who else?"

Sheppard.—"As I remember, the Duke was present, and, I think, Colonel Rumsay."

Col. Rumsay.—"No, I was not; it was done before I came."

Serjt. Jeffreys.—"What was the design of that paper? Recollect yourself; what was the design?"

Sheppard.—"The design of that paper was in the nature of a declaration, setting forth the grievances of the nation, in order to a rising, I suppose by the purport of the paper; but cannot remember the particular words of it."

Foreman of the Jury.—"Can you say my Lord Russell was there, when that declaration was read, as you call it?"

Sheppard.—"I can't say that."

Att. Gen.—"But he was there when he talked of seizing the guards?"

Sheppard.—"Yes, my Lord was there then."

Lord Russell.—"Pray, Mr. Sheppard, do you remember the time these meetings were?"

Sheppard.—"I can't be positive as to the time; I remember it was at the time my Lord Shaftsbury was absent from his own house, and he absented himself from his own house about Michaelmas-day; but I cannot be positive as to the time."

Lord Russell.—"I never was but once at your house, and there was no such design as I heard of. I desire that Mr. Sheppard may recollect himself."

Sheppard.—"Indeed, my Lord, I can't be positive in the times. My Lord, I am sure, was at one meeting."

L. C. J.—"But was he at both?"

Sheppard.—"I think so; but it was eight or nine months ago, and I can't be positive" (*k*).

That this evidence also was known to be irregular is proved by Sir John Hawles, who remarks upon it thus: "What sort of evidence was that? In all civil matters, a witness shall not be permitted to give evidence of the contents of a deed or writing without producing the deed or writing itself, or a true copy of it,—and for a very good reason, as he may make a false construction of it. I remember," he continues, "a witness who swore to the contents of a deed of entail, and being asked whether he knew a deed of entail, and by what he knew the deed he spoke of to be a deed of entail, answered, 'that he knew a *tail'd deed* very well, and he knew the deed he spoke of to be a *tail'd deed* because IT HAD A TAIL half as long as his arm,' meaning the label of the deed. And if this be the

(*k*) State Trials, vol. 9, p. 601.

practice and reason of the practice in civil matters, shew me any authority or reason anything should be permitted to be given in evidence in the trial of any civil matter" (*l*).

During the trial, intelligence was brought that Essex had destroyed himself in the Tower. That this was done with a deliberate purpose there can be no doubt; that the time of the trial was arranged to coincide with the event there is strong reason to believe;—and if so, it is a conclusive argument to shew that Essex did not, as was asserted, perish by his own hand (*m*). This circumstance, with a malignity truly fiendish, was immediately turned by the Crown lawyers against the prisoner—and with fatal effect, for the jurymen asserted afterwards that it went farther with them than all the evidence of the witnesses produced by the Crown (*n*). "Who should think," said Jeffreys, "that my Lord Essex (*o*) should

(*l*) State Tracts, vol. 2, p. 43.

(*m*) (Julian) Johnson, an honest and vigorous writer, says, after quoting Lord Essex, "*I say let his integrity be known, and speak as loud as his blood cries;* and I am sure they who would stifle that man's honour would stifle his death." Notes on the Phœnix edition of the Pastoral letter, p. 77. This would hardly have been said unless there had been a very general belief.

(*n*) State Tracts, vol. 2, p. 36.

(*o*) I must say, though with great distrust of my own judgment, as I see Mr. Hallam holds another opinion, that after the most careful examination I have been able to give to the evidence, the conclusion at which I have arrived is, that Essex was murdered in the Tower. Mr. Hallam seems, however, to think, that the *only evidence* is that of the two children who speak to the bloody razor being flung out of the window, which no doubt is a singular fact; but besides this there is a mass of other evidence. There is the evidence of Richard May, of Adams and his wife, and of Dorothy Smith. Now the evidence of Dorothy Smith is this: "that being servant with one Holmes, in Baldwin's Gardens, she heard several papists discoursing in Holmes's house concerning the taking off of the Earl of Essex; that they had seen the Duke of York, who suggested that he should be poisoned (the reader may recollect the attempt on Colonel Hutchinson); but that at last it was settled his throat should be cut, and the Duke promised to be there when it was done.

be guilty of such desperate things? which, had he not been guilty of, he would scarcely have brought himself to that

them declare that the Earl's throat should be cut, and that they would give out he had done it himself. That she immediately communicated what she heard to Billinger, who exhorted her, if she valued her life to be silent. That on the day of the Earl's death, some of these people came to her master's house, one of whom struck her master on the back, and exclaimed, the feat was done; and added, that he could not but laugh to see how like a fool Lord Essex looked when they came to cut his throat. She said, that afterwards she told this story to Rowden, who advised her to hold her tongue, or she might ruin him and his family, and that she declared she hoped the time might come when she might speak the truth without danger." This latter part of her statement to Rowden, is confirmed by Rowden, by Mrs. Rowden, and by Mrs. Mary Rowden. Adams says, that Dorothy Smith was his servant in James's time, and often declared, in tears, the conversation and account of Lord Essex's death; that it lay on her mind night and day; and that he exhorted her to be silent. May says, that Dorothy Smith made the same statement to him; that he exhorted her to silence; but that on King William's accession, he (May) went to Dorothy Smith, and told her she might safely say what she knew. Now let us see what this evidence amounts to. If Dorothy Smith speaks truth, Essex was murdered,—that is the first step; and, according to all rules of historical evidence, if these six witnesses speak true,—witnesses in no way connected with each other,—the probability is, that Dorothy Smith does speak true; for it should be observed, that there was nothing to gain, and no party purpose to serve, by this story. Lady Essex and Bishop Burnet (whose egregious and unreasoning vanity was enlisted on the opposite side), both discouraged the inquiry. The evidence of this Dorothy Smith is quite independent of that which induced Braddon to take up the matter, for he did not know her till afterwards: "I never heard of Dorothy Smith till Mr. Tourney informed me of her, February, 1688." But there is a great deal of evidence besides this. John Lloyd was sentinel on the Earl of Essex. He declared, "that by the special order of Major Hawley, he let in two or three men into the Earl's lodgings just before his death; and, besides this, he was very sure, and could safely swear, that Major Webster (a ruffian who went by that name), was one, and that as soon as he let them in, he heard a noise in my Lord's chamber, and somewhat thrown down like the fall of a man, after which it was said that the Earl of Essex had cut his throat." Is this false? How happens it to correspond with Dorothy Smith's account? There is no suggestion that they were in league together, or had ever seen each other. Let us go on. Martha Bascomb deposed, that a little before Lord Essex's death she was walking before the chamber window. She heard a noise, looked up to the

untimely end to save the method of publick justice." This passed without any reprehension from the Bench. The

window, saw three or four heads move together, and heard one cry out very loud and dolefully, *murder ! murder ! murder !* That a quarter of an hour afterwards, she heard of Lord Essex's death. That she mentioned what she had seen to Perkins, who exhorted her to silence. Perkins confirms this on his oath. Are Perkins and Martha Bascomb perjured ? Two women, Elizabeth Gladwin and Sarah Hughes, say on oath, that they knew one Ruddle, who is dead. That Ruddle spoke French well. That this Ruddle told them he was at the Tower when Lord Essex died. That it was reported he had cut his throat, but that he (Ruddle) was sure he was murdered, and murdered by order of the Duke of York. That he (Ruddle) heard a conversation in French between the King and Duke. That the Duke declared, of all the prisoners there he was the one whom it was most important to destroy. That the King said he would spare him for his father's sake, at which the Duke was much displeased. Did Ruddle say this ? Are the two women who gave this evidence before the Lords perjured ? For what reason ? What had they to gain if Ruddle did say this ? How comes his evidence to correspond so exactly with Dorothy Smith's ? Taken by itself it is nothing ; taken in conjunction with what has been stated above, it adds to its formidable character. The witnesses say that Ruddle said this in a state of great excitement, and protested he thought no man safe if throats were to be cut in so barefaced a manner. Now Ruddle is confirmed in part by a Mr. Essington, a man of fortune and character. He swears he was in the Tower that morning. He observed the Duke part a little way from the King, and beckon to two men. That the two men went towards Essex's lodgings, and in less than a quarter of an hour came back, and said, "the business is done." Is Essington perjured ? Nicholson, a corn factor, proves that he was warder in the Tower when Lord Essex died. That he let a stranger in for a shilling to see the Tower. That Major Hawley reproved him violently for this. Philip Johnson swears, that his wife, who is dead, by order of Major Hawley, in whose service she was, and in whose house Lord Essex was found dead, helped a man called Major Webster to strip the clothes and wash the body of the Earl, for which Hawley gave her ten shillings, and that *the cravat she took off the Earl's neck was cut in three places.* Is this perjury ? Miriam Webster proves, that Mary Johnson told her she washed the body. In addition to this, it was sworn, that Major Webster, who kept an ale-house opposite the Tower, on the very day of Essex's death produced his bloody pocket handkerchief, with a coronet on it, and said, "Here is the blood of a traitor ; I hope to see many rogues go the same way ;" and on the same day, having been before very poor, he produced a knit purse, out of which

moment Lord Anglesea, a witness for the prisoner, stated hearsay, he was stopped by the Chief Justice, who had allowed

he counted forty-nine guineas. John Bampton and his wife both declared on oath, that they asked one Robert Meeke, a soldier in the Tower, to give an account how Lord Essex came to cut his throat; to which Meeke answered with earnestness and passion, that the said Earl did not cut his own throat, but was barbarously murdered by two men, sent for that purpose by his royal highness to the Earl's lodging just after his drill. Now this Robert Meeke was afterwards found murdered. Robert Meeke desired those persons to whom he had told what he knew of Essex's death, not to divulge it, and declared he should be murdered for what he knew; and the very day he was murdered, begged two men to keep him company, for, he said, "I observe that I am dogged;" and the very next morning Meeke was found dead in the Tower ditch, just opposite Major Webster's ale house. One of the coroner's jury, one Colston, who taught writing and mathematics on Tower Hill, because he wished not to bring in a verdict of *felo de se*, and said the jury were infatuated to do it, was sentenced to pay a fine of 300*l*., and to be pilloried. Now let us see the evidence of the children, who knew nothing of the preceding matter. William Edwards, about thirteen, swore, that he was going to school on the morning of Essex's death, and saw a hand fling a bloody razor out of the window. His mother swears, that her son told her, about ten in the morning of the same day, the same story. There could have been no time for contrivance or preparation; neither is there any conceivable motive for falsehood on the part of the boy or his mother. Is what he said he saw false? Is what the mother swore false? If what the mother swore is true, it is probable that the boy's statement is true; and if the boy's statement is true, Essex was murdered, for it was sworn that the razor was found by his body. Again, Jane Loadman, aged thirteen, swears, that on the same morning she saw a hand fling a bloody razor out of Essex's window; and William Glassbrook swears, that on the same morning he heard the girl tell her aunt that the Earl of Essex cut his throat, upon which her aunt was very angry; whereupon the girl did declare she was sure of it, for she saw him fling the razor out of window, and the razor was bloody. The aunt, Margaret Smith, swears the same thing. Now this girl evidently does not mean to injure the King's party in what she swears. Her inference is, that Essex cut his throat, and she does not know that the fact she mentions refutes that inference; for if a razor were flung out of window, the razor put by the side of the body, to make the jury believe he had cut his throat, as the valet Bonamy swore, is false evidence. Bonamy, the valet, contradicts himself; and the story of a man's paring his nails with a razor, is itself improbable. Russel, the warder, also gives inconsistent accounts. Besides this, Samuel Story

the witnesses for the Crown to give page after page of hearsay testimony, in spite of the repeated and indignant expostulations of the prisoner (*p*).

positively swears, that Major Webster confessed to him that he flung the razor out of the window, and when he was asked why, ascribed it to his consternation; thereby corroborating the children. There were five cuts on the right hand of Essex, and three on his neckcloth. When the jury desired to see the clothes, Major Hawley told them it was the body, not the clothes, they were to sit on. Floyd, the sentinel, taken up as privy to the murder, 1688, stated to the Justice, and to the Secret Committee, that by order of Major Hawley he let two or three men, of whom Webster was one, into Essex's lodgings just before his death, and immediately afterwards heard a great trampling, and a fall like that of a body. It was also proved, that two days before the death of Essex, it was reported at Andover that he had cut his throat then, while the King and Duke were there; and that it was reported at Frome, one hundred miles from London, on the morning after the event took place. To this it must be added, that, as Mr. Hallam very candidly states, the government had no case against Essex, and his life was not in the slightest danger. The presence of James at the Tower may be accounted for by the importunity of his agents. Charles knew nothing of the matter, and was taken there on some other pretence. But the agents of James might insist upon some such sanction to their proceedings. Sir John Hawles, the Solicitor General in William the Third's time, certainly believed that Essex was murdered; and he gives as a reason for it, the care that was taken to fix Lord Russell's trial for that very day: "My Lord Essex was killed, or to be killed, that morning; as to this matter, it is not material whether by his own or another's hand." "The jury (Russell's) might have been told a great many circumstances to shew the improbability of Essex's killing himself." State Tracts, vol. 2, p. 37. It should be recollected, that all this evidence was taken most reluctantly. Lord Sunderland was deeply implicated by the evidence of Holland, which I have not insisted on, who stated that he, at the instigation of Sunderland, actually assisted in the crime, and discouraged the inquiry. Such an investigation could then answer no purpose, and could not be agreeable to Queen Mary or her husband. Queen Anne struck Braddon out of the Pension List, saying, that he had flung blood in her father's face. Altogether, there is at least as much evidence to believe that James ordered the assassination of Essex, as that Ferdinand did that of Wallenstein; nor would it, in my opinion, be worse than other actions of James's life. Charles I entirely acquit; and perhaps other horrours might be discovered if the history of this transaction could be fully laid open.

(*p*) The case of Yardley *v.* Tothill, 2 Keble, shews that the rule against hearsay evidence was quite understood at this time. Rabelais had

The Lord Chief Justice, in summing up to the jury, repeated all Lord Howard's hearsay evidence, which he said was inducement to the matter that affected Lord Russell more immediately. He took no notice at all of the fatal blow inflicted on Lord Howard's credit by the witnesses, Lord Anglesea, Burnet, and Mr. Howard, called on behalf of the prisoner, but artfully substituted the point whether an accomplice was a *competent* witness, for the question whether he was a *credible* one: neither did he take any notice of the loose and vague manner in which Rumsay and Shepherd, but Rumsay more especially, gave their evidence, or of their repeated contradictions of each other and themselves (*q*): he stated also that Shepherd spoke to a discourse about a rising, whereas Shepherd, when pressed on that point, answered, I do not remember any further discourse: so he misrepresented Rumsay's evidence, who had said there had been no discourse about a rising, whereas Pemberton repeated his evidence as if he had said, that the intended surprise of the guards was in order to a rising. The Chief Justice also dwelt upon the contents of the written declaration spoken to by Shepherd, which was contrary to all principle,—first, because it was parol evidence of a writing which ought to have been produced or accounted for, and next, because there was no evidence of any kind that the paper had been communicated to Lord Russell, or sanctioned in any way by his approbation. In short, his conduct was, though not so manifestly unjust as at Hone's trial, extremely partial, and unbecoming. Yet, in spite of all this partiality, —because he had not done openly, what he contrived, however effectually, to accomplish; because he did not insult misfortune; perhaps, because he did not seize the occasion of insulting the pattern of womanhood at the bar,—he was dismissed from his situation, and his name struck out of the list of privy councillors.

(*q*) At Cornish's trial Rumsay admitted that he had stated what was false on occasion of Lord Russell, out of humanity, as he said, to the man

Thucydides remarks, that in times of civil violence they generally succeed best who take the shortest path to reach their objects. The gifted, refining, and more scrupulous men, who endeavour to preserve appearances, become the victims of the blunt, rude, stupid ruffians who at once level their daggers at the throat of their enemies. Proceeding upon this principle, the "merry monarch," our most religious and gracious King, selected Jeffreys to destroy Algernon Sydney, the most illustrious man then alive in England; and, from the spotless virtue of his life, no less than from his deep learning and great capacity, the Court's most dangerous antagonist. Charles required for his purpose neither knowledge to perplex, nor abilities to seduce, nor eloquence to persuade, nor plausibility to deceive,—but a determined ruffian, such as the soucing prostitution of the bar of that day alone could furnish, with a front of brass, and a heart of iron. Such a man was Jeffreys. There was a sort of tie in Nature between him and his employers. The perpetration of crimes, which other men commit with reluctance, was no inconsiderable part of his reward. To him the pedantry in which, as a veil, the Cokes and Pophams wrapt up their enormities, would have been useless. Jeffreys loved vice as Cato did virtue, for its own sake; and dwelt with rapture on its deformity. He had a soul, to the morbid cravings of which the blood he was required to shed, the insults he was expected to pour out, the sufferings, mental and bodily, he was called upon to inflict, ministered a depraved and unnatural delight. The judges, his contemporaries, are obliged to him: the servile Hyde, the miserable Forster, the corrupt Pemberton, the ignoble North, the perjured Wright, the flagitious and abject Trevor, nay, the brutal Scroggs himself, when placed by the side of Jeffreys, appear innoxious and almost respectable. In him was impersonated the genius of the reign, which began by senseless outrages to departed

virtue : "Trucidatis tot insignibus viris virtutem ipsam exscindere concupivit, interfecto Thrasea Pæto, et Borea Sorano."

Sydney was brought to his trial in November, 1683. The indictment was read to him, and he was called upon for his defence. "My Lord," he said, "I find an heap of crimes put together, distinct in nature and distinguished by law; and I do conceive that the indictment is void, and that I cannot be impeached thereon."

L. C. J.—"We are not to admit any discourse till you answer whether you be guilty or not . . . You must plead or demur."

Sydney.—"If I put in exceptions to the bill, I do not plead until those exceptions are overruled. This was the case of Sir Henry Vane."

L. C. J.—"I must tell you, you must plead or demur."

Sydney.—"My Lord, every one will acknowledge that there are or have been vicious indictments. Now, if I plead to an erroneous indictment, and am acquitted, I may be indicted again . . . . If any one say I have levied war, and by several acts undertake to prove I have done it, I can say I have done it or have not. But here I don't find anything specified, nor can I tell upon what statute I am indicted. I pray I may see the record."

L. C. J.—"That we cannot do." (English justice!)

Sydney.—"My Lord, I desire you to accept this." [Shewing a parchment.]

L. C. J.—"What is it? If you put in a special plea, and Mr. Attorney demurs, you may have judgment of death, and by that you wave the fact."

This statement, which was urged again by the crawling reptile Withens, was false. It was not true that the plea waved the fact, and that, if the plea were found against the prisoner, judgment of death must be pronounced. Jeffreys

to do, and what then was almost impossible,—he calumniated the English law. In the mean time the Solicitor General, whose name I am sorry to say was Finch, played the pettifogger, by remarking, "I must do my duty. Mr. Williams (this was Speaker Williams) exceeds his duty; he informs the prisoner several things."

Williams (who of course saw through the falsehood).—"I only said, if it was a plea, put it in. Mr. Attorney can hear all I say."

Whereupon Mr. Williams was reproved by the Lord Chief Justice.

Sydney.—"Why then, if you drive me upon it, I must plead." [He pleaded not guilty.]

The trial was then fixed to take place in a fortnight.

Sydney.—"In the next place I desire a copy of the indictment."

L. C. J.—"We can't grant it by law" (*s*).

On the 21st of November Sydney was again brought to the bar. He began by complaining of the hardship he had suffered from the refusal of a copy of the indictment. Jeffreys said, "By the opinion of all the judges a copy of the indictment was refused my Lord Russell. Therefore arraign him on the indictment, we must not spend our time in discourses to captivate the people."

West was called.

Sydney.—"I pray one word before Mr. West be sworn. I have heard Mr. West has confessed many treasons. I desire to know whether he is pardoned."

L. C. J.—"I don't know that."

Sydney.—"How can he be a witness?"

L. C. J.—"Swear him. I know no legal objection against him. He was a good witness on my Lord Russell's trial."

(*s*) Again, I ask, would any law in a free country, but one made by

Sydney.—"My Lord, if another did not except against him, it is nothing to me."

Mr. North (the contemptible writer).—"Pray give an account to the Court of what you know of a general insurrection intended in England."

Sydney.—"What he knows concerning *me*."

L. C. J.—"We will take care of that."

Sydney.—"Is it ordinary that he should say any thing unless it be to me and my indictment?"

L. C. J.—"Mr. Sydney, you remember in all the trials about the late Popish Plot, how there was first a general account given of the plot in Coleman's trial, in Plunket's, and others. I do not doubt but you remember."

West then began with a long detail of hearsay evidence. Captain Walcot told me in October last, &c., Colonel Rumsay said, &c. (in Sydney's absence). Afterwards I was not privy to any thing else, but what I had the report of from Mr. Nelthrop and Mr. Ferguson. Mr. Nelthrop told me the prisoner had said——

Sydney.—"My Lord, I am extremely unwilling to interrupt the gentleman."

L. C. J.—"You must not interrupt the witness. Go on, Sir."

West.—"Mr. Welthrop told me the prisoner had sent Aaron Smith into Scotland, &c." Then a long detail of hearsay which he thus concludes: "As to the prisoner, I know nothing, and did never speak with him till since the discovery." Not one syllable that this witness said was evidence.

Rumsay was the next witness.

He repeated hearsay and described meetings, but said not one word as to the prisoner. And Mr. Phillipps remarks, he did not corroborate West as to the statement which West pretended to have received from him; on the contrary, he said, that he had received from West the very information which

West pretended to have received from him. Such was the value of this testimony.

Sydney.—"My Lord, I must ever put you in mind whether it be ordinary to examine men upon indictments of treason, concerning me that I never saw nor heard of in my life."

L. C. J.—"I tell you all this does not affect you, and I tell the jury so."

Sydney.—"But it prepossesses the jury."

Keiling was then sworn.

He repeated a conversation with Goodenough: "And I have heard him say that Colonel Sydney, *whom I don't know*, had a considerable part in the management of that affair!"

Att. Gen.—"Now we come to the prisoner, we will call my Lord Howard."

Lord Howard of Escrick was a Titus Oates without his courage or his excuses. The mild and loyal, but honest Evelyn, calls him "that monster of a man, Lord Howard of Escrick"(*t*). The flesh of every honest man in Court must have crept with loathing as the murderer of Lord Russell thus began:—

"Truly, my Lord, on entering on the evidence, which I am about to give, I cannot but observe, what a natural uniformity there is in truth. For the gentlemen, who have been before me, have so exactly instanced, in every particular, what I have to say, that two tallies could not more exactly fall into each other, though I confess, I had not seen their faces, for some months, before the breaking out of the plot. The witness then proceeded to state, that, in the January preceding, a select council was appointed, consisting of himself, the Duke of Monmouth, Lord Essex, Lord Russell, Algernon Sydney, and Hampden; that the object, which they had in view, in

(*t*) Memoirs, vol. 1, p. 566. "Mr. Algernon Sydney, who was executed on the single testimony of that monster of a man, Lord Howard of Escrick."

associating together, was to give life and motion to an enterprise, which had been long in hand, but was then become languid and flat. The first meeting was at Hampden's. The witness could not remember the order, or method, in which the parties discoursed; but the result was, that they should then settle the points, which were afterwards to receive their particular attention; these were, the time, the place, and the persons fittest to be employed. Some opinions were given, but nothing was resolved; the points for consideration were committed to their thoughts to be digested afterwards. They were also to consider what magazines should be procured, and what sums of money raised. These, said the witness, were only the heads, which were then agreed on, and were to be afterwards better considered. The party declared it to be of the utmost importance to have a perfect understanding and union of council with the leading men in Scotland; and determined, that some person should be sent into Scotland to promote this object.

"About a fortnight after this meeting, there was another at the house of Lord Russell, where the same party were assembled; and after some conversation respecting the leading principles, on which they should act together, they debated on the expediency of the measure, which had been advised at the last meeting, that of sending into Scotland, to invite over to England, some of the leading men of the party, who might bring information as to the state of the people, and consult on the means of raising a commotion in that kingdom. It was agreed, that Lord Melvin, Sir John Cockram, and two of the Campbels, should be invited to join the party in England. Sydney engaged to select some person for this business, and named Aaron Smith. Aaron Smith was accordingly sent to Scotland, in pursuance of the debate.

"Here the evidence of Lord Howard closed. The Chief Justice inquired, whether Sydney wished to ask the witness

any questions? 'None,' said Sydney, 'I have no question to ask Lord Howard.' 'Silence'—said the Attorney General—'You know the proverb.'"

If the third part of Dryden's wonderful poem, the Hind and Panther, had then been written, Sydney might have replied by quoting the lines, which no doubt describe his feelings,

> "She suppress
> The boiling indignation of her breast,
> She knew the virtue of her blade, nor would
> Pollute her weapon with ignoble blood,"
> Her fainting foe she saw before her eye,
> And back she drew the shining weapon dry."

A collision with Sydney was not to ennoble such an enemy. "The Lord Howard," he says in the paper he delivered to the sheriff, "is too infamous by his life and the many perjuries not to be denied, or rather sworn to by himself, to deserve mention, and being a single witness would be of no value, though he had been of unblemished credit, or had not seen and confessed that the crimes committed by him would be pardoned only for committing more, and even the pardon promised could not be obtained "until the drudgery of swearing was over" (*u*). Lord Anglesey said, as before, that Howard, in Lord Bedford's presence, had denied all knowledge of the plot, and protested that Russell had nothing—could have nothing—to do with any such proceeding. Lord Clare said, that Lord Howard said of Sydney with great asseveration, that he was as innocent as any man breathing.

Att. Gen.—"When was this?"

Lord Clare.—"At my house."

Att. Gen.—"How long before Lord Howard was taken?"

Lord Clare.—"About a week."

The next question was intended to destroy Lord Clare.

Att. Gen.—"I would ask you, my Lord, upon your honour, would not any man have said as much who had been in the plot?"

(*u*) Howard's own words.

Lord Clare.—"I cannot tell. I know of no plot."

Philip Howard swore that Lord Howard had told him the plot was false, "a plot made upon us, and, therefore, no man was free;" and added, "I have that particular obligation from Colonel Sydney that no one man had from another."

Burnet swore that Lord Howard, in his presence, with hands and eyes lifted up to Heaven, protested he knew nothing of the plot.

Joseph Ducas, a French servant of Sydney's, swore that after Sydney's arrest, Lord Howard said to him, "God knows I know nothing of this! and if Colonel Sydney was concerned in the matter he would tell me something, but I know nothing."

Lord Paget said, that Lord Howard had to him denied all knowledge of the plot.

Edward Howard, who had been browbeaten at Lord Russell's trial, said, "Lord Howard assured me, under great asseverations, he could neither accuse himself nor any body living . . . . I add, I think if he had known any such thing he would not have made his application to the King in this manner, I am afraid not so suitable to his quality."

L. C. J.—"No reflections upon anybody."

Mr. Howard.—"My Lord, I reflect upon nobody, I understand where I am; but since your Lordship has given me this occasion, I must needs say that that reproof which was given me at the trial of Lord Russell, made me, by reason of a weak memory, omit some particulars. I will speak now which are these. My Lord, upon the discourse of this plot, did further assure me that it was certainly a sham. How, my Lord, do you mean a sham (*v*)? said I. Why, such an one, cousin, says he, as is too black for any minister of public employment to

(*v*) "A sham:" verba meretricis speciem subrustici pudoris præ se ferentis et cupido amanti dicentis—"I am a-sham-ed"—amatoris deinde

have devised, &c. And I am sure if I had the honour to be of this gentleman's jury I would not believe him."

L. C. J.—"This must not be suffered."

Att. Gen.—"You ought to be bound to your good behaviour for that."

L. C. J.—"The jury are bound by their oaths to go according to their evidence; they are not to go by men's conjectures."

Sydney.—"My Lord, I spake of a mortgage that I had of my Lord Howard. I do not know whether it is needful to be proved, but it is so."

Lord Howard.—"I confess it."

Then Blake was called. Blake swore that Lord Howard said to him, he had his warrant for the pardon "as soon as the drudgery of swearing is over."

Tracy swore that Lord Howard said, in his presence, he was sure Colonel Sydney knew nothing of the plot.

Sydney.—"Did he take God to witness upon it."

Tracy.—"Yes."

Sydney.—"Paswick, what did my Lord Howard say in your hearing about the pretended plot, or my plate?"

Paswick.—"He asked for your Honour, and they said your Honour was taken away by a man to the Tower for the plot, and then he took God to witness he knew nothing of it, and believed your Honour did not either. He said he was in the Tower two years ago, and he believed your Honour saved his life."

Sydney.—"*Did he desire the plate?*"

Paswick.—"Yes, and said it would be sent to his house to be secured."

A record of the conviction of Lord Russell was then produced, and read without objection (*w*). This was scandalous

(*w*) In Horne Tooke's trial, the counsel for the prisoner gave in evidence the acquittal of Hardy. The Attorney General (who knew the jurors were well aware of the fact) did not object to its admission.

injustice. The papers found in Sydney's closet were then put in, and although the act of Parliament averring the attainder, alleges with the ignorance and confusion peculiar to such documents, that the evidence of the handwriting was insufficient, there can be no doubt that it was complete and satisfactory. All evidence of handwriting, unless where the witness has seen the pen form the characters, is evidence by comparison. From what we have seen before of A.'s writing we conclude this to be A.'s writing. The evidence of course varies in degree from being almost valueless, to that which brings conviction; but to say that it ought to be excluded altogether is ridiculous. In Sydney's case the evidence was abundant. Three witnesses were called: one of them had seen him write; another had paid bills on his signature, and his payments had been always recognised; the third had seen, examined, and acted upon documents purporting to be in his hand in business. The evidence (*x*) of these witnesses would be admissible in any English Court of justice at this day.

But the iniquity was, first, in holding that these *un*published papers were tantamount to a second witness to prove an overt act of treason, without which second witness Sydney was by law entitled to his acquittal; secondly, in holding that writing a treatise, even if it had been published, to prove that Kings were made for the sake of the people, and not people for the sake of Kings, and that to set up a Divine right was blasphemous nonsense, amounted to an overt act of treason; thirdly, in holding that such writing not proved to be in any way connected with any design or treasonable practice charged

(*x*) Doe *v.* Suckermore, 2 Nev. & Per. 48; 5 Adol. & Ell. 730. A point was made, whether a person, who had gained his knowledge of the handwriting by an examination of it, might prove the attestation of the writer. Two judges held he might, and two that he might not. And such is the wisdom of English law, there the matter stands till somebody is ruined by obtaining a positive decision on the subject, which positive decision may, perhaps, be overruled, and ruin somebody else

in the indictment, also amounted to an overt act, as required by the statute.

The following extracts are from the charge of Jeffreys to the jury:

"I must tell you, whatever happens to be hearsay from others, it is not to be applied immediately to the prisoner; but, however, those matters that are remote at first may serve for this purpose, to prove there was generally a conspiracy to destroy the King and government: and for that matter, you all remember it was the constant rule and method observed about the Popish Plot, first to produce the evidence of the plot in general: this was done in that famous case of my Lord Stafford, in Parliament.

. . . . .

"So, gentlemen, I must tell you, that if in case there be but one witness to prove a direct treason, and another witness to a circumstance that contributes to that treason, that will make two witnesses to prove the treason: because I would explain my mind, not long ago all the judges of England were commanded to meet together, and one, that is the senior of the King's counsel, was pleased to put this case: If I buy a knife of J. S. to kill the King, and it be proved by one witness I bought a knife for this purpose, and another comes and proves I bought such a knife of J. S., they are two witnesses sufficient to prove a man guilty of high treason; and *so it was held by all the judges of England* then present, in the presence of all the King's counsel.

. . . .

"Another thing which I must take notice of to you in this case is, to mind you how this book contains all the malice, and revenge, and treason, that mankind can be guilty of: it fixes the sole power in the Parliament and the people; so that he carries on the design still, for their debates at their meetings were to that purpose. And such doctrines as these suit with their debates; for there a general insurrection was

designed, and that was discoursed of in this book, and encouraged. They must not give it an ill name: it must not be called a rebellion, it being the general act of the people. The King, it says, is responsible to them, the King is but their trustee; that he had betrayed his trust, he had misgoverned, and now he is to give it up, that they may be all Kings themselves. Gentlemen, I must tell you, I think I ought more than ordinarily to press this upon you, because I know the misfortune of the late unhappy rebellion, and the bringing the late blessed King to the scaffold, was first begun by such kind of principles: they cried, he had betrayed the trust that was delegated to him from the people. Gentlemen, in the next place, because he is afraid their power alone won't do it, he endeavours to poison men's judgments; and the way he makes use of, he colours it with religion, and quotes Scripture for it too: and you know how far that went in the late times; how we were for binding our King in chains, and our nobles in fetters of iron. Gentlemen, this is likewise made use of by him to stir up the people to rebellion" (*z*).

Thus instead of saying, God save the King! Jeffreys said, God save the tyrant! and the jury, to the everlasting shame of England, said Amen. Sydney was found guilty, and brought up afterwards for judgment. The following scene took place; and never did real dignity and greatness of mind obtain a more complete triumph over place and title:

Sydney.—"My Lord, I desire the indictment against me may be read."

L. C. J.—"To what purpose?"

Sydney.—"I have somewhat to say to it."

L. C. J.—"Well, read the indictment."

Then the clerk of the Crown read the indictment.

Sydney.—"Pray, Sir, will you give me leave to see it, if it please you."

L. C. J.—"No, that we cannot do."

Sydney.—"My Lord, there is one thing then that makes

(*z*) State Trials, vol. 9, p. 890.

this absolutely void, it deprives the King of his title, which is treason by law, 'Defensor Fidei.' There is no such thing there, if I heard right."

L. C. J.—"In that you would deprive the King of his life, that is in very full, I think."

Sydney.—"If nobody would deprive the King of his life no more than I, he would be in no danger. Under favour, these are things not to be overruled in point of life so easily."

L. C. J.—"Mr. Sydney, we very well understand our duty, we don't need to be told by you what our duty is, we tell you nothing but what is law; and if you make objections that are immaterial, we must overrule them. Do not think that we overrule in your case, that we would not overrule in all men's cases in your condition. The treason is sufficiently laid."

Sydney.—"My Lord, I conceive this too, that those words, that are said to be written in the paper, that there is nothing of treason in them; besides, that there was nothing at all proved of them, only by similitude of hands, which upon the case I allege to your Lordship, was not to be admitted in a criminal case. Now it is easy to call a thing *Proditorie;* but yet let the nature of the things be examined, I put myself upon it, that there is no treason in it."

L. C. J.—"There is not a line in the book scarce but what is treason."

Justice Withens.—"I believe you don't believe it treason."

L. C. J.—"That is the worst part of your case; when men are riveted in opinion, that Kings may be deposed, *that they are accountable to their people*, that a general insurrection is no rebellion, and justify it, it is high time, upon my word, to call them to account" (*a*).

Mr. Bamfield.—"Sir, I pray you to hear me one word as Amicus Curiæ, I humbly suppose that your Lordship will not give judgment if there be a material defect in the indictment, as the clerk did read it, he left out 'Defensor Fidei,' which is part of the style of his Majesty."

(*a*) State Trials, vol. 9, p. 898.

L. C. J.—"We have heard of it already, we thank you for your friendship, and are satisfied. Mr. Sydney, there remains nothing for the Court but to discharge their duty, in pronouncing that judgment the law requires to be pronounced against all persons convicted of high treason; and I must tell you, that though you seem to arraign the justice of the Court, and the proceeding——"

Sydney.—"I must appeal to God and the world, I am not heard."

L. C. J.—"Appeal to whom you will" (*b*).

He then proceeded, after some remarks, in a strain of coarse vituperation, and hypocrisy still more detestable, to pronounce the barbarous sentence of perverted law upon the illustrious patriot. After it had been delivered, Sydney said:—

"Then, O God! O God! I beseech thee to sanctify these sufferings unto me, and impute not my blood to the country, nor the city, through which I am to be drawn; let no inquisition be made for it; but if any, and the shedding of blood that is innocent must be revenged, let the weight of it fall only upon those that maliciously persecute me, for righteousness' sake."

L. C. J.—"I pray God work in you a temper fit to go unto the other world, for I see you are not fit for this."

Sydney.—"My Lord, feel my pulse (*c*) [holding out his hand], and see if I am disordered; I bless God, I never was in a better temper than I am now."

Memorable words! that at this hour make the cheek glow, and the pulse beat high, wherever freedom has a worshipper. They are the "Sursum corda!" (*d*) of her ritual. Even Jeffreys seems for a moment to have felt their power: he attempted no reply. The sentence he pronounced was executed; and the

(*b*) State Trials, vol. 9, p. 901.

(*c*) "My pulse, as yours, does temperately keep time,
And beats as healthful music."
It seldom happens that such a text is illustrated by such a commentary.

(*d*) "Lift up your hearts."

"good old cause," for which the tongue of Hampden and the pen of Milton had pleaded, was hallowed by the death of Sydney.

Lord Russell was an honest man, but his views were narrow, and his abilities rather below than above the common standard. Yet, such is the English passion for mediocrity, that he has been the object of more general veneration than Sydney, a man of genius far more lofty, and of aspirations far more noble, than those by which our public men have been since distinguished. An attempt has been made, which has not been refuted with all the scorn that a charge resting on testimony so insufficient deserves, to detract from the reputation of this illustrious man. It has been eagerly said by the advocates of the Stuarts and the Lauds, and not denied by some of their antagonists, that Sydney received money from France, not indeed for abandoning his own opinions, but for acting in conformity with them. Such a charge, brought against a generous republican, inspired by a contempt for kings as innate, sincere, and haughty as ever exalted the spirit of an Athenian or a Roman citizen, ought to rest upon very conclusive evidence. It is so contrived that to controvert it by the evidence of facts is impossible,—as, bribed or not, that Sydney always did that which it was consistent for him to do, is not disputed. Let us see then to what the evidence amounts. In the first place, we know that Charles and his Court looked upon Sydney as incorruptible (*e*), and that this was one cause of their implacable animosity towards him. A King like Charles forgives acts of personal hostility, so long as he

(*e*) "When the care of my private affairs brought me into Flanders and Holland, anno 1663, the same dangers accompanied me; and, that no place might be safe unto me, Andrew White, with some others, were sent into the most remote parts of Germany to murder me.

"The asperity of this persecution obliged me to seek the protection of some foreign princes; and, being then in the strength of my age, had reputation enough to have gained honourable employments; but all my designs were broken by letters and messages from this Court, so as none durst entertain me; and when I could not comprehend the grounds of dealing with me in such a way, when I knew that many others, who had been my companions, and given [as I thought] more just causes of hatred

can reconcile them to his favourite theory of corruption, far more easily than integrity, which is the sin for which, in Courts, there is no remission nor forgiveness, as it implies perpetual opposition to his measures. The single testimony against Sydney is a statement of Barillon's—a statement never brought to Sydney's notice, and which he had therefore no opportunity to refute—a statement not made in any detail, nor supported by any circumstances. Barillon does not mention the manner in which the money was conveyed to Sydney—whether he gave it himself, or whether it was sent by others; and this simple statement is to overbalance the weight of Sydney's austere and inflexible purity! But it may be said, why was not the charge brought against Lord Russell, if it was altogether an invention? Why? because Lord Russell was known to be extremely opulent, and Sydney was known to be extremely poor. Why might not Barillon deceive his master by inserting so great a name among his pensionnaries?—he was notoriously a profligate and corrupt man. Why might he not be deceived? He was notoriously the dupe of false information. Madame de Sévigné tells us, that he was imposed upon at a most critical period, and that all the intelligence he sent during the Revolution was false: he was altogether imposed upon by Sunderland. Is the mere statement, the unsupported, unexamined, and unnoticed, never ventilated statement of a corrupt dupe, to be conclusive against a man of heroic virtue? If there was any other circumstance in Sydney's life to give credit to the charge; if he had ever swerved a hair's breadth from the path of honour; if he had done anything inconsistent with the sublime examples after which his life was modelled, the evidence would even then be far from cogent, but it would be stronger.

against them than I had done, were received into favour, or suffered to live quietly, a man of quality, who well knew the temper of the Court, explained the mystery unto me, by letting me know, that I was distinguished from the rest *because it was known that I could not be corrupted.*" Apology of Algernon Sydney.

I have dwelt the longer on this topic because of all the writers on our history with whom I am acquainted, Professor Millar is the only one who has pointed out the utter worthlessness of the charge against our great patriot, and placed it in its proper light. Many writers have been, I suspect, unjust to Sydney, because he was a republican. Was this so great an error? If so, it is a glorious one. Malo cum Platone errare, was the saying of a great man. Was it not better to err in the company of the Hampdens, the Hutchinsons, and the Miltons, than to be right with the Lauderdales, and the Cliffords, and the Buckinghams, and the Monks? And was there nothing more than speculation? If Sydney looked to the past, he saw (while the Italian republics were the light and glory of Europe), the land groaning under oppression and soaked in its own gore, solely for the sake of determining what name should be engraved on the chain by which its inhabitants were bound down; he saw, also, from the death of Elizabeth, that the reign of every monarch was a tissue of vice, hypocrisy, injustice, cruelty, meanness, and oppression, full of disaster and disgrace. If he looked to the present, he saw Charles surrounded by concubines, pandars, and buffoons; he saw that the same power which, during the Commonwealth, had sent Parliament a blank paper, desiring it to dictate peace on its own conditions, had burnt our ships at Chatham (*c*); he saw our credit annihilated, our commerce decaying, our honour lost, our constitution violated, the vestiges of good faith and love of fair dealing, which have always been supposed the redeeming qualities of Englishmen, fast disappearing, under the influence of the King and his satellites; he saw swarms of spies, informers, suborners of evidence, turning the wholesome atmosphere of civil life into pestilence, and making poison of our daily bread; he saw men like Oates, and Bedloe, and Sawyer, and Saunders, swollen, by the rankness of the time,

(*c*) "A disgrace and blot, not to be fetched out by the fire that burnt them, nor by the ocean that carried them." South's Sermons, vol. 3, p. 275.

into a sinister importance; he heard the pulpits resound (*d*) with exhortations to the most abject submission, and blasphemous declarations that man had been redeemed into perpetual thraldom; he saw, moreover, these lessons literally exemplified in our Courts of justice; he saw Sheldon and Ward (*e*) making religion, and Scroggs and Jeffreys making law. Might he not, seeing and hearing all these things, without being an enthusiast (a word so hateful to our ears), and on *practical* grounds, entertain some doubt as to the beneficial consequences of kingly government at home? And if he cast his eyes elsewhere, and saw, in Holland, the inhabitants of a few salt marshes, scarcely rescued from the sea, after having shaken off the yoke of a powerful monarch, rising, in half a century, to a degree of prosperity and renown almost without example, their country the nurse of warriors, jurists, and statesmen, the asylum of arts, industry, commerce, literature, and freedom of thought, resisting the gigantic power of France, chastising England, protecting Europe,—might he not, without being an enthusiast, think that republican institutions had been beneficial abroad? Nor would it be easy even now to prove that he wanted foresight. Could a republican government have caused greater evils than the corruption described in Hervey's Memoirs, by which, and by which alone, the House of Brunswick, under its two first princes, was kept upon the throne? or than the dreadful want of public spirit which gave such men as the Duke of Newcastle and Lord Bute, and others equally contemptible, such fatal influence in our councils? Or if Sydney had foreseen the loss of America, our legislation actually raising the price of bread, in defiance of the rights and wishes of the people (turning by their portentous folly the chosen blessings, for which our prayers are put up to Providence, into a Divine malediction), India delivered over to the government of sordid and rapacious tradesmen, a debt

(*d*) "When heads and fellows of Colleges become Greeks and Romans, Greeks and Romans become servile." Harrington.

(*e*) This High Church persecutor was Bishop of Salisbury.

of hundreds of millions incurred to prevent France from governing itself as it chose, and any of the family of Napoléon from inhabiting it; if some prophetic vision had enabled him to foresee that the toil, and blood, and treasure of the English labourers would be lavished to establish such a monument of reckless despotism as the flagitious treaty of Vienna, and to anticipate the judicious management which has made Ireland what it is,—would he have been wholly without *practical* arguments in favour of his theory? It is no doubt a strong, and for us, it ought to be, a conclusive argument against a republic, that it supposes too great virtue in the mass of the people, it relies too much on the public spirit and generosity of its citizens; and if to this be added the love of monarchy and of rank common to all classes among us, of which our history furnishes such abundant proof (*f*), it is clear that Sydney did not make sufficient allowance for the character of the English nation, that he did not argue as if he was legislating in fæce Romuli. At the same time, we should recollect that the argument is not altogether on our side,—that the great merit of a republic is, to prevent the rewards due to great and important services from being lavished on the most insignificant of mankind, merely because they are the personal favourites and courtiers of the Sovereign. It enlists eloquence, learning, valour, and capacity in the public cause: it teaches men to despise honours which the weak may confer on the frivolous, or the profligate on the base, and to rely on manly and generous pursuits as the surest means of distinction and success: and

(*f*) None stronger than omitting the statue of Cromwell, the most glorious of modern rulers, from the statues of English Kings, by a committee of taste. A committee of taste might have recollected what Tacitus says of the omission of the statues of Brutus and Cassius, in the funeral procession of Tunia, in the worst days of Roman servitude,—"Sed PRÆFULGEBANT Cassius atque Brutus EO IPSO quod effigies eorum NON visebantur." This was the same body which exemplified its notion of taste by dividing on the question, whether Dryden was one of our poets. Perhaps, indeed, it thought that to place Cromwell among the Stuarts, and the four first monarchs of the House of Brunswick, might have been a contrast too invidious.

thus it is that republican institutions, where they are practicable, have lifted men to a height far beyond that which, under monarchies, they have ever been able to attain (*g*). It is to republics that we owe our superiority to the inhabitants of Asia Minor, and to the savage in the wilderness. But for republics we might now be what our ancestors were in the time of Cæsar, or, worse still, what the Russians are under the government of Nicholas.

In no country, but England, not under the most miserable despotism—not under the wildest and most execrable tyrants, could such a murder as that of Sir Thomas Armstrong have been perpetrated by the law. In no country, but England, have there ever existed institutions so perfectly barbarous as to enable a judge, before whom a prisoner has been brought, publicly to consign him, without hearing or reading one syllable of evidence for or against him—without any pretended inquiry of any sort into his guilt, to a cruel and ignominious death. All other tribunals have required some proof, even of imaginary crimes—all other judges, however bad, have professed to ground their verdict upon some evidence. If men in France were hurried away without inquiry to state prisons, it was by the strong arm of power, not by legal tribunals. But if in France, aye, or in Spain, in any country not stupified by the love of form, any tribunal had been called upon in the presence of an attentive multitude, to order an accused person to be put to death at the very moment that it ostentatiously professed entire ignorance of his guilt, Nature would have vindicated her rights, and the fate of a system so revolting and detestable would have been sealed for ever.

(*g*) Speaking wholly without reference to this country, I should say, that the strongest arguments in favour of a republic, after the great lessons of antiquity, were to be found in these books :—*Machiavelli's Principe* (this is, indeed, the work of a complete and almost fanatical republican ; the argument of the book, from the beginning to the end, is, if the government of a King is to be upheld ; this is the way to do it) ; Hervey's Memoirs ; Chesterfield's Letters ; Doddington's Diary ; Parliamentary Debates, under the administration of Perceval and Lord Liverpool ; State Trials, *passim*.

But in England, though the proceedings were in public, the judges contrived to destroy all the benefit of publicity. They took care to make it impossible for the public to know anything about the matter: the business might as well have been carried on in Chinese. Thus they contrived to commit crimes in the face of day, which judges acting in secret would not have dared to perpetrate. By lawyers the sufferings thus caused were fully known, and utterly disregarded, unless, indeed, where the violation of some technical and arbitrary rule excited an indignation, which the mere violation of natural justice, which murder, confiscation, and imprisonment, however unjust, if inflicted in conformity with arbitrary rules, would never have provoked. Pollexfen, and Maynard, and Jones, were as ready to destroy or ruin the innocent as Scroggs and Sawyer, if it could be done, as it generally might be done, according to law. But as the people could not understand the language in which the proceedings were carried on, or the absurd forms by which they were surrounded, they gradually resigned all exercise of their understandings on the subject. They became callous to the spectacles of injustice daily going forward under their eyes, and as on many occasions the judge, in infringing the clearest right, was but the minister of the law, the spectators were unable to discriminate between the crimes that were sanctioned and those that were prohibited by our institutions. This state of things can alone account for such a scene as that to which the proceedings in the case of Sir Thomas Armstrong gave rise, taking place in a public Court of justice, for though the judge transgressed his powers, yet the law which he did find it necessary for his purpose to transgress, and which now exists, was so cruel, so foolish, and so shocking, that it gave a colour to his wickedness. The history of the law of outlawry in criminal matters was this (*h*): "At common law, if a person was beyond sea when

(*h*) In civil cases, where property is concerned, the defendant, by entering an appearance, reverses the outlawry; but in criminal cases, where life, and character, and liberty are concerned, the prisoner cannot reverse the outlawry (after the year), or claim a trial. So humane, just,

an outlawry was pronounced against him, it was an error in fact, for which the outlawry was to be reversed; and it is an error in all outlawries but for high treason to this day. By the 6 Edw. 6, that error is taken away in high treason, but there is a proviso in that statute, that if the person outlawed shall within a year after the outlawry pronounced, yield himself to the chief justice of the King's Bench, and offer to traverse his indictment, and on his trial shall be acquitted, he shall be discharged of his outlawry. Upon the construction of this statute no judgment was ever given; and the reason is, no man outlawed was ever denied a trial till this time, if he was taken within a competent time. The reason of making that statute was this; men would commit treason, and presently fly beyond sea, and stay there till the witnesses who should prove the treason were dead; then return, and reverse the outlawry for the error of their being beyond sea; and the witnesses being dead they were safe; and therefore this statute takes away that error in part, though not in the whole, and doth in effect say, that the person outlawed shall not have advantage of that error, unless he comes and takes his trial within a competent time, which that statute limits to a year after the outlawry pronounced"(*i*). Sir Thomas Armstrong was seized upon at Leyden *within* the year, and brought over to this country on the 14th of June, 1684; he was brought before the King's Bench, and the judges, Jeffreys, Withens, Holloway and Walcott. The year since his outlawry had not then expired. The Attorney General, Sawyer, prayed an award of execution against him on the outlawry. "Arraign him on the outlawry," said Jeffreys. He was arraigned and asked, "What he had to say for himself? Why execution should not be awarded on his attainder?"

Sir T. Armstrong.—"My Lord, I was beyond sea at the time of the outlawry. I beg I may be tried."

and enlightened is the English law, and such the value of its *forms*, as a shield against oppression, of which this case is a striking instance.

Jeffreys.—"That is not material to us" (*i*).

Sir T. Armstrong.—"I desire to be put upon my trial." (A request, compliance with which would have been matter of course in any Court of justice not governed by the perfection of reason, on this side Mount Atlas).

Jeffreys.—"WE CANNOT ALLOW ANY SUCH THING. CAPTAIN RICHARDSON, WHAT ARE YOUR DAYS OF EXECUTION?"

Jailor.—"Mondays, Wednesdays and Fridays, my Lord."

Armstrong's Daughter.—"Here is a statute, my Lord."

Jeffreys.—"What is the matter with that gentlewoman?"

Armstrong thus quoted the statute of Edw. 6.

Jeffreys.—"Let it be read."

Daughter.—"Here is a copy of it" (shewing a paper).

Jeffreys.—"Why, how now! We do not use to have women plead (*k*) in the Court of King's Bench. Pray be quiet, Mistress."

Armstrong.—"My Lord, I would not allege this before, because I have been a close prisoner, and *nobody permitted to come to me* (*l*). I desire counsel may be assigned me."

Jeffreys.—"Read the statute he desires."

It was then read.

Att. Gen.—"I suppose Sir Thomas will now shew he yielded himself to your Lordship."

Jeffreys.—"This is the first time I have seen Sir Thomas."

Armstrong.—"My Lord, I have been a prisoner, and the year is not yet out. I now render myself . . . . . I am within the benefit of the statute."

Jeffreys.—"We think otherwise."

Armstrong then begged for counsel.

Jeffreys.—"For what reason? We are of opinion it is not matter of doubt."

Armstrong,—"Methinks the statute is very plain."

Jeffreys.—"So it is, very plain, you can have no advantage

(*i*) Therefore any Englishman abroad might be destroyed at the pleasure of the Court.

(*k*) Nor men,—judging from what took place there.

(*l*) He was loaded with irons, and very ill used. One of his daughters was struck by the keeper of Newgate. Parl. Hist. vol. 5, p. 245.

of it. Captain Richardson, you shall have a rule for execution on Friday next."

Armstrong.—"I know my own innocence" (*m*).

Jeffreys.—"You may go away with what opinion you please of your own innocency," &c.

Daughter.—"My Lord, I hope you will not murder my father,—this is murdering a man."

Jeffreys.—"Who is this woman? Marshal, take her into custody."

Daughter.—"God Almighty's judgments light upon you!"

Jeffreys.—"God Almighty's judgments will light on those guilty [he should have said accused] of high treason."

Daughter.—"Amen, I pray God!"

Jeffreys.—"So say I. But clamours never weigh with me at all. *I thank God* I am clamour proof, and will never fear to do my duty."

Then she was carried away.

Armstrong.—"My Lord, I am within the statute. I was outlawed while I was beyond sea, and I come now here within the twelvemonth. That is all I know, or have to say in this matter."

L. C. J.—"We think quite the contrary, Sir Thomas."

Armstrong.—"When I was before the council, my Lord, they ordered that I should have counsel allotted me, but I could have no benefit by that order; for when I was taken I was robbed of all the money I had, and have not had one penny restored to me, nor any money since; I know not whether the law allows persons in my condition to be robbed and stripped."

L. C. J.—"I know nothing at all of that matter, Sir Thomas."

(*m*) And unless he had been innocent the Crown would hardly have incurred the scandal of putting him to death unheard. Armstrong urged that Holloway, under the same circumstances, had been allowed a trial. "Yes," said Jeffreys, "they had enough against Holloway." "Then," replied Sir Thomas, "they have not enough against me; my blood be upon you." "Let it," answered Jeffreys. Parl. Hist. vol. 5. p. 245.

Armstrong.—"My Lord, I know lawyers will not plead without money, and being robbed I could not have wherewithal to fee them."

L. C. J.—"Sir Thomas Armstrong, you take the liberty of saying what you please; you talk of being robbed, nobody has robbed you that I know of."

Armstrong.—"Nobody says you do know of it; but so it is."

L. C. J.—"Nay, be as angry as you will, Sir Thomas, we are not concerned at your anger. We will undoubtedly do our duty."

Armstrong.—"I ought to have the benefit of the law, and I demand no more."

L. C. J.—"That you shall have by the grace of God. See that execution be done on Friday next, according to law. You shall have the full benefit of the law."

A rule for execution was then given, as in such cases sentence was not pronounced. Such was the use not of Magna Charta only, (which, except when employed to end a period, or to inveigle some wretched men to destruction, was utterly unmeaning), but of the plain words of a positive statute, when interpreted by English judges. If Jeffreys and Sawyer had each drawn a pistol from his pocket, and shot Sir Thomas Armstrong where he stood, they would have committed a far less cruel, but not a more barefaced or informal murder, than the English people, always so practical, and boasting of Magna Charta and trial by jury, then stood quietly by to witness. All the exquisite tortures, which the English law, or, rather, the English judges (*l*), then provided for those convicted of high treason, were carefully and elaborately inflicted on Armstrong; and to complete the sketch of manners, Charles, the "merry monarch," to reward Jeffreys for this foul murder, took, the next day, a ring from his own finger, and with the refined urbanity and good humour, for which he was so famous,

(*l*) Hobbes' Dialogue between a Lawyer and Philosopher.

placed it on the finger of a ruffian whom no ordinary felon could have looked at without shuddering (*m*).

The conduct of the judges at the trial of Cornish, is thus accounted for by Sir John Hawles: "No explanation can be given of these proceedings, but that some of the judges had newly come out of the West, where they had been so flushed and hardened, that nothing appeared to them rigorous and cruel; and the others seemed to vie with them in their practice."

It may be thought that the trials which have been read, carry judicial infamy to its utmost limits; there are, however, two other trials which will shew wickedness still more atrocious, and cruelty still more transcendant; these were the trials of Lady Alicia Lisle and Mrs. Gaunt, for treason committed by harbouring and assisting rebels: to his eternal shame, and to the lasting dishonour of his profession, Pollexfen, the great Whig lawyer, took an active part in the murder of Lady Lisle: he was the counsel, and Jeffreys the judge. She was convicted against evidence, and in defiance of the law, which must have been perfectly well known to any lawyer present, as it was not proved that Hicks, whom she received, was a traitor, much less that she knew him to have committed treason. To comment on the conduct of Jeffreys would be useless; but shall Pollexfen escape the execration of posterity? Can any cant about professional duty, or being counsel for the Crown, in any way extenuate the wickedness of a man who contributes to put an innocent woman to an excruciating death, or rather who does not by every means in his power endeavour at all hazards to save her from destruction? Are

(*m*) A similar attempt was made in the case of the King *v.* Johnson, 2 Strange, 824, in which the Attorney General actually quoted Sir Thomas Armstrong's case. "But the Court seemed very unwilling to hear anything of that case." A Latin plea was put in, and after a struggle the prisoner was allowed a trial, and *acquitted*. That any man, not of infamous character, should stand up calmly in the open Court of justice of a free country, and ask those who are to administer justice in mercy to put a fellow citizen to death without a trial, does appear surprising, even after the perusal of Meeson and Wellsby, and Crown Cases Reserved.

the words Whig and Tory to blind us as to right and wrong? And shall we refrain from saying, that the maxims on which Pollexfen acted on this occasion would put an end to human intercourse, and would degrade any body of men that did not disclaim and hold them in abhorrence to the level of a gang of murderers and assassins? James, with the savage ferocity that marks every part of his character, refused his pardon, and the noble matron was executed at Winchester. On the same charge, and on evidence equally false and inconclusive, Mrs. Gaunt was convicted before Chief Justice Jones, and though there was not testimony enough to justify a moment's consideration in the mind of the jury; with the baseness common to all juries at that time, they found her guilty, and she was sentenced to be burnt alive,—which sentence was literally carried into effect. It will surprise the admirers of English legislation to know, that burning alive continued to be the legal punishment for a *woman* convicted of high treason, till the year 1790, and was actually inflicted upon a woman towards the close of the last century. The cruelties of Wallenstein's army at the sack of Magdeburg, fall short of those inflicted by English judges and juries in the days of the Stuarts; nor in all the excesses of the French Revolution, would any revolutionary tribunal have dared to outrage humanity by the infliction of such a punishment on an aged and innocent female for an act of benevolence and mercy (*n*).

(*n*) Butler says, that man can "make peace,"—

> "Promote mortality and kill,
> As fast as arms by sitting still,
> Like earthquakes slay without a blow,
> And only moving, overthrow;
> Make law and equity as dear,
> As plunder and free quarters were;
> And fierce encounters at the Bar,
> Undo as fast as those in war."

He adds the old and just complaint against the English, who, he says,—

> "Advance men in the Church and State,
> For being of the meanest rate."

As we have all abundant reason to recollect,

In a curious trial which took place under Jeffreys (1684), in which a question of right to an estate was at issue, and which is reported in the State Trials under the head of "The Lady Ivy's Trial for great part of Shadwell," two deeds were produced to establish the defendant's case,—one purporting to be in the second and third years of Philip and Mary, and another in the same year from Marcellus Hall to Easter. Both these deeds were forgeries; and they were thus detected by Mr. Bradbury, who was, I suppose, a conveyancer of that day. The style of the King and Queen in both ran that they were, among other titles, King and Queen of Spain and Sicily .... Dukes of Burgundy, Milan, and Brabant. Now at that time Philip and Mary never used the style of King and Queen of Spain, nor, in the enumeration of their other titles, was Burgundy ever put before Milan. "In order to prove this," said Bradbury, "I have here all the records of that time .... we shall first read the titles of the acts of Parliament ..... Here are the fines of Easter Term following, which shew that the old style continued." The fines of Easter Term were then read. After this, evidence was put in to shew that Lady Ivy had committed other forgeries,—one of a mortgage for 1500*l.* A Mrs. Duffett was sworn, who said, "My Lord, I did see Mr. Duffett (her husband) forge and counterfeit several deeds for my Lady Ivy."

Serjt. Stringer.—"Pray what did they do to the deeds they made to make them look like ancient deeds?"

Mrs. Duffett.—"For making outsides look old and dirty, they used to rub them on windows that were dirty, and wear them in their pockets, to crease them, for some weeks together .... it was used to lay them in a balcony or open place for the rain to come upon them and wet them, and then the next sunshine day they were exposed to the sun, or a fire made to dry them hastily, that they might be shrivelled."

L. C. J.—"Is your husband alive or dead?"

Mrs. Duffett.—"Dead: he died beyond sea."

It is difficult to say that this is not very material evidence;

and yet now it would (in civil cases I think improperly—in criminal cases I think properly) be rejected. In civil cases, where A. and B. are struggling together, the balance of probability ought to decide the question. But in criminal cases this is not sufficient; in criminal cases (though no one would suppose it who recollects that this great country is without the institution, so essential to justice, of a public prosecutor) it is not, or it ought not to be, a mere struggle between the prosecutor and the prisoner, but a grave question in which error, on one side, is far more pernicious to the community than error on the other. In a question between two ordinary individuals, if an error be committed, it matters little to the public whether it be committed in behalf of Nokes or in behalf of Stiles; but society is a party concerned in every criminal inquiry, and so concerned that the impunity of crime on some occasions, which must follow from a strict adherence to general rules, is far more consistent with its welfare than the punishment and disgrace of innocence which would ensue from their violation. If this reasoning be correct, it follows that greater strictness is requisite in criminal than in civil cases, because in the former class of cases the consequences of error to the public are not the same on whichever side the error is committed, while in civil cases they are identical. As good arises from evil, one consequence of our savage laws was to impress the minds of those judges who were not hardened by the spectacle of human suffering, with the great importance of uniform rules of proceeding.

Having thus stated why I think such evidence ought to be rejected in a criminal, I will state why I think it ought to be received in a civil proceeding. The argument against its reception is, that it is collateral to the point in issue between the parties, and that the person affected by it might fairly complain of surprise. He might say, "All I came prepared to prove is that this particular deed is genuine: how can you

genuine which I never expected to hear of." I will not say there is nothing in this objection, because I will not say that there is no difficulty in legislation; but I own it appears to me by no means a formidable one. My first and conclusive answer is, that if the person were really surprised, the trial ought to be postponed to give him time to meet the evidence. This might be done in half the time in which, and at half the expense for which, a new trial is now obtained. Secondly, it is extremely improbable that if the charge were false, it should not be in the power of the person against whom it was brought at once to shew its improbability. Such things are not often or easily done: most of the categories apply to them; they are done at a particular time, in a particular spot, for a particular purpose, by particular people brought together by particular circumstances, and living in a certain degree of intimacy; they produce certain consequences, and are surrounded by certain events, which it would be difficult to invent on cross-examination. Thirdly, this evidence can hardly be said to be collateral to the issue, for this simple reason,—that in daily life, a man who was about to take a bond from a person, and neglected it, would be thought a maniac. Why then should this intelligence be rejected by a Court of justice endeavouring to ascertain the truth of a transaction? I fully allow that the use of juries, which, in most civil cases, is so fatal an impediment to right and justice, does make rules of evidence necessary which appear absurdly strict to those who do not reflect how utterly unable most juries are to assign a proper value to different degrees of testimony; but I do not think that the field should be so far contracted as to exclude what every rational being would admit to be most important.

Letters were put in from Lady Ivy to her accomplice, offering to give him half the sum for which he had forged a mortgage deed.

Mr. Williams.—"Your Lordship sees one of these letters

tells Mr. Duffett she intends to set Sir William Salkeld's mortgage on foot, and he should have half what she recovered: if it were a true mortgage, why should she give him half?"

In order to contradict the evidence as to the forged deeds, the counsel for Lady Ivy offered to shew that it was erroneous by a history: "We have a history which tells you the very day when the King resigned, which was the 28th October." This Jeffreys refused to admit, characteristically remarking, "Now, instead of records, they put in a little lousy history." It ought, however, to have been received, for the reason given by an able and learned writer (*o*), "as being the best of which the subject-matter is capable," to prove a matter of European history. Starkie goes on to say, that a history is not evidence to prove particular facts and customs; though I own the distinction appears to me quite untenable. The Attorney General argued, "on a point of fact in a foreign country, a foreigner's history, not printed for the purpose of the trial, ought to be evidence." He then endeavoured to give parol evidence of the records. Jeffreys was furious:

"Lord, gentlemen, what do you make of us, to keep us here with I do not know what! Mr. Attorney, he tells us that Mr. Neale was so great a blockhead to brag of this, and so we were prepared for an answer; but all the answer is, my Lord Coke is mistaken, and there are many records, but we have none of them, Præmoniti, Præmuniti. If he did brag so, and you knew it, and would not bring records to wipe off the

(*o*) Starkie on Evidence, vol. 1, p. 250. Camden's Britannia was rejected on the question, whether, by the custom of Droitwich, salt pits must be sunk in a particular place. Dugdale's Monasticon was not allowed to be brought to prove, whether the Abbey de Sentibus was an inferior Abbey, which is mighty absurd. Starkie mistakes Lady Ivy's case, which he quotes under a wrong name—Neale *v.* Fay, (it is cited by the title of Neale *v.* Joy, in 12 Mod. Rep., and by Buller in his Nisi Prius), and says, chronicles *were* admitted; whereas they were rejected, the Chief Justice saying, is a printed history, written by I know not who, evidence in a Court of law?

objection, it is ten times worse than if it had been answered only with the unexpectedness of it."

Mr. Bradbury.—"My Lord, I dare affirm that there are none of the Rolls of that year so till after Easter Term."

L. C. J.—"Lord, Sir, you must be cackling too! We told you your objection was very ingenious, but that must not make you troublesome; you cannot lay an egg but you must be cackling over it. The objection is now upon them; let them answer it if they can. Have you any of the records here?"

Sol. Gen.—"We have not, it seems, my Lord."

L. C. J.—"Then this must pass unanswered, and must be left to the jury."

The Solicitor General offered in evidence the record of a conviction of a person, who had sworn the lease in question was forged, for perjury. This too was rejected. "That conviction is, I think, a good evidence that the deed was not forged." *L. C. J.*—"None in the world, Mr. Solicitor."

When the Solicitor General, to destroy the credit of Mrs. Duffett, offered to put in the sworn statement of her husband, Jeffreys rejected the evidence for the clearly erroneous reason, that the evidence of a husband was not admissible against a wife, although the wife was no party to the suit; in other words, that they might not swear on opposite sides in the same case (*p*).

L. C. J.—"Nay, be not angry, Mr. Solicitor; for if you be, we cannot help that neither."

Sol. Gen.—"My Lord, I must take the rule from you now."

L. C. J.—"And so you shall from the Court as long as I sit here, and so shall every one else by the Grace of God. I assure you I care not whether I please or displease; we

(*p*) "If both had testified for my Lady Ivy, it had been evidence, or if both had testified against her." Chief Justice's charge, p. 644.

must not have our time taken up with impertinent things; for I must say, there have been as many offered in this cause to-day, as ever were in any case that ever I heard; and if all be not as some would have it, then they must be in passion presently. The Court gives all due respects, and expects them."

The jury found a verdict against Lady Ivy, that is, for the plaintiff, thereby declaring their belief that the deeds were forged (*q*).

In 1686, Henry Booth, Lord Delamere (*r*), son of the famous royalist Sir George Booth, was tried during the prorogation of Parliament before the Court of the High Steward on a charge of high treason. He had been committed to the Tower in 1684 by Lord Sunderland under a warrant for that offence. Jeffreys, whom Lord Delamere had denounced while in the House of Commons for his conduct as Chief Justice of Chester, and whose natural ferocity was therefore inflamed by personal hatred, was appointed High Steward, and twenty-seven peers, many (*s*) of whom held high office under the Crown, were appointed the jury. I have already pointed out the absurdity and injustice of such a tribunal, the votes of a majority of the members of which were sufficient to convict. In spite of an exhortation from Jeffreys, "to give glory to God, and to make amends to his vicegerent the King, who had made it evident that his inclination was rather to shew mercy than to inflict punishment," Lord Delamere, who,

(*q*) State Trials, vol. 10, p. 555; Mossam *v.* Dame Theodosia Ivy.

(*r*) Afterwards Earl of Warrington. Many of his speeches and charges to grand juries are preserved in the State Tracts.

(*s*) Among them were the Lord High Treasurer, the Lord President of the Council, the Lord Steward of the Household, the Lord Chamberlain, the Treasurer of the Household, the Master of the Ordnance, Lord Godolphin, and Lord Churchill. Hatsell's Precedents, vol. 4, p. 345. Trial by one's peers must have been a valuable privilege indeed, when they were so chosen for Lords and commoners.

probably, did not quite concur in this view of the matter, chose to stand upon his defence. Lord Delamere began by pleading to the jurisdiction, insisting that, since Parliament was only prorogued, he could only be tried by the whole body of the peers. The Attorney General maintained that he was not bound to demur formally to the plea, as it was irregular and had not been signed by counsel. Lord Delamere asked that counsel might be assigned him to draw out the plea. Jeffreys ruled that the Court had jurisdiction, and that Lord Delamere ought to have been ready with his counsel—which he well knew was impossible. The trial then proceeded. Jeffreys addressed the Lords in the following strain:

"Yet, my Lords, while the King and the Parliament were thus, as I may say, endeavouring to outdoe each other in expressions of kindness, that wicked and unnatural rebellion broke out; and thereupon the arch-traitor Monmouth was, by a bill brought into the lower House, and passed by the general consent of both Houses, [and I could wish, my Lords, for the sake of that noble Lord at the bar, that I could say it had passed the consent of every particular member of each House,] justly attainted of high treason.

"My Lords, what share my Lord at the bar had in those other matters, I must acquaint you, is not within the compass of this indictment, for which you are to try him, as his peers; for that is for a treason alleged to have been committed by him, in his Majesty's reign that now is."

Lord Howard of Escrick was first called. He said at once that he had nothing to say against Lord Delamere; but being told by Jeffreys that he was to give an account of what he knew of any consultations for a rebellion during the late King's life, he proceeded after his former fashion to give an account of what Walcot and Shaftesbury had told him about the Rye House Plot—matter altogether foreign to the investigation.

This question shews that the witness never ought to have been called: *Att. Gen.*—"Before my Lord Howard goes, I will ask him if he knows of any design of a rising in Cheshire?"

Lord Howard.—"No, my Lord, I knew of none at all."

Lord Grey was the second witness; he said nothing that affected Lord Delamere.

Wade gave a great deal of hearsay evidence.

Goodenough *said that he had been informed in Holland that Lord Delamere was one of those Lords* who had promised to draw his sword in the Duke of Monmouth's favour.

Lord Delamere declined to put any questions to this witness, observing that he had never seen his face before.

Jeffreys.—"That is pretty strange, so famous an under-sheriff of London and Middlesex as he was."

Jones was next called, and gave four pages of hearsay evidence.

Jeffreys.—"My Lord Delamere will you ask this witness any questions?"

Lord Delamere.—"No, my Lord, I never saw his face to my knowledge."

Story gave hearsay evidence of what a person, who lived at Bishopsgate, had said to him. After he had given his evidence Lord Delamere asked him whether he knew one Saxon.

Story.—"Yes, my Lord, I knew him a prisoner in Dorchester gaol, when I was a prisoner there myself."

Vaux proved that he had gone out of town with Lord Delamere, and that Lord Delamere travelled under a feigned name. Edlin said the same. Paunceford said that he had heard Edlin give the same account before; that he had heard one Disney speak of Lord Delamere by the name of Brown.

Saxon alone gave material evidence against Lord Delamere. This evidence closed the case for the prosecution. The prisoner ought, by the plain words of the law, to have been at once acquitted, admitting all that Saxon said to be true. He was but a single witness,—the law required two. But as in the

case reported in Dyer the judges neutralized the statute by holding that if Titius saw treason committed, and told what he saw to Mævius, in the presence of Caius, Caius and Titius were two witnesses. The judges of the Stuarts hit upon another device, equally wicked, and not quite so transparent. Jeffreys laid it down, that if Titius sees the prisoner buy a knife to murder the King, and proves that it was bought with that purpose, and Caius proves that he bought the knife, they make two witnesses. With equal reason it might be said, that if Titius proves that the prisoner bought a knife to kill the King, and Caius proves that the prisoner got out of bed in the morning, these are two sufficient witnesses. Yet, according to the English system, this was law, if the judge chose so to declare it, and, in a criminal case, law from which there was no appeal. Mischievous, indeed, was the delusion; impudent, indeed, the imposture; that turned the will of such a judge as Jeffreys into the common law.

The prisoner made a sensible and manly speech, he appealed to the tried loyalty of his race. "This I may the more boldly speak, because I speak it by good authority—because, in the patent that created my father a peer, his late Majesty is pleased to say, that his rising mainly contributed to his restoration." He then read the clause in the preamble of his father's patent.

"Many witnesses," he said, "have been produced against me, and much swearing; but little or nothing of legal evidence to affect me, for there is but one man who says anything home or positively to affect me, and whom I shall answer by and bye. All the rest are but hearsays, and such remote circumstances as may be tacked to any evidence against any other person, but are urged against me for want of greater matters to charge me with; and, therefore, I hope the producing and pressing these matters against me is rather a strong argument that I am innocent than that I am guilty, for had I have had other and greater matters, your Lordship would have been sure to have

heard of them." He then addressed himself to destroy the credit of Saxon, and I quote the following passages, because they shew that at that time evidence of specific facts given by third parties was admissible to impeach the character of a witness. The change which has taken place in this respect, and which is far more important than most alterations of the law by statute, is entirely the work of the judges, who have thus taken upon them, without one syllable of remonstrance from the Legislature, the functions of King, Lords and Commons.

Lord Delamere.—"I desire Richard Hall may be called."

Lord High Steward.—"My Lord Delamere, if you begin that way to call witnesses against Saxon, it is fit he should be here to know what is said against him."

Lord Delamere.—"Ay, with all my heart, my Lord."

Lord High Steward.—"Then call Saxon again. [Then Saxon and Hall came both in]."

Lord Delamere.—"Pray, Mr. Hall, tell my Lords here what you know of Sir Thomas Saxon."

Lord High Steward.—"What is it you ask of this witness?"

Lord Delamere.—"My Lord, I desire him to give an account of what he knows of a letter that was forged by Saxon, in the name of one Hildage."

Hall.—"About the 19th of December, in the year 1683, I received a letter by Thomas Saxon, from Richard Hildage, wherein he desired me to send him the sum of 6*l.* odd money, which I owed him: I received the letter, and paid the money, and, to the best of my knowledge, some little time after, I met with the said Hildage at Newcastle, who asked me to pay him the money I owed him. I replied, I had paid the money according to his note; but he said he never gave any such note, and threatened to sue me; thereupon I sent one Lord to Hildage, that is here now in the Court, and desired Hildage's

back again, and afterwards he sent again for his money, and I sent to Saxon for it, but still the money did not come."

Lord High Steward.—"Did you ever speak with Saxon himself?"

Hall.—"No, but with his wife, who came to me about it; but he acknowledged he wrote the letter before John Lord."

Saxon.—"Did not my wife tell you that Richard Hildage lent me the money?"

Lord High Steward.—"Nay, you must not dialogue with one another, but if you have any questions you must propound them to the Court. My Lord Delamere, have you any questions to ask him?"

Lord Delamere.—"No, my Lord."

Lord High Steward.—"Then what is it you would have him ask, Saxon?"

Saxon.—"I desire you would please to ask him, whether or no he did not lend me the money?"

Lord High Steward.—"He! who do you mean?"

Saxon.—"Richard Hildage did."

Lord High Steward.—"What say you, did Richard Hildage lend him the money?"

Hall.—"No, my Lord."

Lord High Steward.—"Look you, my Lord Delamere, the objection carries a great deal of weight in it to prove him a very ill man, if it be fully made out."

Lord Delamere.—"My Lord, if your Grace please, I can prove that he owned the writing of the letter to another man."

Lord High Steward.—"My Lord, he does own here that he wrote a letter, and that he wrote it in Hildage's name, but he saith, the letter he so wrote in Hildage's name was by Hildage's direction; and if so, that takes off the objection made against him."

Lord Delamere.—"I must submit that to your Grace, whether what he says in that matter be evidence?"

Lord High Steward.—"What Hildage did, or did not, is the main turn of the question in this case; for he might lend him the money, and yet afterwards might say, when he thought he might lose it, that he did not send any such letter, and all this be true, and Saxon in no fault; I must confess, if Hildage were here himself, and should deny the lending of the money, or the giving him directions to receive it, you would have fixed a shrewd objection upon him; but otherwise hearsays and discourses at second hand are not to take off the credit of any man's testimony."

Lord Delamere.—"But Hall says Hildage denied the receipt of the money or any order for receiving it."

Lord High Steward.—"That signifies nothing, being but by second hand."

Saxon.—"If it please your Grace here is my brother in Court will give you an account of it."

Lord High Steward.—"Well, well, hold your tongue; will your Lordship please to go on?"

Lord Delamere.—"The next witness, my Lord, that I shall call shall be Francis Ling [who came in]."

Lord High Steward.—"What do you ask this witness?"

Lord Delamere.—"Mr. Ling, pray will you tell his Grace, and my Lords, what you know concerning Saxon's receiving any money in the name of Mrs. Wilbraham, without her order?"

Ling.—"He called at this same Hildage's at Newcastle, and received twenty-five shillings, and said it was for Mrs. Wilbraham, in her name; but she never received a penny of the money, nor knew of his having received it, till he came to pay another quarter."

Lord High Steward.—"Where is that Mrs. Wilbraham? Is she here?"

Ling.—"No, my Lord, she is a neighbour of ours, an ancient woman, fourscore years of age, and cannot come so far."

Lord High Steward.—"This is the same case with the other, you can never think to take off the credibility of witnesses by such testimony; for this is only a tale out of an old woman's mouth: what if that old woman told him a false story?"

Ling.—"She said ——"

Lord High Steward.—"I care not what she said, this is no evidence at all."

Lord Delamere.—"Then pray call Richard Shaw; [who came in]."

Lord High Steward.—"Well, what say this witness?"

Lord Delamere.—"Shaw, can you tell anything of Thomas Saxon's writing a letter, and sending it in the name of one Pangston, a bayliff?"

Shaw.—"He writ a letter, as I understand, concerning some money that I owed him; for I owed him a little money, and being I did not pay it, he does forge a letter, and puts William Pangston's name to it, so I got up the other morning——"

Lord High Steward.—"Where is Pangston? Is he here?"

Shaw.—"No, my Lord, he is not, but he told me he did not write the letter."

Lord High Steward.—"Why, this is just the same again, and we all know how easy a thing it is to hear a bayliff tell a lie."

Shaw.—"I cannot tell, but I called——"

Lord High Steward.—"All this is nothing. It is a difficulter matter to hear such fellows speak truth than anything else, I am sure" (*t*).

Lord Delamere proved, by evidence that could not be resisted, that he was in London when Saxon swore that he was in Cheshire; for he proved that he was present at Lord Macclesfield's trial at that time.

After the evidence he again addressed the peers. "All," he said, "except what Saxon has asserted, is hearsay upon hearsay at the third or fourth hand;" as undoubtedly it was. "If people will use my name, and say this that and the other, and talk among themselves of messages sent to me, can I, or any man in the world, help it? . . . . . My Lords, I desire your leave to ask this one question: Would not any of your Lordships think himself in a bad condition as to his fortune, if he could produce no better evidence to prove his title to an estate than what has been produced against me this day to take away my life? I am not the only man who may be falsely accused; God knows how soon such an accusation may fall to the lot of any of your Lordships."

Jeffreys remarked,—"My Lords, I confess there is something I cannot omit taking notice of, not for your Lordships sakes, but for the sake of this numerous and great auditory, that one mistake in point of law might not go unrectified, which seemed to be urged with some earnestness by the noble Lord at the bar: that there is a necessity in point of law, that *there should be two positive witnesses* to convict a man of treason.

"He seemed to lay a great stress upon that; but certainly his Lordship is *under a great mistake* as to the law in that point; for without all doubt, what was urged in answer to this objection by that learned gentleman that concluded for the King, is true, there may be such other substantial circumstances joined to one positive testimony, that by the opinion of all the judges of England, several times has been adjudged and held to be a sufficient proof.

"As for the purpose in this case, suppose your Lordships upon the evidence that has been given here this day, should believe Saxon swears true, who is a positive witness, and shall then likewise believe that there was that circumstance of Jones's coming over from Holland with such a message upon the 27th of May, [which is directly sworn in evidence; you

are the judges of that evidence], and what the other witnesses have sworn likewise, and is not denied by my Lord, the prisoner at the bar, that he went out of town that night, changed his name, and went in an indirect bye road; certainly these circumstances, if your Lordships be satisfied he went for that purpose, do necessarily knit the positive testimony of Saxon, and amount to a second witness.

"That is if Saxon's positive testimony be true; then suppose all these circumstances, that gave the jealousy, do make up a strong presumption to join with the positive evidence of Saxon; then you have two witnesses, as the law requires, especially if the answer given by the prisoner to those circumstances be not sufficient, [as the slender account he gives of his so frequent journies in so short a compass of time], but that there still remains some suspicion. I could have wished, indeed, that matter might have been made somewhat more clear, that no shadow of suspicion might remain."

Lord Delamere was unanimously acquitted.

The doctrine (*u*) of passive obedience, in its most slavish and repulsive form, had been, from the time of Elizabeth, the distinguishing and dishonourable tenet of the English Church. It had been laid down without any sort of reserve or qualification; cases the most extravagant had been studiously selected; instances of oppression the most grinding, and of cruelty the most frantic, had been ostentatiously put forward, and its prelates had answered, that as St. Paul had submitted

(*u*) South on Romans xiii. 5. "Obedience to the magistrate is obedience to God at second hand." "It is no small part of the Divine prerogative to be able to command homage to the worst of kings, as the majesty of a prince is never more apparent than in his subjects' submission to an unworthy deputy or lieutenant!" "Though Nero deserves to be abhorred, the emperor is, and ought to be sacred." "Rebellion is a mortal sin." "Every lawful ruler holds the government by certain deputation from God . . . . . This is the voice of Scripture; this is the voice of reason." Again, Judges xix. 30: "(The English) is the only Church in Christendom whose avowed principles and practice disown all resistance to the civil power." Vol. 3, p. 123.

to Nero, no provocation could justify the resistance of a Christian man. In return for these doctrines, the Crown (*v*) had supported the Church (*w*) on all occasions; and that support was at one time essential to its existence; for it was placed upon a slippery ridge, and while persecuting the Dissenters for going farther, than its founders on second thoughts had thought proper to do, on one side; and the Roman Catholics for not going far enough upon the other; while requiring an exact conformity to its very peculiar doctrines; all that royal favour could do, was little enough to protect it against the hurricane of popular disappointment and indignation, until time had been given for it to strike its roots deeply into the land; during the reigns of Elizabeth and of James therefore, it held existence by a very precarious tenure.

It has always been the Church rather of the rich than of the poor, rather of the aristocracy than of the people; it has always been exposed, at least as much as other Churches, to attacks from without, and more than other Churches, as the experience, even of modern times, may shew, to treachery from within. Some of the doctrines held by its most powerful prelates are absolutely incompatible with its existence; nor do I know in history any instance of inconsistency equal to that which it exhibited at the period of which I am writing, and continued to exhibit down to the reign of George the Third, when at one and the same moment, the Church of England deduced a claim to the apostolical succession through Roman Catholic priests, and yet passionately maintained the laws by which Roman Catholic priests were, simply for being Roman Catholic priests, hanged, drawn, and quartered. A more

(*v*) James the First stated the compact plainly enough.

(*w*) "Clergymen preached up themselves while they strained the prerogatives of the Crown. They have seldom come to the people but when they have been cast off at Court; and the laymen who follow them are either as selfish as they, or such as Nature cut out for their properties, having endued them with no capacities or thought of their own." Plain English. Political Tracts, vol. 2.

impudent outrage was never offered to the reason of mankind; and the Church that ventured upon it was, and it is no wonder, obliged to appeal repeatedly to the whole authority of the monarch for protection. These doctrines of Divine right and passive obedience had been inculcated successfully on the great body of the landed gentry. They were the language of the Bench and of the Bar, for the Temple contributed its mite to the treasury of servitude. They were echoed from a thousand pulpits; Oxford was not last in the race of submission, and about the time of which I am writing, the works of Locke and Milton were solemnly burnt in that University (*x*). It is hardly possible to forget, that in the dark period of Roman servitude, a similar deed was perpetrated, and that the works of Cremutius Cordus were burnt, because the author had praised Brutus, and called Cassius the last of the Romans. Who does not remember the indignant comment of the historian, which, if deserved in his time, was a hundred fold more deserved by those whom the discovery of printing could not restrain from giving such a proof of obtuse malevolence? The books, he said, remained "occultati et editi, quo magis irridere licet eorum socordiam, qui præsenti potentiâ credunt extingui posse etiam sequentis ævi memoriam—nam contra punitis ingeniis gliscit auctoritas, neque aliud externi reges, aut qui eâdem sævitiâ usi sunt nisi dedecus sibi, atque illis gloriam peperere" (*y*).

James relied upon these declarations, inculcated on all

(*x*) I quote from memory these lines, recited in the theatre at Oxford on that occasion, to celebrate this Protestant auto da fé:—

"Videas flammâ crepitante cremari
Miltonum, cælo terrisque inamabile nomen."

(*y*) The following is part of the judgment and decree of the University of Oxford, passed in Convocation, July 21, 1683:—

The following propositions were,—

"The first proposition:

"All civil authority is derived originally from the people.

"The second:

"There is a mutual compact, tacit or express, between a Prince and his

occasions, and attested by the most solemn appeals to Heaven, from prelates, from divines of every class, from great bodies of men, whose peculiar obligations to teach morality made any departure from the oaths they had so repeatedly taken God to witness peculiarly disgraceful. He thought he might take the Church of England at its word. He thought, that at any rate, whatever became of predestination or Presbyters, *this* was a principle to which it had pawned itself. He thought he might apply to those reverend men the test of fidelity, which the Author of Evil is in Scripture represented as suggesting. He did not, indeed, carry the trial so far as that which Job was obliged to undergo; or that to which the loyalty of the Catholics had been so long exposed. He did not "touch their bone and their flesh," but he put forth his

subjects, and that if he perform not his duty, they are discharged from theirs.

"The third:

"That if lawful governors become tyrants, or govern otherwise than by the laws of God and man they ought to do, they forfeit the right they had unto their government.

"The fourth:

"The sovereignty of England is in the three estates, *viz.*, King, Lords, and Commons. The King has but a co-ordinate power, and may be overruled by the other two.

"We decree, judge, and declare all and every of these propositions to be false, seditious, and impious, and most of them to be also heretical and blasphemous, infamous to Christian religion, and destructive of all government in Church and State.

"We farther decree, that the books which contain the aforesaid propositions and impious doctrines are fitted to deprave good manners, corrupt the minds of unwary men, stir up seditions and tumults, overthrow states and kingdoms, and lead to rebellion, murder of princes, and atheism itself; and therefore we interdict all members of the University from the reading of the said books, under the penalties in the statutes express. We also order the before recited books to be publickly burnt by the hand of our Marshal, in the court of our schools."

It is singular, that in 1688 the University should have acted in conformity to these very principles, on which foundation alone the throne of all English Sovereigns has been placed, and a denial of which would have been, and was punished as seditious down to the days of Lord Bute.

hand to touch their possessions, and they cursed him to his face.

There was much truth in his expostulation to the bishops, "Will you resist," he said, "my dispensing power? Some of you have preached for it before now." "You," he might have said to the bishops, "have tempted me to do what I have done by your own reiterated assurances, without qualification and without end; you have invited the conduct, of which you now complain, by your protestations that the crime of resisting me, and Him of whom I am the vicegerent, was the same. Was your patience only to be shewn in bearing and causing the sufferings of others? Was your obedience to cease the moment you are called on to exemplify it? You have stood forward to assist me in riveting the chains of others, and do you refuse to wear your own? Will you turn against me for an act on which your declarations encouraged me to venture, and of which you, more than any other class of men, are the cause? Will you make the criminal, and avenge the crime?" Far more creditable would it have been to the Church of England to have prevented such expectations, than to disappoint them afterwards. She now relied upon what the principles common to all Creeds might have taught her to distrust—a death-bed repentance (*z*). Words cannot be plainer than those of the oath of allegiance:

(*z*) It is difficult to read, without a smile, the following passage in Halifax's admirable letter to a Dissenter (Somers's Tracts, vol. 2, p. 369), in which he exhorts the Dissenters to reject James's advances:—"If you had now to do with those rigid prelates, who made it matter of conscience to give you the least indulgence, and even to your more reasonable scruples continued stiff and inexorable, the argument might be fairer on your side. But since the common danger has so far laid open that mistake, THAT ALL THE FORMER HAUGHTINESS TO YOU IS FOR EVER EXTINGUISHED," &c. In this very century a Bishop of London has declared dissent a crime. The High Church party frustrated all William the Third's noble schemes for uniting Protestants by a grand and comprehensive toleration; and though, in the day of peril, Sancroft himself had proposed to make concessions, the plan was abandoned altogether.

"I, A. B., do declare and believe, *that it is not lawful on any pretence whatsoever* to take up arms against the King, &c.

"So help me God."

This was an oath of the Church's own making, which had been taken by the clergy, the magistrates, and officers in civil or military employment. Notwithstanding which, they did take arms against, depose, and endeavour (at the Battle of the Boyne for instance) to destroy their King; and the Convocation of the Clergy (1689) did approach William the Third, by whom that vicegerent of Heaven had been driven out of the kingdom, with a loyal and dutiful address.

The following extracts, from a vigorous and liberal writer (*a*), accurately describe the conduct of the Church at this crisis:—

"The Scripture," he says, "was thought to teach the law of the land; that to give authority to Scripture, and the King to both; nor is it to be wondered at that men should hold this, when it was affirmed by one of the leaders, that if the King be God's vicegerent, he is, upon that account, as much above all as God is. These strains of loyalty from the pulpit, were echoed back from the Benches at Westminster, and in the country, and followed with inhuman worrying of all opposers, till the late King (James) mounted the throne. While the noblest patriots were singled out for destruction, the people, like hardened Jews, headed by their *priests, were taught to cry Crucify! Crucify!* If the sole reason for refusing the King's proposal had been the breach of law implied in it, it is not unlikely that they would have taken notice of assuming a reverence by law determined, before it was resettled. But they *differing upon terms*, from that time the *pulpits began to change their note*; then the doctrine of passive obedience was to be evaded and distinguished into nothing, instead of confessing that clergymen had gone beyond their sphere . . . . . indeed, they did not expect to have had the dispensing power so soon turned against them that gave it.

"*Nothing more exposes a party*, than to find those *very things* in which they seemed to place the essential difference from all others, *to be quitted by them as soon as interest changes.* Who, therefore, could choose but smile to observe, that some who had urg'd that Princes ought to be obey'd in all their commands, not contrary to God's Law, should refuse to read the declaration for liberty to Dissenters?

"That they, who blam'd men for undutifully fettering Princes, should, when they were well back'd, make overtures little short of the Nineteen Propositions?

"Or that they, who must admit that our dissenting bishops did not scruple inviting the Prince of Orange to take the government upon him before the late King left the kingdom, should contend that they are the only true sons of the Church, who left all things to God's Providence, without interposing themselves till he was actually gone?

"Or who could have expected *that that bishop*, who, but a *little while before had rebuk'd a very worthy and prudent divine for preaching against popery, should have been one of the seven?*

"Or that he who mightily applauded the late King's league with France, as a proper means to curb the fanaticks, should have been another?

"Or that *he who maintained* the Real Presence, in such a manner as gave offence to the *greatest admirers of his monkish sanctity* and gesticulations, and gave countenance to the praying to Saints, by what he published of their intercession for us, while we celebrate their memories, should have been a third?

"Or that the Duke of York's chaplain, in Scotland, whose depth was fathom'd by Mr. Marvel, in his Parson Smirk, should have been a fourth?

"I would by no means derogate from the action, or rather suffering; it was great for the persons, lucky in the time, and crown'd *with an event, which it appears that some of them neither desir'd nor deserv'd.*

"But methinks it is not to be indur'd, that ages of sufferings in others, greater in birth, and in all things truly praiseworthy, should be nothing in comparison with what befel them. The fulsome praises which are given them for the first act of that kind, would make one think it was admir'd only for the rarity, or extoll'd beyond measure, out of a pious design of encouraging men, too backward in the cause of their country, to go on in the right path to fame" (*z*).

The praise to which the bishops are entitled, is that of having presented a remonstrance to a despotic Sovereign,—not only without any hazard to life and limb, but without any serious danger to their estates or their liberty. It is clear that the result was what they never contemplated; nor, perhaps, does history furnish (*a*) a stronger proof of infatuation than the violence of James on this occasion. Therefore, their imprisonment is not to be attributed to them as a merit; it is not to be looked upon as the act of persons who do, from a sense of duty, what they expect to suffer for. It never could have happened at all if bigotry had not quenched every spark of reason in James's mind. Even Jeffreys remonstrated. Now for men to do what the most unscrupulous instruments of tyranny consider innocent, does not require any extraordinary degree of fortitude. Some compensation they made no doubt to society, by this tardy act of opposition to a will which they had taught others was irresistible. But is there

(*z*) State Tracts, vol. 2, p. 89.

(*a*) "As to the case of the seven bishops, those most reverend and moral persons were called upon to say whether the petition was their writing before they knew that a prosecution was to be commenced; and this being a species of extorted confession, could not avail before a Court of justice . . . . . Whereupon the evidence of Lord Sunderland was called forth . . . . . But what was the paper? A libel? No; it was a fair, decent, loyal remonstrance to his Majesty, praying that he would be graciously pleased not to enforce his authority in the exercise of an important prerogative of the Crown. This petition was, indeed, called a libel. But was it a libel? No." Lord Ellenborough, King *v.* Mr. Justice Johnson, State Trials, vol. 29, p. 463.

any instance where any priesthood has submitted quietly, and without a struggle, to the loss of its power, wealth, and influence? They saw that this was the object on which James was determined, and which was ever present to his imagination. That conscience was an element in the resolutions of the seven bishops, and the exclusive element in the mind of such a man as the excellent Ken, I fully believe; but after the scenes of horrour which occur in every page of this portion of our history—when one thinks of Dissenters perishing in pestilential gaols, of the rivers of blood that inundated the land—one cannot spare much of one's pity or admiration for men who, contrary to all reasonable expectation, underwent a short imprisonment, and whose sufferings were so inconsiderable that a charge of writing bad grammar was enumerated, with much bitterness among them. Happy would it have been for the Twyns, the Colleges, the Lisles, the Gaunts, and the Cornish's, if such an imputation could have been ranked among *their* calamities. As addressed to the heads of the Church, the arguments of James were quite unanswerable: but England may congratulate itself on the infatuation which hurried James to attack the temporalities of the clergy; for if he had not interfered with them, the blood of Russell and of Sydney would have been shed in vain—

"Hoc nocuit Lamiarum cæde madenti."

So capricious and wholly unaccountable are the paroxysms of popular indignation. The difference was great between the scaffold of Lady Lisle (*b*) and the seven days' imprisonment which the bishops underwent; or the danger to which, under any conceivable state of things, they might have been exposed. The fate of Cornish was never before their eyes,—yet the nation that had endured the one, deposed their monarch for the other. The same people that were so fallen since the days of the Commonwealth, as to behold with indifference their peaceful husbandmen, their opulent merchants, their virgin daughters, their

noble matrons, their gifted patriots, drawn out one by one to be tortured and put to death (*c*),—so changed as formally to renounce, for themselves and their posterity, the birthright of freemen,—so degenerate as to beseech the King to consider them as his hereditary thralls, whom, at his pleasure, he might beggar, imprison, mutilate, and destroy; the same people whom neither the embowelling of Armstrong, nor the stake of Mrs. Gaunt, nor the assizes at Taunton, neither the coronet of Cleveland, nor the lawn of Ward, nor the ermine of Jeffreys, neither a silenced press, nor the dishonour of our arms, nor the corruption of our councils, nor military law, nor judicial massacre, nor a pensioned King, could rouse from its trance of servitude, burst out into a flame, because seven bishops, who had most of them been shamefully active (*d*) in the per-

(*c*) Burton and Graham were the solicitors to the Treasury during this period of legal slaughter, for which they received 47,000*l.*; Sir Roger L'Estrange assisted them. They offered 100*l.* quarterly, to a prisoner, one Cragg, if he would give evidence against Lord Delamere; and on his refusal, caused him to be kept close prisoner in Newgate, without fire or candle, for forty weeks. Prideaux was seized in his house, Ford Abbey, Devonshire, June 19, 1685, was brought to London, was committed to the Tower a second time, and could never discover of what he was accused. His wife applied, through several people of quality, to the King for his release, and received for answer, "That nothing was to be done, for the King *had given the prisoner* to the Chancellor Jeffreys." And this is the King who, it is supposed, would scruple to order the murder of a state prisoner (!) for the sake of his Church. At last, Prideaux, who never was brought to trial, who never could find out what was the charge against him, was released on the payment to Jeffreys of *fifteen thousand pounds!* Such was the use of English law. Parl. Hist., vol. 5, p. 245.

(*d*) As a specimen of what the persecution of Dissenters was, I quote the following petition, in which the sufferings of a very small body are described. It is from the Quakers. Somers's Tracts, vol. 1, p. 231:—

"Sheweth,—That of late, one thousand five hundred of the said people [both men and women], having been detained prisoners in England, and part of them in Wales [some of which being since discharged by the judges, and others freed by death, through their long and tedious imprisonment], there are now remaining [according to late accounts], about one thousand three hundred eighty and three, above two hundred of them

secution of Dissenters, who had all of them justified the worst actions of the Crown, who had encouraged the King by their

women: many under sentence of præmunire [both men and women], and more than three hundred near it; not for denying the duty, or refusing the substance of allegiance itself, but only because they dare not swear. Many on writs of excommunication, and fines for the King, and upon the Act for Banishment. Besides, above three hundred and twenty have died in prison and prisoners, since the year 1660; near one hundred whereof, by means of this long imprisonment [as it is judged], since the account delivered to the late King and Parliament, in 1680, thereby making widows and fatherless, and leaving them in distress and sorrow.

. . . . .

. . . . .

"And here in London, the gaol of Newgate hath been from time to time crowded, within these two years [sometimes near twenty in one room], to the prejudice of their health; and several poor innocent tradesmen of late have been so suffocated by the closeness of the prison, that they have been taken out sick of a malignant fever, and died in a few days after.

"Besides these long continued and destructive hardships upon the persons of men and women, as aforesaid, great violences, outragious distresses, and woeful havock and spoil, have been, and still are, frequently made upon our goods and estates, both in and about this city of London, and other parts of this nation, by a company of idle, extravagant, and merciless informers, and their prosecutions upon the Conventicle Act, many being convicted and fined unsummoned and unheard in their own defence.

"The statutes on which we, the said people, suffer imprisonment, distress, and spoil, are as followeth:

"The 5th of Eliz. c. 23, De Excommunicato Capiendo.

"The 23rd of Eliz. c. 1, for Twenty Pound per Month.

"The 29th of Eliz. c. 6, for Continuation.

"The 35th of Eliz. c. 1, for Abjuring the Realm, on Pain of Death.

"The 1st of Eliz. c. 2, for Twelve Pence a Sunday.

"The 3rd of King James 1, c. 4, for Præmunire, Imprisonment during Life, and Estates Confiscated.

"The 13th and 14th of King Charles 2, against Quakers, &c., Transportation.

"The 22nd of King Charles 2, c. 1, against Seditious Conventicles.

"The 17th of King Charles 2, c. 2, against Nonconformists.

"The 27th of Henry 8, c. 20, some few suffer thereupon.

"Upon indictments at common law, pretended and framed against our peaceable, religious assemblies, for riots, routs, breach of the peace, &c., many, both men and women, thereupon fined, imprisoned, and detained

pathetic entreaties for servitude and supplications for arbitrary power, by their deliberate and vehement asseverations, in season and out of season, that for man to be a slave was the revealed will of God, and were therefore to a certain degree responsible for his guilt,—were consigned by the master whose passions they had inflamed, and whose reason they had contributed to extinguish, to an easy and short imprisonment in the Tower.

These remarks apply to the assistance lent by Sancroft, and the invitation given by the Church of England to the Prince of Orange, with an armed force,—and even to the refusal of the bishops to read the King's declaration of indulgence to tender consciences, an act which, on their own principles, they were bound without hesitation to perform. The heads of the Church, resolving not to comply with the order, drew up, in a very barbarously written and very respectfully worded petition, the reason of their determination. This the seven signed, and (Sancroft excepted) went over from Lambeth to Whitehall and presented to the King. Even in the act of presenting it, their expressions were almost servile, and cer-

for nonpayment, some till death. Instance the city of Bristol, what a great number have been these diverse years straitly confined and crowded in gaol, mostly above one hundred on such pretence, about seventy of them women, many aged. And in the city of Norwich, in the year 1682 and 1683, about seventy kept in hold, forty-five whereof in holes and dungeons for many weeks together; and great hardships have been, and are in other places. So that such our peaceable meetings are sometimes fined on the Conventicle Act, as for a religious exercise, and other times at common law, as riotous, routous, &c., when nothing of that nature could ever be proved against them, there being nothing of violence or injury either done, threatened, or intended against the person or property of any other whatsoever.

"The during and tedious imprisonments are chiefly on the writs *de excommunicato capiendo*, upon the judgment of *præmunire*, and upon fines, said to be for the King.

"The great spoil, and excessive distresses and seizures, are chiefly upon the Conventicle Act, and for twenty pounds a month, two-thirds of estates, and on *qui tam* writs."

tainly quite inconsistent with anything like concurrence in the measures that frightened James out of his kingdom. This was the single act on which James was insane enough to ground a charge of misdemeanour. The archbishop and six bishops were summoned before the King in council. Jeffreys shewed the archbishop the petition, and asked whether he would acknowledge the signature; this the archbishop, in a very undignified manner, refused to do. The archbishop, however, said, if the King would command them to acknowledge their signatures, they would do it, relying on his generosity not to make use of their confession. "No," said the King, "if you deny your own hands, I know not what to say to you." The bishops withdrew for a short time, and were then summoned again; when the Chancellor said, he was commanded by the King to require an answer to the question, whether the signatures on the petition were the writing of the bishops? Upon which the signatures were acknowledged, as they ought to have been at once. The bishops refusing to enter into recognizances to appear, they were committed to the Tower. They were brought up to plead to a criminal information on the first day of Trinity Term, 1688. When the information was about to be read, one of the bishops requested that it might be read to them in English. "No," said the Solicitor General Williams, "no, my Lords the bishops, are learned men, we all know; read it in Latin." And in Latin it was read,—whether backwards or forwards no one of course, not a lawyer, could understand. After tendering a dilatory plea, which was rejected, they pleaded Not Guilty; and were allowed to go at large on their own recognizances till the 29th of June, 1688, when the trial took place. The Diary of Henry Earl of Clarendon shews, that their imprisonment must have lasted from the 8th of June, 1688, to the first day of Trinity Term (the 15th of June) in that year—that is, a week: the honours of martyrdom were never more cheaply won!

It was attempted, but in vain, during the trial of the bishops, to withdraw the question of motive, or of the nature of the writing which they had published, from the consideration of the jury. That it should afterwards have become part of the common law of this country, that the fact of publication was the sole point for the jury to investigate, is a proof, which ought never to be forgotten, of the disposition of the judges to usurp authority which the constitution had carefully placed in other hands, and which, after they had thus seized upon it, they exercised in such a manner as to make the freedom of the press a snare and a mockery to the subject. Such it continued to be even after the act of Parliament which was intended to wrench that invaluable privilege from the judicial gripe, for, under Lord Ellenborough, men were convicted (*c*) as libellers for publishing writings that were innocent and meritorious; and according to the principles laid down by him, and endured without remonstrance in the corrupt and degenerate age during which that arbitrary and violent partizan was allowed to hold the office of Lord Chief Justice, every man who attacked the measures of government in a way displeasing to the members of that government, was a libeller (*d*),

(*c*) To call Lord Sidmouth the Doctor, was a libel.

(*d*) In the case of the King *v.* W. Cobbett, State Trials, vol. 29, p. 49, Lord Ellenborough lays down the law to be, "that if a publication be calculated to bring a government into dis-esteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the infliction of the law;" and while smarting under such odious tyranny as this, we boasted of the freedom of the Press. Every pamphlet written against the government was a libel; every squib of Mr. Canning on Lord Sidmouth was a libel; the Rolliad was a series of libels. Such is judge-made law. The fact is, our law was so much the more tyrannical, as it punished people for doing what they were told it was their birthright to do. Nobody is told in Russia, as the public were told by Lord Ellenborough, that "he has a right, to expose the folly and imbecility of government;" and then punished, because in doing this he has "violated the feelings of the individual members of the government." To the feelings of whom is it agreeable to be told that he is foolish and imbecile? The permission to take the pound of flesh from the heart without shedding

—every man who doubted the enlightened policy of Perceval, or questioned the abilities of Lord Sidmouth, or pointed out the almost incredible ignorance of Lord Castlereagh,—every man who held up to the scorn and ridicule of mankind the intolerant and absurd measures which were bringing us to the very brink of destruction, was liable, at the pleasure of my Lord Ellenborough, to be convicted, by a jury packed as juries were in those days, to be imprisoned, and put in the pillory—while our trial by jury, and the freedom of our press, were held up by *practical* writers on our laws as his inalienable inheritance. Wide indeed was the interval between such a state of things and an enlightened government!

The acquittal of the bishops seems rather to have irritated James than to have suggested any cause of doubt or hesitation to his mind. Accordingly not the laity only, but the clergy, co-operated in the deliverance which the Prince of Orange brought us. Some of the prelates joined to invite him over. The University of Oxford, in spite of Divine right and passive obedience, offered him their plate, and associated for him against their King—a short deviation into good sense which that learned body has expiated by the most pertinacious adherence to the cause of tyranny and superstition even down to our own times. Others of the prelates, when summoned to the King's presence, refused to sign an abhorrence of the invitation which their brethren had sent to the invader. In doing so, they were guilty of great prevarication. They put their refusal on any ground but the real one; they affected to doubt that the declaration was authentic. The archbishop took care to remind the King of the prosecution and the attack upon his style. They said it would be presumption in them to pretend to strengthen the word of a

blood, was quite as valuable. To all this, however, did the English people submit. The judge was not impeached, and we went on boasting of trial by jury (which was always packed in a case of libel), and freedom of the Press, the palladium of the constitution!

King; that they would assist his Majesty with their prayers, and that the loyalty of the Church of England was immoveable. How sincere they were the result has shewn. The Revolution of 1688 saved the Church, and ruined the House of Stuart. The counsels of an intolerant hierarchy cost Charles the First his life; the vengeance of the same body lost James the Second his throne (*e*).

Five points were successively decided on the Trial of the Seven Bishops:—

"1st. The first argument arose on the motion of the Attorney General to file the return of the Lieutenant of the Tower to the writ of *habeas corpus*. The counsel for the defendants insisted, that it did not appear from the return, that the bishops had been committed by warrant of the Privy Council."

The judges decided in favour of the Attorney General's

(*e*) The episcopal Church of Scotland, always a slave to power and supported by the most infernal persecution, presented a characteristic address to James the Second, expressing its confident hope "that God, in his great mercy, would give the King the hearts of his subjects, *and the necks* of his enemies. So pray (what Demon did they address?) we," &c. Edinburgh, Nov. 3, 1688.

Archbishop Sancroft had no turn for being a martyr; he refused to consecrate Burnet himself, but, to avoid a *præmunire*, granted a commission to any three bishops and the Bishop of London to exercise his functions—authorizing others to do an act that he looked upon as unlawful. So, although he believed James his lawful King, and was head of the Church, he did not speak, vote, nor protest on the side which his conscience led him to support. Eight bishops refused the oaths:—Sancroft, Archbishop of Canterbury, Turner, Bishop of Ely, Lake, of Chichester, Kenn, of Bath and Wells, White, of Peterborough, [these were five of the seven bishops sent to the Tower by King James], Lloyd, of Norwich, Thomas, of Worcester, and Frampton, of Gloucester. An equal number took them:—Lamplugh, Archbishop of York, Compton, Bishop of London, Barlow, of Lincoln, Mew, of Winchester, Sprat, of Rochester, Lloyd, of St. Asaph's, Trelawney, of Bristol, and Beaw, of Llandaff, whose example was afterwards followed by Smith, of Carlisle, and Watson, of St. David's. Doyly (Life of Sancroft, vol. 1, p. 400) vindicates the archbishop's integrity at the expense of his understanding.

argument, and this decision was just, but founded on reasons altogether unsatisfactory.

"2nd. The second question was, whether the bishops, as Peers of Parliament, could be legally committed on a charge of libel."

This was decided in the affirmative.

"It was for the purpose of deciding this question (says Mr. Phillipps) that the judges seem to have thought it necessary to determine incidentally another and much more extensive question,—whether a commitment of Peers of Parliament, on such a charge and such a warrant, was legal. Although the three judges who delivered their opinions were evidently unwilling to touch the question of privilege, yet it is clear that they did decide that question; and they decided it on the ground, that surety of the peace might be demanded for publishing a seditious libel. It is remarkable, that although the objection necessarily involved the question of privilege of Parliament, yet scarce anything was said on the nature and extent of such privilege, and not any information upon this subject was supplied by the arguments on either side."

"3rd. The third argument was upon a point of practice, whether the bishops were compellable to plead *instanter* to the information, or whether they might have an imparlance? The Court determined that there was no right of imparlance."

The next question was, whether legal proof of its handwriting had been given.

"4th. This subject appears to have raised more argument at the Bar, and much more doubt upon the Bench, than the case would, at this time, be thought to warrant. It is now settled, that if a witness has received letters, which can be proved to have been written by a particular person, or letters of such a nature as to remove all doubt of their having been written by the hand from which they profess to come, he may be admitted to give evidence as to the character of that person's handwriting. And the legal reader will not, it is

ceived, feel much difficulty in acquiescing in the opinion of the two judges, who held, that although some of the signatures had not been proved [and, therefore, some of the bishops were to be considered as not at all implicated in the transaction,] yet that the petition might have been properly read against those of the bishops, whose signatures had been sufficiently proved by competent evidence."

"5th. The last objection related to the proof of publication. This point occurred before the arrival of Lord Sunderland, at which time a majority of the Court were of opinion, that the publication had not been sufficiently proved. The charge against the bishops, it will be remembered, was, that they composed, wrote, published, and caused to be composed, written, and published, a certain libel in the county of Middlesex. As to the charge of composing and writing, there was not the slightest evidence of this being done in Middlesex. With regard to the other part of the charge, namely, the *publishing and causing to be published* in the county of Middlesex, the case for the Crown was much stronger than might be supposed from the course of the arguments. On a careful examination, it will appear, that there were other important circumstances in the case, which might reasonably have led the jury to conclude that the petition was delivered by the bishops to the King in the Council Chamber at Whitehall, for it was proved that this petition had been in the hands of the bishops, who had signed it; that on a certain day the petition was seen in the hands of the King, in the Council Chamber at Whitehall; that the archbishops and bishops were in the presence of the King at that time; and that on being questioned by the King, on the subject of the petition, they admitted their signatures. It appears, further, from the paper itself, that it was addressed to the King, written for the purpose of being delivered to the King, and intended to be presented in the usual course, as a petition. Upon these facts, a person of plain understanding might reasonably come to the conclusion, that

the bishops delivered the petition to the King on that day, and at that time, when they were seen in the royal presence. This being so, there was evidence as to the fact of publication in the county of Middlesex, fit to be submitted to the jury for their consideration."

The task I have undertaken has induced me to confine myself almost exclusively to the trials of those accused of offences against the state, and whom for whatever reason it was the purpose of the government to destroy, because the characters in which law is written on such occasions are broad and bold, and the impression which they leave is ineffaceable. The pedantry, caprice, and vacillation, the worship of power, the love of oppression, the disregard of substantial right, the servility to form, which, in civil cases, escape public notice, and are followed by no more important consequences than the ruin of a suitor and his family, dilate and swell on such occasions into the portentous magnitude of a national calamity; thrones are shaken, and nations are convulsed, by doctrines and principles which in another sphere only leave the home of the poor man desolate, scourge him to the bone, and strip him of the possibility of redress. If a tenth part of the chicane, delay, and intolerable expense which a suitor in Chancery must even now lay his account to meet, prevailed in a Court of criminal justice,—if the evils inseparable from the way in which the proceedings before the Masters in Chancery are carried on, in spite of complaint, in spite of argument, in spite of the heart-rending miseries which a system so perfectly and detestably irrational must every hour engender, were to be endured where men's lives and characters and liberties are at stake,—every trace of freedom, all that makes life secure, and society agreeable, all that distinguishes the government of England from that of Morocco, would be blotted out of our institutions. It is therefore to the State Trials that we must turn, if we wish to ascertain the state of judicial investigation, for there we shall find written in characters clearly read and easily decyphered the real history of its progress.

Yet there is one enactment of this period, which, though purely of a civil nature, it is impossible for any history of evidence to pass over, I mean the Act for Prevention of Frauds and Perjuries, or, as it is generally called, the Statute of Frauds, a statute borrowed no doubt from the French law, to which I have already called the reader's notice, and which is so loosely drawn, and has been so ridiculously interpreted, that the evils it was intended to prevent could hardly have been greater than those of which it has been the immediate and perpetual occasion. This statute was passed in the 29th year of Charles the Second, and it is the third chapter of that year.

The first two clauses provide that leases and interests of freehold not reduced to writing, unless they are for a shorter term than three years, and at least two-thirds of the annual value of the thing demised is reserved to the landlord, shall have the force of estates at will only.

The third clause provides, that no leases, interests, or estates, either of freehold or for terms of years, shall be granted, assigned, or surrendered, unless by operation of law, or unless by deed or note in writing, signed by the party assigning, granting, or surrendering, or the agent of such party, lawfully authorized himself by writing.

The fourth section is *verbatim* to this effect:

"IV. And be it further enacted, That no action shall be brought whereby to charge any *executor or administrator* upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any *special promise* to answer for the debt, default, or miscarriages of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall

be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The 5th section provides, that all devises of land shall be in writing, and attested by three or four witnesses.

The 6th points out how devises shall be revoked.

The 7th provides, that all declarations or relations of trust shall be in writing.

The 8th relates to trusts arising, transferred, or extinguished by operation of law.

The next clause that relates to our present subject, is the famous 17th, by which contracts for the sale of any goods, wares, or merchandize, for the price of ten pounds or more, shall not be valid, unless the buyer accepts and actually receives part of the goods so sold, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum of the bargain be made and signed by the party to be charged by such contract or their agents.

Sections 19, 20, and 21, relate to nuncupative wills.

The 22nd provides, that no written will of personal estate shall be altered by word of mouth.

The remaining three sections we may pass over.

Lord Northington is reported to have said, that every line of this statute was worth a subsidy; if he had said that every clause of it had cost a subsidy, under the auspicious influence of English judges, he would have been much nearer the truth.

With regard to the first section, it is in many respects co-extensive with the fourth; and every interest within the fourth section seems equally to be within the first. It was decided, that a mere license is not within the first section; and, therefore, that an oral agreement (*e*) to stack coals on a piece of ground for seven years was valid, although the sole use of the land on which the coals were stacked was granted to the buyer. How is this to be distinguished from the very evil which

the statute intended to prevent? how can it be said that the sole use of a piece of ground is not an interest in land? So, however, it has been decided, in defiance of the plain words of the statute, down to the present hour (*f*). It has been decided, that the sale of a standing crop of grass (*g*) is within the act, and requires a written agreement; but that the sale of a crop of standing wheat (*h*) does not; a sale of growing poles, or standing underwood, is within the act, and must be in writing; a sale of trees is not, and may be made by word of mouth; a sale of potatoes, of turnips in the ground, of growing hops, is not within the statute, and may be made by word of mouth; and an agreement for the sale of growing crops, between Caius and Titius, if one is the incoming and the other the outgoing tenant, may be made by word of mouth; but if Caius and Titius, not being incoming and outgoing tenants, agree to the sale of growing crops, such an agreement may not be made by word of mouth. "*The law on this head*," says Sir E. Sugden, "*is not in a satisfactory state, and can hardly be considered as settled.* The cases still require to be thoroughly examined by the Courts, in order to place the law on a proper foundation" (*i*). When the reader recollects that this is a commentary on an act of Parliament, passed in the time of Charles the Second, and the subject of incessant litigation, he may, perhaps, doubt whether a Code would have occasioned greater confusion and uncertainty. To enumerate the decisions on the seventeenth section would be endless. Every kind of irrational distinction and mischievous subtlety as to agents, and the authority of agents, as to what are goods and chattels, as to what writing is sufficient, as to what is a complete agree-

(*f*) Cocker *v.* Cowper, 1 C., M. & R. 418. This is exactly the way in which the general of the order of the Theatine monks interpreted the rule commanding them to wear white. He wrote opposite the statute, "*white*, that is to say black."

(*g*) Evans *v.* Roberts, 5 B. & C. 829.

(*h*) 3 B. & Cr. 364.

(*i*) Sugd. Vend. & Purch. vol. 1, p. 101.

ment, as to what is a sufficient reference to a third writing, has been illustrated at the expense of miserable suitors; it has been decided, that sales by auction are within the statute, and that sales (of the same property) before a Master in Chancery are not; and, in short, every suggestion that could harass, perplex, bewilder, confound, distract, mislead, and ruin a suitor, has found a congenial soil in this clause of the enactment under notice. But the grand and leading absurdity of the whole yet remains to be considered; I mean the provision concerning the attestation of wills. Lord Mansfield remarks upon it, "that the whole clause,—which introduces a positive solemnity to be observed, not by the learned only, but by the unlearned, at a time when they are supposed to be without legal advice, when the direction should be plain to the meanest capacity,—is so loose, that there is not a single branch of the solemnity described or defined with sufficient certainty to convey the same idea to the greatest capacity" (*k*). Now, again, the provision as to witnesses is either mischievous or beneficial: If mischievous, why was it adopted at all? If beneficial, why was it not extended to personal property? According to this clause, if a testator said, "I give to Caius my house at Greenacre, for ninety-nine years, if he shall so long live;" these words, in the testator's own writing, were sufficient, and no witness was necessary. But if the testator write, "I give to Titius my home at Greenacre, for his life," without the attestation of three witnesses the will was invalid. Where is the evil in the one case that is not in the other? So, down to our own time, the same will, which was worth nothing in Westminster Hall, was valid in Doctors' Commons. The same will that might convey millions, was impotent to pass a cabbage garden,—one tribunal looked upon it as genuine, and the other, in the same country, considered it as spurious. The formalities essential in one Court, were disregarded in the other. It seems scarcely possible that such a state of things

(*k*) Wyndham *v.* Chetwynd, Burr. Rep. vol. 1, p. 418.

can be altered for the worse, but so skilful is the English Legislature in the work of evil, that the New Wills' Act seems likely to defeat more fair and genuine wills, even than the old one. (*l*). The decisions to which this act has given occasion, indeed, are monstrous, and surpassed in absurdity by none that it has been my province to record. To return, however, to the old law: is it possible to offer a more direct affront to reason than to say that the same will is genuine as to property

(*l*) 1 Vict. c. 26, s. 9. This law, which at best is founded on error, has been already construed in different senses, that is, abrogated or enlarged by the judges, and promises to be a fruitful source of ruinous litigation. It is a good specimen of one of the greatest curses of our system,—judge-made law. "A new ground of contest has arisen," says a grave writer, "as to what may be considered a signing of the will at the *end or foot thereof*,"—a ground that could exist in no country but this. The provision is itself sufficiently absurd, and has already deprived several persons of their property. Williams on Executors, p. 68. I would especially call attention to the decision of the Privy Council, in Smee *v.* Bryer, as a proof that there is no limit to the absurdity which the habits of quibbling, nourished by our system, encourage. "Notwithstanding the will contains a complete disposition of the testator's property, &c., yet if there is an unreasonable (who is to decide what is unreasonable?) blank space between the conclusion of the will and the signature of the testator, 'the will is bad,' even *though it be manifest that the testator had no intention to evade, but, on the contrary, was anxious to comply with the statute.*" Williams, ib. Judicial infatuation can hardly go farther. Can the utter want of all capacity for legislation be exemplified more strongly? Can the wretched consequences of incessantly dealing with unmanly quibbles and sordid pettifogging (for sophistry is too flattering an expression), be placed in a clearer light? Who is to decide what is an unreasonable space? One judge may say one inch, another two, another three, and so on. What does the act say about an "unreasonable space?" If such a decision had been pronounced by beings not fit to be shewn in a museum in any country but England, the only inference would have been, that they had been bribed. Conceive the misery, and distress, and confusion that such a decision *must* produce. Could wider scope be given to litigation and chicane? This is the English way of redressing evils. This is judge-made law; and thus it is, that from inveterate habits our judges destroy all the beneficial effects of acts of Parliament, by forced and ridiculous interpretation. Since that decision, the law is as much altered as it could be by a vote of King, Lords, and Commons.

in one shape, and spurious as to property in another; that it is, and is not, in the same place, at the same identical point of time, the genuine writing of the testator. Transubstantiation is not a more direct rebellion against the evidence of the senses. Until right and wrong, wisdom and folly, happiness and misery, justice and injustice, are the same thing, English legislation will appear, down to the present hour, preposterous; nor will the reader of our law, in modern times, (excepting always the cases that turn on points of special pleading in the Court of Exchequer), find more reason to blush in considering any portion of our judicial history, than in perusing the conflicting, captious, confused, sophistical, and self-destructive decisions on the Statute for the Prevention of Fraud and Perjuries (*m*).

(*m*) The only great legislator that ever sprung from a Saxon stock, quotes the decisions on the Statute of Frauds as a flagrant instance of the evil of judge-made law: Livingstone, Introductory Report to the Code of Evidence for Louisiana, page 289. Published by Kay and Butler, Philadelphia.

CHAPTER VI.

FROM THE REVOLUTION TO THE ACCESSION OF THE HOUSE OF BRUNSWICK.

"E quindi uscimmo a riveder le stelle."
Last line of the Inferno.

After the Revolution a new and more enlightened spirit pervaded our judicial proceedings. The heroic age of wickedness in criminal inquiries had passed away, the heroic age of absurdity in civil suits, which reaches from the death of Lord Mansfield to the hour when these words are written, and will continue while the *New Rules* prevail, and perhaps longer, had not yet begun. Among the inestimable blessings conferred on England by our Great Deliverer, blessings which all the virulence of faction could not entirely neutralize, must be numbered the more decent demeanour and comparative integrity of the judges. Persecuted and thwarted as he was incessantly by an oligarchy composed in part of overgrown upstarts, aspiring to patrician honours, in part of degenerate gentlemen, seeking wealth with mercantile avidity, a body corrupted itself and corrupting all within its reach, of whose selfishness our history from this time down to the days of railway committees and directors, furnishes so many sad and striking proofs, yet this was an advantage which even the House of Commons of that

day, bribed and composed of traitors as it was, could not destroy.

This improvement, indeed, was most remarkable during the reign of William, for some of the proceedings under the House of Hanover remind the reader of the judges of the House of Stuart. As soon as the vigilance of the public began to subside, the judges began to relapse into their ancient habits; prisoners were insulted, and witnesses browbeaten as before(*a*).

Holt, the great judge of this æra, was a narrow-minded, but a humane man, as well as a consummate lawyer. His understanding was vigorous, and his probity inflexible. He behaved towards the state prisoners with the most perfect fairness, and, according to the notion of the time, with liberality; yet such were the miserable sophistries and prevarications of the English law, and so inveterate the habit of preferring form to substance which they had created, that many of the reasonings even of Holt himself, at this time, can be reconciled to no principle of reason or of justice.

In 1691 Lord Preston was indicted for high treason; he pleaded his peerage as a bar to the jurisdiction of the Court. Holt informed him that to make out his plea he must produce his patent under the Great Seal; and when Lord Preston, after stating that the patent was actually in the possession of the Clerk of the House of Lords, desired he might be furnished with the means of obtaining it; Holt answered, "My Lord, we are not to furnish you with the means of pleading to the jurisdiction of the Court." Why not, if it was a just plea? How could a man like Holt say to an accused person,—although you have a legal plea and the means of proving it, we will take advantage of your situation as a prisoner to preclude you from enforcing those means. It is true that the Solicitor General, Somers, clearly shewed that there was in fact nothing in Lord Preston's argument; but the technical reason laid down by Holt is not the less preposterous and shocking to

common sense. "Because," said Mr. Somers, "it should not be pretended than an advantage was taken against the prisoner for a defect in point of form, or that anything was insisted on which had the least appearance of a hardship, that we may proceed in the most clear and unexceptionable manner that can be, I must beg leave to observe to your Lordship how far this matter has been debated, and determined on in another place." He then shews that Lord Preston's claim to an English peerage had been rejected by the House of Lords. This was conclusive, but so inveterate was the love of pettifogging that a Serjeant Thompson, junior to Somers, insists on a technical argument, and Lord Holt, overruling Lord Preston's plea, says, "We cannot give your Lordship time to plead to the jurisdiction of the Court." Lord Preston after this desired that the indictment might be read in Latin, and that his solicitor might be present while it was read. It should be remarked that the indictment was preferred not against Lord Preston only, but against two others, Ashton and Elliot. Pollexfen, the Chief Baron, in the true spirit of a lawyer, who had assisted the murders of the bloody assizes, and helped for the sake of a fee to burn an innocent woman alive, remarks, "Do you all desire this to be done? for if you should each of you severally have it read a great many times over, they that take notes in shorthand may take a copy of it as it is read, and a copy of it is not to be allowed." Holt, with his usual manliness, immediately overruled this suggestion, and ordered the indictment to be read. But when Lord Preston asked for a copy of it, it was refused, Holt remarking, that he did not advise Lord Russell to apply for a copy of his indictment, "for we knew he could not have it by law." An application was then made to delay the trial. This also was refused. "The want of witnesses," said Holt, "is only a surmise and a pretence, for there is no oath made of any witnesses they want, or who they are; indeed, if we had oath made that they wanted material witnesses, and to material points, for their

defence, that might be occasion for further consideration; but shall we put off a trial upon a bare suggestion of the want of witnesses. Sure that was never done." Mr. Somers said, "they have had a week's notice of trial already, and for many days of that week at least they have had as many counsel to assist them as they desired, and all the solicitors they had a mind to have had free access to them. So that they have wanted no opportunity to prepare themselves for trial that men in their circumstances could have; as to what has been said about the jury the law indulges them in the number of their peremptory challenges, without being put to shew cause, and there is reasonable time between this and to-morrow for their making such inquiry into the jury as is justifiable; but if by time to look into the jury be meant there must be time for tampering, that I am sure you will not permit." "But there shall be no contending in a matter of this nature for a day; if it be desired, and the Court please to put it off till to-morrow, we are contented, but there can be no reason to put it off for a longer time." Some allusion having been made to the fate of Cornish, Pollexfen said, "The hardship on Cornish was, that he was taken on Tuesday off the Exchange, and tried before that day se'nnight, and that was hard indeed." Then follows a remark with the stamp of the school of Jeffreys, "I know not whether *you* were about your business, your lawful business, when you were taken; God of Heaven knows that!" The trial was then postponed to the next day, when Lord Preston and the other prisoners were arraigned. Great care was taken to explain to them the right of each peremptorily to challenge thirty-five jurymen. The prisoners insisted on this right, and were tried separately.

The Solicitor General (Somers) opened the case. "Treason," he said, "consists in the imagination of the heart; but because that imagination can be discovered no other way but by some overt act, therefore the law does require that some open act manifesting that intention and imagination be assigned and

proved." "The general design of the conspiracy was this: the King and Queen were to be deposed, and this was to be effected by a French army and a French fleet. It will easily be granted, that nothing more dreadful can enter into the imagination of an Englishman than the destruction of our fleet and the conquest of our kingdom by the arms of France . . . . . The prisoners pretend to shew (in the papers found upon them) the possibility of restoring King James by the power of the French King, and yet to preserve the Protestant religion, the laws and liberty of the kingdom. They themselves went no further than to think it possible, but, I believe, it will be hard to persuade any other Englishman that it is possible, unless one instance could be given that the French King ever employed his arms for setting up anybody but himself, his own religion, and his own government. I never heard that he did pretend to rest any part of his glories on the virtues of moderation and self-denial . . . . . I did never think it was the part of any who were of counsel for the King, in cases of this nature, to endeavour to aggravate the crime of the prisoners by going about to put false colours upon evidence, or to give it more than its due weight, and, therefore, I shall be sure to forbear anything of that nature." He then proceeds to state the case against the prisoners, which was this: it was proved that they had hired a boat to take them over to France, that they were seized by the captain of a man of war (Billing) in this boat, under hatches, where they could neither stand nor sit, but lay along on ballast. In this place treasonable papers were found, with lead fastened to them, and Ashton was seen to take this packet of papers from the ballast, and put it in his bosom. Near the place where the treasonable papers lay, two seals of Lord Preston's, when he was secretary, were found. Great entreaties were urged to induce Billing to dispose of the papers, or to connive at their destruction. "The prisoners mixing extraordinary promises with great compliments." "Gentlemen," said Somers, "these

things which I have mentioned carry a strong presumption of guilt, for Englishmen, especially one of the quality of Lord Preston, to go into the country of an enemy without any manner of passport, and in such a manner as they could not expect but to be seized as spies, unless they were well assured of a good reception when they came there. But there is no occasion to leave anything to conjecture in this case, what is contained in these papers marks the design of the voyage beyond dispute. I think, gentlemen, after you have heard the evidence, you will be very well satisfied that my Lord Preston and the other two who stand indicted, were equally concerned in the papers; they were all alike earnest to preserve them from being seen; they all solicited for the disposing of them, and promised rewards if they might prevail.

"Gentlemen, these papers are of various natures. One I mentioned before, is entitled, 'The Result of a Conference between several Lords and Gentlemen, both Tories and Whigs;' in which it was undertaken to prove the possibility and methods of restoring King James by a French power, without endangering the Protestant religion, and the civil administration, according to the laws of this kingdom. Another contains heads for a declaration to be prepared, in order to be published when the French have had success at sea, and are landing; and that is filled with such pretences as they thought most specious, and most likely to amuse and delude the people.

"There is another sort of these papers which consists of letters. These letters are directed in false names, and are not subscribed, and it is not to be imagined it should be otherwise. Yet, gentlemen [though that is not the present business], the hands of the writers of these letters are very well known, and the subject-matter of them will easily reveal to you for whom they were intended; for though these letters are most of them written under divers cants, some under the colour of trade, some of them under the colour of a law suit for the redeeming

of a mortgage, others under the notion of a match, and a settlement to be made upon that match, yet the real business is so plain that you need but hear them read to see through the disguise.

"Though they begin generally in the style of merchants writing to one another, or the like, yet towards the end of the letters, you will observe expressions of duty and reverence [terms which do not usually pass in correspondence between persons of that sort] sufficient to shew that somewhat else was intended to be covered in what went before."

Some questions were put which we should consider irregular, as, What promises did they or any of them make you? (*b*); What did any of them say about the tide turning? Lord Preston, on putting a question to one of the witnesses, was told by Holt, "Your way is to propose your questions through the Court, and they will ask them for you" (*c*).

Mrs. Pratt proved that the smack was hired by two of the prisoners to go to France.

Paseley, the master of the smack, proved, that he went with the three prisoners and Lord Preston's servant in a boat from the Surrey Stairs to the vessel at the Tower, on which they embarked; that they twice concealed themselves under hatches,—the second time when they were taken; and that one of them desired him to say they were bound for Flanders, not for France.

Betsworth, the waterman, who rowed the wherry, corroborated this evidence. Fisher and Amond, two sailors in the employment of Paseley, did the same.

Captain Billop proved, that he received directions from Lord Danby and the Lord President to arrest some persons who were on their way to France; that, on pretence of pressing, he boarded the smack, when he found the prisoners in the situation described by Paseley, under hatches, lying on

(*b*) State Trials, vol. 12, p. 698.
(*c*) State Trials, vol. 12, p. 695.

the ballast; that he handed up Lord Preston first, searched him, took all the papers he could find on him, and put them in his pocket; that he put his hand into Ashton's bosom, and took from it the packet of papers with lead fastened to it. He proved also, that great offers had been made to him if he would connive at the destruction of the papers—"dispose of the packet;" that he took the papers to Lord Nottingham, who read them in his presence, tied them up, and returned them to him.

It was proved that the packet and seals were in the ballast near Lord Preston.

Lord Preston said, "I suppose it would be deduced from hence as if this packet, because it lay near those seals, was my packet?"

Holt.—"We have not yet heard, my Lord, what use they will make of it."

Lord Preston.—"But I desire to take notice of it. I think it is a hard presumption."

Holt.—"Since your Lordship mentions it, I will take a little notice of it too. It is only a circumstantial evidence;—how far it will weigh is to be left to the jury. The packet is found in the place where your Lordship lay, and by it seals that belong to your Lordship,—one is the seal of your office as Secretary of State, the other is your own proper coat of arms."

The papers were traced through Lord Nottingham, Lord Carmarthen, and Lord Sidney (*d*), and identified by Billop; they were read; among them was a list of the English ships. One of them was proved to be in Lord Preston's hand. As to the act of treason Holt laid it down, "that if Preston had a treasonable intention in carrying those papers into France,

(*d*) Afterwards Earl of Romney, brother of Lord Leicester and Algernon Sidney, one of Grammont's heroes. He and Bentinck were the King's chief favourites. Johnson, whom I have quoted, comments with much indignation on the honours and estates lavished on the latter, which were, indeed, excessive, and gave rise afterwards to some violent and unjustifiable proceedings.

and, in prosecution of that intention, took boat at Middlesex, that was an overt act in Middlesex. Whenever, in the county of Middlesex, your Lordship acted with a view to that design, that is treason, and there you are guilty. It is a treason complicated of several facts done in several places." And this opinion is corroborated by Mr. Justice Foster (*e*), who lays it down, that going into a foreign kingdom, or purposing to go there, in execution of a treasonable purpose, is an overt act of compassing the King's death. "Lord Preston was taken in the county of Kent, with his papers: but his taking boat at Surrey Stairs, which are in Middlesex, was a sufficient overt act in Middlesex, which was the county alleged in the indictment."

Holt stated the evidence to the jury with great perspicuity and great candour. Though he was repeatedly interrupted by the prisoner, he never for a moment allowed himself to be betrayed into the least peevishness or asperity towards him. Pollexfen, on the contrary, the Chief Baron, addressed the jury in a manner that might have reminded them of Scroggs and Jeffreys. The jury found the prisoner guilty, and sentence was passed on him; but he was pardoned. Elliott was not brought to trial. Ashton was found guilty, and executed (*f*). On the scaffold he asseverated, with the most solemn adjurations, what nothing but the besotted violence of party prejudice could induce any reasonable being to doubt, that the pretended Prince of Wales was in reality the Queen's child.

This plot was intended to seize the opportunity of the King's going to the Congress at the Hague. It was laid by the Earl of Clarendon, Lord Preston, his brother Mr. Graham, the Bishop of Ely, and Penn, jun. (the Quaker). The Bishop of Ely (*g*), in his letters, undertook for his elder brother (Sancroft), *and the rest of the family.* He was one of the

(*e*) Discourse 1, p. 194.

(*f*) The Queen remitted the quartering, &c.

(*g*) A proclamation issued for apprehending him, Penn, and Graham, as traitors.

seven bishops, and thus gave a most conclusive proof that no regard for civil freedom had caused the resistance of the *family* and himself to James the Second. He said, in one of the letters to the Queen, "I have lived in some pain for an opportunity to write you my humblest acknowledgments and truest duty, from which, by the Grace of God, I am no more capable of swerving, than of renouncing my hopes of Heaven." This evidence, as to the disposition of "the rest of the family," determined William finally to deprive those bishops who refused to take the oaths of allegiance to his government. Accordingly he appointed in their stead men well known for their exemplary moderation (*h*), learning, and unaffected piety; among them were not only Beveridge and Patrick, but two Primates who, in addition to their other merits, wrote Saxon English with unrivalled purity—Sharp and Tillotson (*i*). These men, especially Tillotson, a man of enlarged views and admirable judgment, held opinions as opposite as possible to those which, since the days of Laud, had been the shame and scandal of the Church. Free alike from the taint of Calvinistic intolerance, and from the blind and insolent bigotry of the school of Cosens and Mainwaring, they placed the Church of England on the basis, now almost abandoned, of free dis-

(*h*) Kenn was a real loss to the Church. Fortunately for the interests of freedom, few such men are to be found among the High Church prelates, as this most excellent and disinterested votary of the Divine right. Kenn, however, was so far transported beyond all bounds of reason and decency, by his strange opinion, that on the death of the best of wives, and almost faultless woman, Queen Mary, he wrote a letter to Tennison, who attended her in her last moments, reproaching him with not having called upon her to repent the sin of her rebellion. This is nothing, however, to the Jacobite clergyman who took for his text, on occasion of her death, "Go now, see this cursed woman, and bury her, for she is a King's daughter."

(*i*) Tillotson died so poor, that if the King had not forgiven his first fruits, his debts could not have been paid. The Queen settled 300*l.* on his widow, who got 2500*l.* for the copyright of his Sermons, the largest sum that had ever yet been given for any work. Sancroft left a large

cussion and comprehensive charity, --a tenure of respect and affection (*k*) far more solid and secure than any which ridiculously misplaced titles or immense wealth, accumulated in defiance of the plain words and obvious meaning of Scripture, can bestow upon the teachers of Christianity.

To unravel the tangled web of corruption, which so many hands were busily employed in weaving, was a task too arduous even for the genius and patience of William the Third, beset as he was by the Marlboroughs, the Russells, the Leeds', the Normanbys, the Abingdons, the Godolphins, the Sunderlands, and I would fain not add to the catalogue of pollution the name of the accomplished and vacillating Shrewsbury. The influence of fear, and the pressure of dangers, which, as Cicero says, it did not require argument to point out, but sensation to perceive, had determined the bigoted English to act against their prejudices. The moment the dangers ceased, and these fears were withdrawn, the prejudices resumed their influence over the purblind multitude, and were encouraged by cunning men, who began to argue in favour of the grovelling absurdities, in contradiction to which they had been obliged, by the purest selfishness, to act. Since the days when the Stoics argued "that the cardinal virtues were animals," the world had heard of no discussions so trifling and unmanly, as those which took place, after the expulsion of James, in the English Parliament. The debates whether the word deserted or abdicated should be used, and about the vacancy of the throne, were below contempt, and are disgraceful to the English name. They shew, by the most mortifying contrast, how different a race had succeeded the statesmen of the Long Parliament—that æra, when the civil capacity of this country was in its meridian splendour. Even

(*k*) "Nam qui nimios poscebat honores
Et nimias quærebat opes, numerosa parabat
Excelsæ turris tabulata—unde altior esset

Somers was obliged to select topics adapted to the narrow minds and miserable superstitions of his audience—topics well suited to Maynard, but ill becoming a man like him. Instead of at once saying, that an oppressed people had sought and found its remedy in resistance, and that every nation had a right to choose its own government,—doctrines which were familiar to all educated men of that day; instead of holding the language of Milton, of Harrington, and of Sydney, he argues from Calvin's Lexicon Juridicum, "Generum abdicat, qui sponsam repudiat:" "He that divorces his wife, abdicates his son, in law;" that there can be an abdication without express words; so he cites Pralejus, Brissonius, and Spigelius (*l*), to the same purpose. Now, suppose all these men had said directly the reverse of what they did say, could that have affected the right of the English nation to get rid of a tyrannical and promise-breaking King? Hampden and Cromwell did not quote Spigelius, when they took arms against James's father. The conclusion of the address of Somers was more worthy of him:

"For which reason, my Lords, the Commons cannot agree to the first amendment, to insert the word 'deserted,' instead of 'abdicated;' because it doth not, in any sort, come up to their sense of the thing: so, they do apprehend, it doth not reach your Lordships' meaning, as it is expressed in your reasons; whereas they look upon the word 'abdicated,' to express properly what is to be inferred from that part of the vote to which your Lordships have agreed, That King James the Second, by going about to subvert the constitution, and by breaking the original contract between King and people, and by violating the fundamental laws, and withdrawing himself out of the kingdom, hath thereby renounced to be a King

(*l*) He also quoted Grotius. The style of this great writer is admirable, and his erudition boundless; but no one who has read him will think him a great philosopher. He always substitutes fact for right, and assumes that what is, ought to be.

according to the constitution, by avowing to govern by a despotic power, unknown to the constitution, and inconsistent with it; he hath renounced to be a King according to the law, such a King as he swore to be at his coronation, such a King to whom the allegiance of an English subject is due; and hath set up another kind of dominion, which is to all intents an 'abdication,' or abandoning of his legal title, as fully as if it had been done by express words. And, my Lords, for these reasons the Commons do insist upon the word 'abdicated,' and cannot agree to the word 'deserted'" (*m*).

Such being the state of men's minds, William was betrayed into several measures, which gave courage to his adversaries, and broke the spirit of his friends.

Finding every notion of patriotism extinct among the majority of those with whom he had to deal, and that the instinctive effort to save their estates from confiscation, their bodies from the gibbet, and their minds from Romish priests, had exhausted all their courage and magnanimity, he was driven to other and most deplorable expedients. It must not be denied, and the disgrace falls far more heavily on our nation than on its deliverer (if, indeed, any portion of the disgrace can properly be said to fall on him), that during the reign of William, bribery was practised in its coarsest shape, and on the most extensive scale (*n*). Burnet tells us, that he remonstrated on this point with his illustrious master, and that William assured him that nothing but the most absolute necessity forced him upon measures he so thoroughly detested; and if we recollect that it was not merely the English Crown which was at stake, but that on William's possession of that Crown depended the emancipation of Europe from the fetters of Louis the Four-

(*m*) Parliamentary Debates, vol. 5, p. 69.

(*n*) This was the time when,—

"Beneath the patriot's cloak,

teenth, the grand object which William (*o*) kept steadily in view, and to which every thought of his great soul was subservient, we shall reserve our indignation for those whose incorrigible selfishness made them inaccessible to every other motive but that of direct pecuniary advantage. Lord Bolingbroke tells us, that Clifford set the first example of deliberately corrupting Parliament. And if corruption be taken in its widest sense, it has been employed as an engine of government, and as an instrument of success, sometimes by ministers of the Crown, sometimes by private men, under the names of South Sea Stock, pensions, sinecures, contracts, loans, offices, fees, governments, and railway shares, down to the hour when the Parliament preceding this under which I am writing (that I may avoid all suspicion of alluding to what is present) was dissolved. From the one period to the other the internal history of England is the history of corruption. Like the hog Plutarch tells us of, which drest in a different fashion, and with different sauces, furnished the sole material of a splendid banquet,—that first, that last, that midst, that without end, is the staple of English political history; and he who casts his eye over the pension lists even of this century, he who sees what the industry of our fathers, and of ourselves, has been strained to support, he who sees the disgraceful sinecures consisting of the fees extorted from plundered suitors in our Courts of justice, in the face of the line in Magna Charta which every attorney's clerk can repeat, fees which add to the otherwise scandalous expenses of English litigation, and which our chancellors and chief justices (*p*)

(*o*) Mr. Macaulay, following in the steps of Burke, has seized upon the true character of William the Third, and delineated it with great spirit and fidelity.

(*p*) I will only quote a few instances. First, Lord Thurlow,—it is known how he provided for his nephew.' Twiss's Life of Eldon shews the sinecures which Lord Eldon, receiving a vast income, gave his son. Lord Ellenborough gave his son a sinecure place which must have been worth at least 6000*l.* a year, consisting of fees from suitors. The profits of

have almost uniformly bequeathed as an inheritance to their children and dependants (an inheritance that the hard earned inheritance of many a citizen has been sold to furnish),—he who examines these things will, indeed, wonder both at the patience of the English people, and the total want of any regard, or, indeed, pretended regard to the public good in so many of their representatives. Montesquieu's prophecy is well known, but I own I think if he had said the English constitution will perish when the electors are as corrupt as the elected, when high and low, educated and illiterate, noble, gentle and simple, are confounded together in one tainted mass of indiscriminate corruption, the probability of its accomplishment would have been far more imminent (*q*). Yielding to this necessity William gave office to the corrupt and insolent Sir Edward Seymour (*r*), a man who veiled under a brutality of supercilious arrogance, which the virtue of Aristides would not excuse, purposes as uniformly sordid as the habits of the most pettifogging scrivener could suggest. Thus also he allowed Sir John Trevor to become Speaker, one of the vermin nourished in the slime and blood "of the knavish part of the law" (*s*), during the worst times of the Stuarts, a wretch whose congenial nature had early attracted the sympathy of Jeffreys, whom in return he laboured by straining (and it would seem

the Registrar of the Admiralty, a sinecure place, must have been at one time upwards of 20,000*l.* a year, and the Pension List and sinecures generally known, were besides all these.

(*q*) Itaque quod Apollo Pythius oraculo edidit Spartam nullâ aliâ re nisi avaritiâ esse perituram, id videtur non solum Lacedæmoniis sed et omnibus opulentis populis, prædixisse. Cic. de Off. 2.

(*r*) He had a grant of Ludlow's estate at Maiden Bradley; and when Ludlow came to England, in 1689, he was afraid of being compelled to make restitution of it. He therefore attacked Ludlow by name in the House of Commons, and obliged him to leave England.

(*s*) When Trevor came to the chambers where he was clerk, somebody asked his patron who he was; "A kinsman of mine, whom I allow to come here to see the knavish part of the law," was the answer. North's Life of Guildford.

the task to him was not hopeless) after infamy greater than that of his patron to supplant; without morals, without knowledge, without courage, without thought, without elocution, without one single title to respect, with all a scrivener's want of cultivation, and more than a priest's intolerance (*s*). This man who was intended, by Nature, and qualified by his pursuits to be a sheriff's officer, or at most the clerk to some fraudulent attorney, became, in consequence of his ignorance and immorality, Speaker of the House of Commons in King William's time, and Master of the Rolls. Happy, indeed, would it have been for the country if this was the only instance where similar claims had raised their possessor to opulence and distinction. The career of this man, however, discloses the full turpitude of the period. While Speaker he had received a bribe of 1000*l*. This was proved against him, and with meanness almost romantic, and which shews how valuable a servant the Stuarts had lost,—he not only put himself, from the chair, the question, "that Sir John Trevor, Speaker of the House of Commons, receiving a gratuity of 1000*l*. from the city of London, is guilty of a high crime and misdemeanour;" but he announced that it was carried without one dissenting voice in the affirmative. He was afterwards expelled the House, and yet this man thus steeped in infamy was allowed for twenty-two years, without a murmur or a remark, to continue Master of the Rolls. Such were the living waters, the pure fountains, to which English law sent its suitors. The priest in this case was worthy of the god. Does the history of any free country furnish a parallel to such amazing and stupendous indifference to decency, to private right, to national honour, to all that the most common instinct would teach the most unlettered serf to venerate? The infamy of this blasted criminal became that of his country. His history

(*s*) Trevor exclaimed, on seeing Tillotson, "I hate a fanatic in lawn sleeves;" "And I," said that ornament of his country, "hate a knave in any sleeves." Lord Campbell's Life of Trevor.

is a lasting monument of the apathy to honour of the English public. For this happened in a country where a free Parliament met, where the scourge, the pillory, and the pestilential gaol, awaited every one who dared to hint that our institutions were not perfect, and that our public men were not incorruptible, where men wholly uneducated were hanged by scores for stealing a shilling handkerchief out of their neighbour's pocket, and where the ashes which the blood of Mrs. Gaunt had not quenched, might at any moment be rekindled by the caprice and ferocity of any one of the illiterate and narrow-minded judges who travelled the different circuits. Is it to be wondered at that with such examples selfishness should sink deeper and deeper into the national character, till it narrowed itself to the measure of the four first princes of the House of Brunswick? Fortunately, however, for mankind, the enemies of William committed greater errors than himself. The tide of popular feeling was, perhaps, about to run in favour of the exiles, when James the Second issued a commission under his own hand to assassinate William the Third, for such, in reality, though covered with the very transparent pretext of seizing him and bringing him to James's presence at St. Germains, the scheme he sanctioned was considered by this nation most evidently to be. To take away life by any means, but those pointed out by law, has always been odious to the English. The nation was in a flame (*t*). An association, framed after that in the reign of Elizabeth, abjuring the title of James, and pledging the subscribers to avenge the death of William, was signed by an immense majority of both Houses of Parliament, and generally throughout the kingdom. The Jacobites became a feeble minority, nor did they recover from the blow till the folly and wickedness of Queen Anne's

(*t*) Hallam's Const. Hist. vol. 2, p. 286. Mazure, Hist. de la Revolution, vol. 3, quotes the commission of James to Crosby. Fifteen Peers, and ninety-two members of the House of Commons, refused to sign the association so long as it was voluntary.

ministers gave them importance in the latter part of the succeeding reign.

The person immediately entrusted with the management of the enterprise, was Sir George Barclay, a Scotchman, capable of the most savage and dishonourable actions. He came to London, and applied to one Harrison, a priest, Charnock, (one of the two fellows of Magdelen who had turned Roman Catholics in the reign of James), Captain Porter, and Sir William Perkins. Among other persons, Harrison applied to a Captain Blain, a zealous Jacobite, but a man of honour. When the priest disclosed the project to him, and said that he had seen the warrant, under the hand of James, for its execution, Blain replied in horrour, that he did not think such a thing had been in James's nature, and went his way. The project nevertheless proceeded, and the numbers of the conspirators increased. It was resolved to attack the King, on his return from hunting, at Richmond, in the lane between Turnham Green and Brentford, on the 15th of February, 1695. The plot was betrayed by two of the conspirators, Captain Fisher, and a Frenchman called De La Rue, and by an Irish Captain, Prendergrass, who had been asked to join in it, and who behaved throughout like a man of honour. He at first refused to mention names, or to give evidence; but on the representation of William, that this vague statement could be no security to him, and would only serve to make him suspicious of the innocent, Prendergrass gave way, and wrote down the names of the conspirators in a list, which he gave to the Earl of Portland; but not until the King had given his honour that he should not, unless with his own consent, be called upon to give evidence against them. Before I proceed to Charnock's trial, I will mention, that in spite of some very perverse opposition, an act of Parliament had passed, regulating the trials of peers and commoners for high treason: by this statute, the 7 Wm. 3, c. 3, it was provided, that in the case of peers, instead of peers selected by the High Steward, all the peers

should be summoned to attend twenty days before the trial; and it was enacted, that in all cases of high treason, whereby corruption of blood may ensue, [except treason in counterfeiting the King's coin or seals,] or misprision of such treason; first, that no person shall be tried for any such treason, except an attempt to assassinate the King, unless the indictment be found within three years after the offence committed; next, that the prisoner shall have a copy of the indictment, [which includes the caption,] but not the names of the witnesses, five days at least before the trial, that is, upon the true construction of the act, before his arraignment; for then is his time to take any exceptions thereto, by way of plea or demurrer; thirdly, that he shall also have a copy of the panel of jurors two days before his trial; and, lastly, that he shall have the same compulsive process to bring in his witnesses *for* him, as was usual to compel their appearance *against* him (*u*).

Though this statute had been passed before Charnock, Keys, and King, three of the conspirators in the assassination plot, were brought to trial, it was not to come into operation till the 29th of March, and their trials took place on the 11th. There can be no doubt that the government would have acted with more liberality in allowing them the full benefit of it, and Holt, I think, would have increased his claim to our respect, if he had postponed the trial till after the time when the act came into operation. But the excessive narrowness and pedantry, which has always disfigured our judicial proceedings, triumphed on this occasion; and the request of the prisoners, that they might be allowed to take advantages of provisions, which the Legislature had now declared conducive to the fair administration of justice, and of which the merest accident had deprived them, was overruled. The evidence against the prisoners was extremely clear and satisfactory; they were most properly found guilty; but if it were not for the thousands of instances where substantial injustice has been, and is inflicted, by the

(*u*) Bl. Com. vol. 4, p. 351.

same illiberal, mechanical views, which induced the Crown lawyers to refuse, and Holt, and his brethren, not to take means to oblige them to grant, the prayer of the prisoners on this occasion, this might be considered no slight blot in the history of our jurisprudence. Holt behaved with the most perfect propriety to the prisoners in other respects. He informed them how to challenge the jury, and of the number of challenges to which they were entitled. The indictment was read over to them in Latin: when the clerk came to this sentence, in the string of inhuman gibberish,—"Falso, malitiore, diabolice, et proditorie, eum fassassaverunt imaginati et machinati fuerunt excogitaverunt, designaverunt, et intendebant, dictum Dominum Regem occidere, interficere et murdrare,"—Charnock, who probably had listened to all this, worse than Gipsey cant, in utter confusion, interrupted,—

"What word was that last, Sir?"

Clerk.—"Murdrare."

Charnock.—"That is an odd word: I cannot understand what it means."

L. C. J.—"It is a *term of art:* the signification of it is to murder. Go on, Mr. Hardesty."

Charnock begged that the indictment might be read a second time; which accordingly was done. Captain Porter, the accomplice, being called, and a question put as to the last year, Charnock objected.

L. C. J.—"It is in the indictment divers days and times, as well before as after."

Charnock.—"The crime for which we are accused is laid to be the 10th of February, 1695."

L. C. J.—"The day is not material, but only a circumstance, but in form, some day before the indictment preferred, must be laid; and though the day mentioned in the indictment is the 10th of February, yet it also said, that the things contained in the indictment, of which you are accused, were done likewise at divers days and times, as well before as after, and

so the indictment comprehends even what might be done the last year as well as this."

Charnock.—"I beg the favour of the Court in this matter; for sure the 10th of February last, can no way be supposed to be in the last year."

L. C. J.—"I told you before, the day is not material, nor are the witnesses, nor the King's counsel, tied up either to the particular time or place mentioned in the indictment, so it be within the county, and before the indictment preferred. All that is to be regarded is, that no evidence be given or admitted of any other species of treason, but what is contained in the indictment; for a man may certainly be indicted for a treason committed this year, and upon his trial, evidence may be given of the same treason committed the year before."

Charnock.—"But then how can a man prepare for his defence?"

Att. Gen.—"The time is but a circumstance, it may certainly be proved at another day than what is laid in the indictment, and yet very good proof; and so it is in all other cases, as well civil as criminal."

Charnock.—"Mr. Attorney General has said enough, I think, to confute himself; for if one year may be put in the indictment, and another year brought in in the evidence, how shall any man be able to apply himself to his defence, whose thoughts run only upon the time laid in the indictment? I hope neither the Court nor the King's counsel will come so hard upon us, as to put our thoughts quite out of all order, that when we apprehend we are only to defend ourselves against what is said to be done this year, we must afresh prepare ourselves to answer what was done the last year."

L. C. J.—"It is always so; for form sake, there is a particular time laid in the indictment, but the proof is not to be tied up to that time; but if it be proved at any time before or after, so it be before the indictment preferred, it is well enough: and not without great reason, for the treason consisting in

imagining and compassing the King's death, which may be manifested by divers overt acts, some before, some on, and others since, the 10th of February, yet they are evidences of one treason, which is, the compassing the King's death."

Charnock.—"Then we may be under an obligation to give an account of all the transactions of our lives, if that be the rule."

L. C. J.—"No, not so either, for that very treason assigned in the indictment must be proved, and, therefore, you are only to give an answer to that, and nothing else" (*v*).

This point being settled, Charnock objected to the competence of Porter as a witness.

The question was thus discussed:—

L. C. J.—"He is a legal evidence, though he does confess himself guilty of the crime."

Charnock.—"He owns himself a partner in a bloody design, and to convict me, he swears to take away my life, to save his own. I cannot imagine why he should be accounted a legal witness, that is a party, by his own confession, in such a matter."

L. C. J.—"Pray, who can tell better what was intended and done in such a conspiracy, than he that was a party in it?"

Charnock.—"My Lord, he has forfeited his life by his own confession, and now he would, by swearing against me, take away my life to save his own."

L. C. J.—"Whatsoever objections you have against the *credit* of his testimony, you may make what use of them you can in the proper time; but for any thing that yet appears, he is a legal witness . . . . . For that matter, it is so in all cases of this nature, not only in cases of high treason, but of robberies and burglaries, and the like, where the parties concerned are, and always have been, allowed to be good witnesses against their accomplices in those crimes" (*w*).

(*v*) State Trials, vol. 12, p. 1397.
(*w*) State Trials, vol. 12, p. 1406.

Holt also laid it down distinctly, that the prisoners were not to make any remarks on the testimony they heard, except those which might be necessary for explanation, until they came to their defence.

Evidence was admitted to shew that De La Rue had made the same statement to the Privy Council that he had made to the Court. This, as I have remarked already, would not be received now; though, for the reasons I have given, its exclusion appears to me founded in error. The evidence was that of Lord Portland:

Att. Gen.—"Did Mr. De La Rue make any discovery of this matter in your presence to his Majesty, on Friday, the 21st of February?"

Earl of Portland.—"Yes, he did."

Att. Gen.—"Your Lordship has heard what he said now; was it to the same purpose?"

Earl of Portland.—"Yes, to the very same purpose; and he did, before he went in to the King, to me, being brought to me by his own desire. It was all the same in substance as he has told you now; and afterwards, he was brought to the King on Friday night, and there he said the same things."

Keys, one of the prisoners convicted, was servant to Porter, the witness, and had been led by him into the conspiracy. It was remarked, that instead of the servant betraying his master, in this case the master had betrayed the servant.

The next who were tried for the plot, were Sir John Friend and Sir William Perkins. They were found guilty and executed. Perkins confessed that he had seen James's commission for assassinating William. The virulent impudence of the Jacobite clergy displayed itself remarkably on the execution of these men. Three non-juring priests of the English Church, Collier, Snate, and Cooke, waited on them to the place of execution, joined in giving them the absolution, as it is still allowed to stand, to the wonder of Protestants, in the service for the visitation of the sick in the English Liturgy, and accompanied

the ceremony by a solemn imposition of hands. The traitorous assassins who were thus absolved by these meddling and presumptuous priests, had expressed no sort of contrition or repentance for the infernal project in which they had engaged. Holt, on the 7th of April, represented to the grand jury in the Court of King's Bench, the pernicious practices of the "three absolving priests," and the jury delivered a presentment against them, as promoters of assassination, and a scandal to the Church. A bill for a misdemeanour was found against them, and two of them were committed to Newgate, but with lenity unexampled in our history, and perhaps misplaced on such an occasion, the matter was allowed to drop, and no punishment whatever was inflicted on the men who had thus employed religion to subvert morality (*w*).

On the 21st of April (1696) of the same year, Brigadier Rookwood, Major Lovick, and Charles Cranburn, three more of the conspirators, were tried for the same offence, and were the first on whose trials the new statute, to which I have adverted, regulating trials in cases of high treason, came into operation. All three, however, were found guilty.

As it was natural to expect, many questions arose on Rookwood's trial, the first under the new act. Sir Bartholomew Shower began with a well-merited compliment to Holt:

"My Lord, we are assigned of counsel, in pursuance of an act of Parliament, and we hope that nothing which we shall say in defence of our clients shall be imputed to ourselves. I thought it would have been a reflection upon the government and your Lordship's justice, if, being assigned, we should have refused to appear; it would have been a publication to the world, that we distrusted your candour towards us in our future practice upon other occasions. But, my Lord, there can be no reason for such a fear; I am sure I have none; for we must

(*w*) Fourteen bishops published a declaration condemning the proceeding as "a profane abuse, since Messrs. Collier, Snate, and Cooke must

acknowledge, we who have been practisers at this Bar especially, that there was never a reign or government within the memory of man, wherein such indulgence, such easiness of temper, hath been shewn from the Court to the counsel, as there always hath been in this. Never was there such freedom, and liberty of debate, and argument, allowed to the Bar, and we thank your Lordship for the same." (*x*)

He then proceeded to disclaim all sympathy with the crime imputed to the prisoner, and to apologise for the objections he was about to take in his behalf.

Holt.—"Look ye, Sir Bartholomew Shower, go on with your objections, let us hear what you have to say."

Shower and Phipps then proceeded to take an objection, that the clause ordering that the prisoner shall have a copy of the panel of the jurors appointed to try him, had not been complied with, because, at the time when the list of jurymen had been sent to the prisoner, the list of the jurymen had not been returned, although, in fact, the list of jurymen sent to the prisoner was an accurate list of those returned by the sheriff. The absurdity of this technical objection was clearly exposed by Mr. Cowper:

"Surely, my Lord, there is no weight in the objection, that because the sheriff had it in his power to alter the panel (*i. e.* list) before it was returned, therefore this is not now a true copy of the panel of the jurors who are to try the prisoner duly returned by the sheriff, which are the words of the act. It is true, if the sheriff had, in fact, altered the panel from what it was, and returned it so altered into Court, no doubt the prisoner would be very well entitled to make this objection,—that he had not a copy of the panel, or the names of the jurors that were summoned to try him. But now we can aver that we followed this act of Parliament literally; for, in answer to their objection, we may ask this question of them, upon the words of the act: Have you not had a true copy of the names

(*x*) State Trials, vol. 13, p. 145.

of those that are to try you, and are duly returned by the sheriff for that purpose? And was not that copy delivered to you two days ago?"

Phipps, for the prisoner, had argued, as a copy of the indictment could not be given till the indictment was found, so a copy of the jury panel could not be given before the panel were returned. This Holt answered by saying, that "an indictment is not an indictment until it be found, for the jury make it an indictment by finding it; till then, it is only a writing prepared for the ease of the jury, and for expedition. The jury may alter what they please in the indictment, or refuse it absolutely; and if the jury, upon examining the witnesses, would only present a matter of fact, with time and place, the Court might cause it to be drawn up into form, without carrying it to the jury. But a panel is a panel when it is arranged before it be returned; and a copy of the panel given before it be returned, is a copy of the panel returned, if it be afterwards returned, as it must."

Shower objected to Porter's competency as a witness, on the ground that he had been convicted of felony. A record was put in, by which it appeared that he had been convicted of manslaughter. It was proved that he had received the King's pardon, and had been pardoned by act of Parliament. Holt held that he was a competent witness. "A pardon," he said, "before attainder prevents all corruption of blood, so that though a man forfeits his goods by conviction, yet after a pardon he is capable of having new goods, and shall hold them without any forfeiture, for the pardon restores him to his former capacity, and prevents any further forfeiture. Indeed, if he had been attainted, whereby his blood was corrupted, no pardon could purge his blood without reversal of the attainder by writ of error, or act of Parliament, or express words in the act to restore blood. But either pardon makes him a new creature, gives him new capacity, and makes him, to all intents and purposes, from the time of the pardon, to be pubus et

legalis homo, and a good witness. *Indeed, this crime might be objected against his credit*, but it is not to be urged against the sufficiency of his evidence, that is against his being a witness."

Porter was sworn. Other witnesses were called to corroborate his account, and the charge was clearly made out. The case of the Crown having come to an end, Sir Bartholomew Shower objected, that consulting and agreeing to kill the King was not an overt act, and that if it was there were not two witnesses to prove it.

Holt.—"Pray take the evidence right; first, what will you make an overt act? What do you think when there is a debate among divers persons about killing the King?"

After a good deal of discussion, and a re-examination of Porter, Holt laid down the law thus:—

"I tell you, consenting to a traitorous design is an overt act of high treason, if that consent be made to appear by good proof. Now, the question is, What is a good proof and evidence of this consent? A man is two or three times at a treasonable consult for killing the King, and though, perhaps, at the first he did not, yet at the second he did; know that the meeting was for such a design [suppose for the purpose there was but two meetings], and at the second it is determined to go on with the design; is not that an overt act, though it cannot be proved that the prisoner said anything?

. . . . .

"The first meeting possibly might be accidental; he might not know what it was for, though that will go a great way if he does not dissent or discover; but when he meets again with the same company, knowing what they had in design, does not that prove a consent? That was the case of Sir Everard Digby in the Powder Plot" (*y*).

Driven from this point, the counsel for Rookwood prepared to attack the character of Porter, at first without stating the nature of the evidence they proposed to give. This was resisted by the Crown lawyers.

Holt.—"Nay, without doubt, it is not regular to produce any evidence without opening it. You must tell us what you call them to."

Shower.—"Why, then, my Lord, if robbing upon the highway, if clipping, if conversing with clippers, if fornication, if——, if any of these *irregularities!* will take off the credit of a man, I have instructions in my brief of evidence of crimes of this nature, and to this purpose, against Mr. Porter."

The counsel for the Crown objected to the evidence.

Holt held this objection valid, and proceeded to lay down the following rule, which has been the law ever since, and which the reader will observe is directly the reverse of the practice which obtained at the trial of Lord Delamere. Jeffreys in that case, certainly from no love to justice or the prisoner, allowed the latter to do what Holt refused to permit, *viz.*, to give evidence of specific crimes committed by the witness, and denied by him.

Holt.—"Look ye, you may bring witnesses to give an account of the *general tenor of his* (*the witness's*) *conversation.* But you do not think, sure, that we will try now at this time whether he be guilty of robbery?"

Some evidence was then produced, which failed of its object altogether.

Holt then began to sum up; he mentioned the fact, that a list of men had been given by Rookwood to one of the conspirators.

Shower objected, that as this was not stated in the indictment as an overt act, it could not be given in evidence. "Can there not," said the Chief Justice, "be one act which is proof of another act that is alleged." The counsel proceeding to argue against it, Holt said, "It never could be the end of the law that all the particular facts that are but evidence of the facts alleged, should be set forth in the indictment. It is not urged as an overt act, but as evidence of an evidence of an overt act, that is alleged; for instance, the overt act alleged is,

that they did meet and consult; shall they not give in evidence what was said and done at those meetings, though not alleged? Sir George Barclay produced a scheme at the Globe Tavern. Shall not the producing of that scheme be evidence? If it may, why not giving the list to Harris?"

The Solicitor General began to moan at the interruption of the Court. When Holt, with the manliness and simplicity of a great judge, I had almost said of a great man, said, "Nay, nay, if there be any mistake let us hear them, that it may be rectified."

Cowper put the argument for the Crown with great ability:

"My Lord, we are in a very strange case here, if we be not very proper in this part of our evidence: the overt act laid is, that the prisoner met together with others to consult how to assassinate the King, and there the prisoner, among the rest, did agree it should be done so and so. It is admitted the prisoner was there; but, say they, if you only prove that he sate by while there was a general discourse of such a matter, but do not prove that he said or did anything expressing his assent, that will not amount to a proof of the overt act laid; and yet, if we go about to prove further any act done that manifests his assent, then they say, you go too far, and prove an overt act that is not mentioned in the indictment. Thus, they grant the agreement is a sufficient overt act, but object, that being present merely is not a sufficient proof of his agreement: then when we go to make proof of anything that is a sufficient proof of his agreement, they tell us it is not proper upon this act of Parliament, because not laid in the indictment, though his agreement be laid in the indictment: and so they would amuse us, rather than make any solid objection to our evidence. This doctrine is certainly very odd, my Lord, and we doubt not will have little weight with the Court or the jury"(*z*).

Holt held the evidence admissible, and proceeded thus:

"Then, gentlemen, as to this matter which they have objected, that this list given on the day of the intended assassination ought not to be allowed as evidence to prove the treason, because it is not specially laid in the indictment, but is, by the late act of Parliament, excluded from being proved to convict the prisoner; now, though the act doth exclude the giving in evidence of any overt act that is not laid in the indictment, yet it doth not exclude such evidence as is proper and fit to prove the overt act that is laid in the indictment. Therefore the question is, whether this giving of the list does not prove some overt act that is alledged in the indictment? There is in the indictment an agreement laid to kill the King; and if that be proved, that is an overt act of this treason. Now when the consent and agreement of Mr. Rookwood to that design is proved, surely the proof of his giving a list of men is a further proof that he did agree to it, and then it is very proper to be given in evidence; for if, by the new statute, no one act can be given in evidence to prove another, then must not only the overt act, but also the evidence of that act, be expressed in the indictment.

"Gentlemen, you have heard the witnesses what they say concerning this matter. In the first place, if you do believe that there was such consults and meetings, where this intended assassination of the King was debated and resolved upon, and that Mr. Rookwood was present and did agree to it, that is an overt act. And again, if you are satisfied that there was an agreement to prepare and provide a number of men to set upon the King and his guards, in the manner you have heard, and he was concerned in making this provision, and was to have a post, and command a party in that attack,—that is a further proof of that consent and agreement that is laid in the indictment.

"Gentlemen, I must leave it to you, upon the evidence that you have heard. If you are satisfied, upon the testimony

Rookwood is guilty of this treason of which he is indicted, in compassing and imagining the death of the King, then you will find him guilty. If you are not satisfied that he is guilty, you will acquit him" (*a*).

The prisoners were found guilty.

In the case of Sir William Parkyns, Holt gave another sign of the unhappy narrowness which, though it may be excused by his study of the law, of which he was so great a master, and although it was in his case consistent with masculine sense and an undeviating wish to do right, is nevertheless a proof that, owing to our unhappy institutions, it by no means follows that a great judge should be a great man.

Parkyns desired he might have counsel:

Parkyns.—"My Lord, there is a new act of Parliament that is lately made, which allows counsel."

L. C. J.—"But that does not commence yet, Sir William."

Parkyns.—"My Lord, it wants but one day."

L. C. J.—"That is as much as if it were a much longer time; for we are to proceed according to what the law is, and not what it will be."

Parkyns.—"But it is declarative of the common law, because it says it was always just and reasonable."

L. C. J.—"We cannot alter the law till law-makers do it."

Parkyns.—"Will your Lordship be pleased to let it be read?"

L. C. J.—Ay, if you have a mind to it, it shall be read."

Parkyns.—"Yes, if your Lordship pleases."

L. C. J.—"Read it."

Clerk of Arraigns reads.—"An Act for regulating of Trials in Cases of Treason and Misprision of Treason [7 Wm. and Mary, cap. 3]."

"All the first paragraph of the new act was read."

L. C. J.—"Look ye, Sir William Parkyns, this law has not

taken any effect as yet; but the law stands as it did before the making of the act."

Parkyns.—"But, my Lord, the law says it is just and reasonable that it should be so."

L. C. J.—"We go according to the law as we find it is."

Parkyns.—"And, my Lord, what is just and reasonable to-morrow, sure is just and reasonable to-day."

. . . . .

L. C. J.—"We cannot alter the law; we are bound by our oaths to proceed according to the law as it is at present."

Parkyns.—"Pray, my Lord, let it be put off till another day then."

L. C. J.—"You shew no reason for it . . . . . The act of Parliament says nothing of notice of trial; that still continues as it was before; and you have had very convenient notice. Go on, Mr. Hardesty, to swear the jury" (*b*).

The case was clearly proved against the prisoner; but every admirer of Lord Holt must regret that the request of the prisoner was refused.

The history (*c*) of the bill, 7 Wm. 3, c. 3, illustrates the selfishness of the Parliament of that day:—

"The bill did not come to the royal assent during the session it was brought into Parliament; for the clause which requireth that all the peers shall be summoned upon a trial of a peer for treason or misprision of treason, a provision founded in sound sense and strict justice, was added by the Lords; and the bill, with that amendment, sent back to the Commons, who disagreed to the amendment; and so the bill dropped for that session.

"In a subsequent session the Commons sent up their own bill again, and the Lords added their clause, which, saith the historian, was not easily carried; for those who wished well to the bill looked on this as a device to lose it, *as no doubt it was,*

(*b*) State Trials, vol. 13, p. 72.

(*c*) Foster's Crown Law.

and therefore opposed it; but, contrary to the hopes of the Court, the Commons were so desirous of the bill, that when it came to them they agreed to the clause. And so the bill passed, and had the royal assent" (*c*).

Sir John Fenwick, who had engaged in the plot, was seized under the name of Thomas Ward at New Romney, in Kent, and thence brought to London, and committed to Newgate. He wrote a letter to his wife, Lady Mary Fenwick, while in the Tower, containing the most conclusive and unequivocal evidence of his guilt. Great efforts were used to save his life; first, by negotiation with the King, to whom he offered to make important discoveries, and afterwards by bribing the witnesses against him to abscond. His wife began with Captain Porter, who contrived that witnesses should be placed to overhear what she said; and that scheme was defeated. The other witness was Mr. Cardell Goodman. He was a man of bad or rather infamous character, and if he had been examined, it would have appeared that his evidence was not much to be relied upon. However, he was induced to leave England; and if Fenwick's trial had been brought on after his departure,—as the law required two witnesses, he must have been acquitted. Fenwick had accused Admiral Russell, a profligate and ill tempered man, and others of the Whigs, of treasonable practices. He was called before the House of Commons, and his evidence appeared to that assembly so unsatisfactory, that it was resolved to pass a bill of attainder against him. Counsel accordingly were heard, and witnesses

(*c*) It was on the occasion of this bill that Lord Shaftesbury, the most elegant of English writers, turned a momentary confusion to such good effect. He was then Lord Ashley, and a zealous supporter of the bill, in behalf of which he rose to address the House of Commons. For a moment he lost his recollection, when the House loudly calling upon him to go on, he thus proceeded: "If I, Sir, who rise only to give my opinion on the bill now depending, am so confounded, that I am unable to express the least part of what I intended to say, what must the condition of that man be, who, without any assistance, is pleading for his life?"

summoned before the House to support this method of proceeding; and Sir John Fenwick was allowed counsel to address the House against it. Captain Porter gave evidence, and when the counsel for the bill proceeded to question him as to one Claney's tampering with Goodman, the evidence was resisted by Sir Thomas and Sir Bartholomew Shower, the counsel for the prisoner. It was proposed to shew that Lady Mary Fenwick had induced Goodman, the other witness, to abscond: "The use we make of this is, to let us in to read what Goodman has sworn to give an account of in his examination." Here the tone of the discussion reminds the reader of that on the trial of Hastings; the one side contending that Parliament was to be restrained by the rules adopted in the Courts of law; the more enlightened and liberal members contending, that Parliament could not be looked upon in the light of a jury, that the precautions requisite perhaps to prevent farmers from being misled were not essential to a body of educated men, and that the object was to discover the truth, whether or not a member could satisfy his conscience, beyond all reasonable doubt, that Fenwick had committed treason. Mr. Howe said, "We are not tied to the forms of inferior Courts, but we are tied to that which was the ground of them, and that is, right reason and true sense." Sir John Hawles, Solicitor General, said with great reason, "It is one thing when a man is to be tried with a jury, and another thing when a man is tried before judges. *A jury may be so swayed and possessed by it that it may not be fit for them to hear it.* But look into the Court of Chancery; and there depositions, if one side say they are evidence, and the other say they are not, are every day admitted; and the rule is, that it is sooner dispatched by hearing of it than not. You do not sit here as a jury, but as judges, and will consider how far the actions of a wife shall concern her husband; you will do the prisoner right, and yourselves right, if you will hear them" (*c*).

The House divided on the question, and the evidence was received.

The deposition of Goodman before the Council was then tendered, and opposed. A warm debate arose. The Chancellor of the Exchequer (Montague) said:

"I would have this paper read; not because it would supply the place of a witness; no, but because you see he hath been indicted by the evidence of Goodman and Porter, and the first is withdrawn; and by whose means you have heard: and I would know, whether Goodman's evidence did amount to accuse him of the same? I do say, in your power of judging, you are not constrained to the rules of Westminster Hall; and I would say that, for your constitution, the Courts of Westminster Hall are to be governed by the letter of the law: but there is lodged in the legislative a power to judge those crimes that are sheltered behind the law; and, I believe, if the several attainders were examined, there was never any attainder that went upon a more just proceeding than this. I take the crime to be, a plot with your enemies to bring in a foreign power; and as if that was not sufficient, he hath made a false and scandalous confession, to bring a distrust and jealousy among the King and his people; and he hath dallied and gained so much time, as he hath had opportunity to corrupt one of the witnesses: and, therefore, it would be hard if no law should reach him. It is said, why did not you keep the witness? It would be hard, after a person hath made a confession for the good of the kingdom, that he should be always kept in irons. We are debating of the bill, while we are now only purely to see what is in this paper. I should not have offered to have made use of this as a second witness; but the being an affidavit or not, is not material in this point: the Commons proceed upon impeachments without affidavits. It is offered as evidence, that Goodman was a witness against him [you have had proof of]; and that he hath been tampered with to withdraw by the friends of this gentleman. I do think

we have gone more fairly and equally to work, than upon any of the records of attainder in your journals" (*d*).

The evidence was admitted, and the bill was passed,—but by diminishing majorities. Burnet spoke in its favour; and in his Memoirs he has told us, with great truth, that "the object of the bill (7 Wm. 3) was to make men as safe in all treasonable conspiracies and practices as possible." Undoubtedly he was right.

The evil of the law requiring two witnesses in a case of treason could hardly be demonstrated more clearly than by the proceedings in the case of Sir John Fenwick. Proscription was employed, because the Legislature had made justice unattainable. If a single witness had proved that Sir John Fenwick had picked King William's pocket, Sir John would have been hanged; but if a single witness proved that he had shot the King, he must have escaped with impunity. But this law was extremely convenient to the traitors and hirelings by whom that great man was surrounded: under it, so long as he employed one single emissary, Churchill might continue in full security to inform the French monarch of the intended attack of the English fleet, and thereby cause the lives of his brave countrymen to be wantonly flung away. The perfidious and sullen Russell might tell James to what point his intense selfishness would allow him to go in treason to his Sovereign and his country. Every minister might carry on his separate correspondence with the exiled Court. No wonder then that this absurd rule has remained almost up to the present hour unaltered, and that an occasional remedy should be sought for its evils, in a particular act framed for a particular occasion. If I wanted to prove what almost every line of the five thousand eight hundred and forty-six statutes (*e*) passed since the

(*d*) State Trials, vol. 13, p. 604.

(*e*) Yet such is the *practical* wisdom of this country, that judges gravely, and in full Court, say, that in this happy country "every one is supposed to know the law!" No human industry would enable any ten

year 1800 but too plainly attests, the complete and incorrigible incapacity of the English (an incapacity which is the effect as well as the cause of our shocking laws) for legislation, I would appeal to no proof more infallible and conclusive than the numerous laws made for a particular emergency, and that alone, without reflection on the past, and without foresight for the future. Thus, in the case we are considering, the conspiracy was unquestionable. The indignation of the country was thoroughly awakened: something was to be done. Admiral Russell, one of the traitors, whose disgraceful proceedings Fenwick had disclosed, brings forward a bill to cut off Fenwick's head, while the same identical loophole, through which Fenwick would have escaped, but for this temporary barrier, is left, after the present danger is provided for, wide open for the benefit of all future traitors.

While considering this beneficial act, it may be well to notice the 10th and 11th sections, which make provision for a more equal trial of those entitled to the privilege of peerage; and here, again, useful as the change required was, and loudly called for, by the principles of natural justice, abundant evidence is furnished of the confusion and narrowness, which seem, by a sort of destiny, inseparable from any measure recommended by those versed in the study of English law. The evil recited in the statute is, "That in the trial of a peer or a peeress, the major vote is sufficient for condemnation or acquittal; whereas, in the trial of a commoner, a jury must

men, if their lives were prolonged to twice the usual date, to master a tenth part of it. Know the law! which is in the breast of the judges, and which varies with the receptacle in which it is deposited. Does any one suppose that the common law in the bosom of even modern judges, founded on Siderfin and Keble, is the same as the common law in the bosom of Lord Mansfield, the only great jurist who has ever presided in a Court of English law, who said, we do not sit here to quote the law of Siderfin and Keble? Know the law! which the judges themselves are supposed, on many occasions, not to have known; as the form of a writ of error from one Court to another shews, which runs thus: Whereas in such a judgment of such judges, "manifest error hath intervened."

agree in their verdict." Would not any one who read this recital suppose that the following clauses of the act removed the evil insisted upon as the cause of the statute? Is it conceivable, even after all our experience of the Cokes and Hobarts, that the evil complained of, if evil it be, should be left unnoticed and untouched? So, however, it is; a majority which, however, must be, as it was then, a majority of twelve to convict, is still sufficient; and a peer has no right to challenge any one of his peers. Thus, in this country, where the object of judicial inquiry is supposed to be truth, either we must suppose that the Sovereign, by calling a commoner to the peerage, does not only vary his condition in society, but completely alters his intellectual faculties, and makes it requisite for him to pursue a totally different course in the investigation of truth—a doctrine which, if applied to other branches of human inquiry, would lead to curious inferences, and to results for which, if real, a peerage would be a poor compensation; or, we must allow, that the present condition of our law, which enforces one system of investigation in the case of a peer, and another in the case of a commoner, is in keeping with many other of our institutions, worthy of the authors of our law and disgraceful to the inhabitants of a civilized community. The real mischief, however, cautiously passed over in the act was, that in the trial of a peer in the Court of the High Steward, the peers tried were returned at the nomination of the High Steward, as has already been pointed out. This evil was annihilated by the clause, which provides, "that all the peers having right to sit and vote in Parliament shall be summoned, twenty days before the trial, to sit and vote at such trial; and every peer so summoned, and appearing, shall vote in the trial of such peer."

It is another proof of the tardy progress of sense and justice among us, that though, as has been seen, counsel were allowed to prisoners to manage their whole defence, which the "common law," a phrase that is an euphemism for the barbarity

and corruption of our judges, with whose will it is precisely synonymous, refused them; yet that the case of an impeachment is, and was, till the twentieth of George the Third, expressly excluded from the benefit of this righteous permission. Why a man struggling against the Commons of Great Britain on a capital charge should not have counsel, the admirers of decisions in the Exchequer probably can tell; but such was the law, and this privilege was refused to Lord Winton and Lord Lovat, who were impeached by the House of Commons, attacked by the ablest lawyers in England, and found guilty. So cautious were the framers of our laws, lest the confused, fantastical, and inconsistent notions, which it was their object to encourage, should receive any more serious interruption, than a concession to the will of a slowly improving people, made absolutely necessary (*e*). Some absurdities they sacrificed, but it was to preserve the rest.

A striking instance of the inveterate habit of the judges, in assuming the province of legislation, occurs in the interpretation given to this act. It was provided, that if the prisoner would avail himself of any defect in the indictment by mis-writing, mis-spelling, or improper Latin (why was justice to be made a mockery by such objection?) he was to take his exceptions before "*evidence given in open Court.*" But though these are the words of the act, the judges substituted for them other words of a different signification, and held that the exception must be taken "before plea pleaded;" and, therefore, if the exception was taken after the plea, and before the evidence given in the very words of the act, it could not be received,—that is, the judges altered the law made by King, Lords, and Commons, and put, as their predecessors in the days of the Plantagenets and Tudors had done, another in its stead. And here it may be convenient to mention another

(*e*) "Iræque leonum
Vincla recusantum."

flagrant proof of legislative incapacity; I mean the 11th clause of the 21st chapter of the 1 Anne.

By this statute [which did not take place till after the decease of the late Pretender] all persons indicted for high treason or misprision thereof, shall have not only a copy of the indictment, but a list of all the witnesses to be produced, and of the jurors impannelled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses, the better to prepare him to make his challenges and defence (*f*).

The act in which this clause is inserted, is entitled an Act for Improving the Union of the two Kingdoms. If the provisions in the clause are righteous, can the life or death of the Pretender affect them? why, if they are conducive to a fair investigation of uncertain facts, should they not be employed, when the fact inquired into is, whether or not the person accused has conspired in favour of the Pretender? In the history of any other country such a provision would appear strange, and would require some singular accident to account for it. Among us, on the contrary, it is the child of many precedents, and the parent of many more.

Although the statute of King William required two witnesses to each treason, yet a collateral fact might, it was held, be proved by one. This distinction between the proof of the overt acts charged and the collateral facts, was taken by Lord Holt in the case of Captain Vaughan. The treason charged against him, of making war on the high seas against England was clearly proved by two witnesses. But Vaughan insisted that he was not a born subject of the English Crown, and called witnesses to prove that he was born in the dominions of the French King, from whom he had a commission. The counsel for the Crown called witnesses to prove him born in Ireland, and when Vaughan's counsel insisted that there was but one witness to that fact, Holt said, "That (the place of

(*f*) 3 St. Com. vol. 4, p. 351.

birth) is no overt act; if there be one witness to that it is enough, there need not be two witnesses to prove him a subject."

In Vaughan's case, where one of the Crown witnesses alluded to a letter, Holt interrupted him immediately.

L. C. J.—"Where is that letter?"

Witness.—"I have it not here."

L. C. J.—"Give not evidence of a letter, without the letter were here; it ought to have been produced."

In this case evidence of particular facts was allowed to impeach the character of a witness—Creagh. In order to shew that he was unworthy of belief, his brother was called, who proved that he had robbed him of money, and threatened him with a criminal prosecution. No objection was made to this evidence, though its admission seems hardly consistent with the rule laid down by Holt himself, in Charnock's case.

Another point of evidence arising from the new statute, was much discussed in Vaughan's case. The overt act charged against him as a proof of levying war, and adhering to the King's enemies, was his cruising in a ship called the Loyal Clancarty. The counsel for the Crown offered evidence of hostile acts committed in another boat: this was objected to.

Holt said, "The force of the objection lies in this, to say a man levied war, or adhered to the King's enemies, is no good indictment, but it is necessary to allege in what manner he levied war, or adhered to the King's enemies."

Solicitor General (Hawles).—"Then we must put all our evidence into the indictment."

L. C. J.—"Consider: if it be not a good indictment without alleging particular acts, then it necessarily follows, that if particular acts are alleged, and you do not prove them, as is alleged, you have failed in the indictment, and so his objection will lie hard upon you."

The act was read.

Holt.—"You may give evidence of an overt act, that is not in the indictment, if it conduce to prove one that is in it.

You cannot give evidence of a distinct act, that has no relation to the overt act mentioned in the indictment, though it shall conduce to prove the same species of treason."

The counsel for the Crown argued, that they might give in evidence other acts in other ships.

Holt.—"I cannot agree to that . . . . . Because a man has a design to commit a depredation on the King's subjects in one ship, does that prove he meant to do it in another? Go on, and shew what he did in the Clancarty."

The evidence, that the prisoner had gone cruising in the Custom House barge, was then rejected. I quote the commentary of the wise, learned, and humane Foster, on this decision:

"The rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point in issue, is founded on sound sense and common justice. For no man is bound at the peril of life or liberty, fortune or reputation, to answer at once, and unprepared, for every action of his life. Few, even of the best of men, would choose to be put to it. And had not those concerned in state prosecutions, out of their zeal for the publick service, sometimes stepped over this rule in the case of treasons, it would, perhaps, have been needless to have made an express provision against it in that case."

The progress of the Work has now brought me to a period when one of the foulest stains in our judicial proceedings was, by a tardy and reluctant exertion of reason, at length obliterated.

Among the many acts of flagrant iniquity established by the judges, and revered by the English, under the name of the common law, perhaps, the most perfectly tyrannical and oppressive, was the regulation, that witnesses in behalf of the prisoner should not be sworn. For this abominable injustice, Lord Coke, who, as advocate and as judge, invariably enforced, and, as legislator, never attempted to amend it, declares there was not so much as a "scintilla juris." It was a direct violation

of natural right committed by the judges, and followed implicitly because it was a precedent. The House of Commons indeed, when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties, against the efforts of the Lords and the Crown, carried a provision, that the witnesses for the prisoner should be examined upon oath. This was in the year 1607. Yet with an infatuation, which will surprise no one who has studied the history of the reformation of admitted abuses in this country, the old absurd law was allowed to prevail in the case of all persons *not* tried for a felony committed in Scotland, or in one of the three northern counties, formally stigmatized as it was by an act of the Legislature: nor was it until the first year of Queen Anne's reign, that a practice so repugnant to the common instincts of social creatures, was, notwithstanding the judges, abolished; and it was provided, that all witnesses for a prisoner, as well as those against him, should be examined upon oath.

Three acts were passed,—the 5 Ann. c. 18, s. 4, the 6 Ann. c. 35, s. 19, and the 7 Ann. c. 20, s. 18,—requiring all judgments, statutes, and recognizances, binding on lands, manors, and hereditaments, in the West and East Ridings of York, and in Middlesex, to be registered; another act was passed, the 8 Geo. 2, c. 6, s. 11, establishing the same law for the North Riding, and there, to the present moment, the matter rests, owing to the fear of opposing the interest of solicitors in one class of those who now are our legislators, the drivelling bigotry of another, the apathy to the public good in all. Nobody can exaggerate the absurdity of such a state of things, or the utter incompetence for legislation that it demonstrates. The student of the history of English law will not be very prone to look to public spirit as the motive of any statute; but it is surprising, that a regard to their own interest should not have taught lawyers the importance of obliterating such an

lators, if the practice of those ancient and modern states who are, and have been, the guides of Europe, is mistaken, why is not the law taken away from those countries where it exists? If a man travels from Middlesex into Kent, or from Northumberland into Yorkshire, do the methods which he must employ for discovering truth vary? Does that system of preserving evidence and ascertaining truth, which is valuable to one who inherits an estate in Yorkshire, become insignificant to the same man if he inherits one in Cumberland? But if the measure is expedient, why do you allow any body of men, for the sake of their own vile interest, to obstruct a law which would be so beneficial to the community, which has so manifest a tendency to expose fraud, and to prevent litigation? For the same reason, it will be said, that our Legislature have allowed the country proctors to triumph in preventing all improvement of the Ecclesiastical Court, to preside in which, at this moment, a bishop may select the most servile and incompetent clergyman (and such selections have been very common) in his diocese, whose ignorance alone, may involve a family in ruin: for the same reason that we allow the most intricate and unnatural system of conveyancing that has ever existed to flourish among us: for the same reason that business is conducted as it is before Masters in Chancery; that what is law in the Queen's Bench, is not law in the Court of Chancery; that oral evidence is used in one Court, and written evidence in another: for the same reason to which we owe the New Rules: for the same reason that, hitherto, the project of a Code, (the want of which is the cause of such endless misery), taken up by law reformers when out of office, is abandoned by them (as a question not significant enough to risk their places for) when in power: for the same reason that the absurdities of Henry the First's time, on which men's lives depended, disgraced even our statute book in the time of George the Fourth. This, indeed, is an intelligible answer. But however shallow the judgment, and flippant the ignorance, of our practical men may be, the authority of Cromwell and of Hobbes, (where

strong sense is valued), cannot be quite overlooked. Cromwell's opinion has been already cited. Hobbes remarks, after alluding to the passage in Lord Coke's Fourth Institute, where he ascribes the increase of litigation to a number of subordinate reasons, and passes over the real one in silence, that if peace and plenty be the cause of such evil, it can only be removed by war and beggary. He then enumerates the pettifogging tricks "of those who have learnt the art of cavilling against the words of a statute, the variety and repugnance of judgments at common law," and thus proceeds:—"Another, and, perhaps, the greatest cause of multitude of suits, is this: *that for want of registering conveyances of land*, which might easily be done in the townships where the lands lie, a purchase cannot easily be had which will not be litigious" (*g*). Let us, however, see whether this scheme for preserving evidence be wild and chimerical; whether it have any other fault, than that of diminishing the business of some solicitors; whether it be contrary even to "Precedent, or the COMMON LAW," that "Unknown God," whom the English so devoutly and so "ignorantly worship."

So far is this from being the case, that to make all transfers of land as notorious as possible, to make the evidence of them as simple and accessible as possible, was one main object of our earliest institutions. The language of the Book of Ruth, "And all the people that were in the gate and the elders said, We are witnesses;" and of Jeremiah, "I took the evidence of the purchase, both that which was sealed according to law and custom, and that which was open, and gave them to Baruch in the presence of the witnesses who subscribed the book of the purchase, before all the Jews that sat in the court of the prison,"—exactly describes the character of such proceedings among us. From the making of Magna Charta to the Statute of Uses, our history of this branch of evidence shews one incessant struggle between the priests and lawyers (who were

(*g*) Hobbes's Works fol. ed. p. 606.

frequently priests) on the one side, and the nation on the other, —the former endeavouring to keep the sales secret, to which the latter had determined to give publicity. Magna Charta forbad the gift of lands to any religious house. To evade this, the lawyers suggested, first, that the clergy might appropriate lands held under them at a nominal rent; secondly, that the secular clergy were not included in the statute. Then came the statute of 7 Edw. 1, Statutum de Religiosis, providing, that "no person, religious, or other whatsoever he be, that will buy or sell any lands or tenement, or under colour of any gift or lease, or by *any other craft or engine*, will presume to appropriate to himself lands or tenements, whereby such lands or tenements *may anywise come into mortmain*." To evade this statute it was suggested, that fictitious suits should be brought against those who wished to bestow their lands on the Church, and that such persons should lose their lands by default. These "recoveries" the judges, worthy predecessors of the Gaudys, the Cokes, and Pophams, adjudged not to be within the words of the statute, —holding, with the same defiance of reason which has distinguished their successors, that recoveries, though suffered in fraudem legis, were nevertheless to be presumed just and lawful. To prevent this came the Statute of Westminster the second, which enacts, that all lands so conveyed shall be forfeited to the Lord Paramount of the Fee. Then the lawyers suggested that the clergy might make all lands near the Church—churchyards, and that they might purchase lands, in the names of other persons, to their own use. The statute 15 Rich. 2, c. 5, prohibits both these expedients (*h*). Then the lawyers advised the clergy that they might purchase of others in "*trust*" for themselves, because a trust was not an use. Thus, for three hundred years, the fraud of priests and lawyers triumphed over every expedient.

At length, a bill was drawn by the King's counsel in Henry

(*h*) Ore de nouvelle par sotile ymagination, et par art et engyn, aucuns gents de religion, parsons, vickers, et autres personnes espiritiels, sont entrés en diverses terres et ténéments adjoignans à leur église, &c.

the Eighth's time, for transferring trusts and uses to possession, and was passed in the twenty-seventh year of his reign. The object of this statute was to make transfers of land public and notorious.

Feoffment was of course notorious.

Four years after this a statute passed, which contributed far more to the happiness of England than Magna Charta;—that was the Act for the Dissolution of Monasteries. But the lawyers were at their "dirty work again," contriving how they might render all the beneficial provisions of the Statute of Uses inoperative: Parliament was on its guard against them. A new conveyance might be introduced by way of Bargain and Sale. By the common law, bargain and sale raised an use; but the conveyance was not complete without actual delivery of possession on the spot. But by 27 Hen. 8, as soon as the use was raised, it was transferred into a possession, and the conveyance was complete. The bargain and sale might be clandestine, and thus the object of the Legislature would be defeated. Now, in order to guard against this evil, Parliament, by a short statute, enacted, that all bargains and sale should be enrolled (*i*).

(*i*) "By this course of putting lands into use, there were many inconveniences, as this use, which grew first for a reasonable cause, namely, to give men power and liberty to dispose of their own, was turned to deceive many of their just and reasonable rights; as, namely, a man that had cause to sue for his land, knew not against whom to bring his action, nor who was owner of it. The wife was defrauded of her thirds; the husband of being tenant by courtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent of debt; the poor tenant of his lease; for these rights and duties were given by law from him that was owner of the land, and none other . . . . . .

"Which frauds, nevertheless, multiplying daily, in the end, 27 Hen. 8, the Parliament, PURPOSING TO TAKE AWAY ALL THOSE USES, and reducing the law to THE ANCIENT FORM of conveying of lands by PUBLIC livery of seisin, fine, and recovery, did ordain, that where lands were put in trust or use, there the possession and estate should be presently carried out of the friends in trust, and settled and invested on him that had the uses, for such term and time as he had the use." Bacon, vol. 1, p. 585, Reading on the Statute of Uses.

But the lawyers, by the invention of Lease and Release, which the judges upheld from the mean, sordid, and sinister motives which have so often induced them to supersede the positive words and plain intention of the Legislature, triumphed over this precaution; and clandestine conveyances, invented by the abuse of one statute and the illusion of another, have prevailed down to our own time. The New Rules, interpreted by the Court of Exchequer, were not more fatal to a cheap and rational administration of justice in one branch of law, than the invention of lease and release, and the ridiculous decision, so thoroughly stamped with the pettifogging notions of our judges, that "an use could not be limited upon an use," were to the other; by which all the evils that the statute was expressly intended to abolish were revived again, in open defiance of the Legislature, and the separation of equity and common law became complete.

Thus, owing to the corruption and imbecillity of our judges, the effect of this statute, which might have contributed so much to the security and happiness of Englishmen, was to add three words to a conveyance,—a true specimen of our jurisprudence! The necessity for a registry of titles to lands was insisted upon in a remarkable Pamphlet by Asgill, who wrote in the time of Queen Anne. His Pamphlet ends by the sketch of a bill (*k*) for that purpose. He remarks, that if

(*k*) Preamble of Asgill's bill:—

"Whereas by the common law of this realm, lands, tenements, and hereditaments were not to be transferred from one to another, but by solemn livery and seisin, or matter of record.

"And whereas by the statute made in the 27th year of the reign of King Henry the Eighth, intituled, 'An Act concerning Uses and Wills,' a bargain and sale did become a compleat conveyance in the law, whereby lands and tenements might be transferr'd from one to another in a clandestine manner, without livery and seisin, or matter of record: for prevention whereof, by another statute made in the 27th year of the late King Henry the Eighth, 'For Inrollment of Bargains and Sales,' it was enacted, that from and after the last day of July, which should be and since was in the year of our Lord, no manors, lands, tenements, or other hereditaments, should pass, alter, or change from one to another, whereby

the cries of monks and friars had been regarded, we had never heard of the dissolution of monasteries; and if the clamours of masters of requests, escheators, and clerks had prevailed, the Court of Wards and Liveries would have been standing to this day. However, it is clear, I think, that the system of conveyancing which now prevails, in so far at least as secrecy is concerned, is not only contrary to sound policy, and to the practice of all enlightened States, but to the manifest intention of our own tardy Legislature; and that its existence is solely owing to the same cause, to which so many other evils are to be attributed now, and to which so many of the most dreadful calamities, under the name of common law, that the English people have ever suffered, were formerly to be ascribed,—the unwarrantable exercise by our judges of a power altogether irresponsible, for which they are generally speaking, of all

any estate or inheritance of freehold should be made or take effect in any person or persons, or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale were made by writing, indented, seal'd, and inroll'd in one of the King's Courts of Record at Westminster, or else within the county or counties where the same mannors, lands, or tenements so bargain'd or sold, lie or be, before the Custos Rotulorum, and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one, and the same inrollment to be had or made within six months after the date of the same writings indented.

"And whereas since the making the said statutes, of late years there have been several inventions for conveying of estates of inheritance of freehold, by way of lease and release, and also for making of bargains and sales thereof for long terms of years, without inrollment of such conveyances; both which are a manifest abuse of the said Statute concerning Uses and Wills, and an evasion of the said Statute for Inrollments.

"And whereas the said conveyances by lease and release, and bargains and sales for long terms of years, being clandestine conveyances to be executed anywhere, and invented contrary to the intent and meaning of the said statutes, and all the antient and avow'd laws and customs of this realm, are now of late years become the most usual and common conveyances for conveying of freehold lands, whereby several frauds and abuses have been committed, and several suits and contentions have risen thereupon, to the manifest hazarding the titles of the freehold lands of this kingdom, and the dishonour of the laws thereof.

"For remedy, &c."

men, most unfit, and which it is the especial object of all civilized governments to take care that they shall not possess.

In establishing a system for ensuring evidence of deeds and wills, the language of a Legislature really desirous of the public good is this:—"I will take care that there is in every district, of a certain extent, an officer appointed by government, whose duty it shall be to draw up your wills and contracts, and to take care that they are not void for any want of formality.

"To provide for such exigencies is one of the main objects for which men meet together in society, and every time that an honest contract is declared invalid, or a genuine will is set aside for want of form, that purpose is defeated (*l*). It is the duty of the state to take care that this calamity shall never happen, if the means which it furnishes are employed. The officer, I appoint, shall preserve a record, and furnish you with copies, which shall be evidence of your deeds; but it is on condition that you follow the injuctions I prescribe. I do not, however, compel you to adopt this course. Take any other means you may think proper for preserving a memorial of your contract, if the contract is a legal one, and if there is no reason to impute fraud to the parties who have entered into it, it may be, nevertheless, enforced. But if it is void for want of form, if it cannot be enforced for want of proof, or for want of the character which compliance with my rules would have given to it, that is no fault of mine. If the copies of your contract are to have the effect of originals, it must be on the conditions I point out. In that case the copy, properly attested and sealed, shall be an authentic act; but, in the other case, it is a mere private instrument, and the signature of the subscribing parties must be proved." The Legislature, after having thus provided, that an act, so drawn up by the proper officer, shall be conclusive evidence between the parties, should then prescribe the forms requisite to protect the public from

(*l*) One would suppose from Meeson and Welsby, that the reverse of this proposition was the truth.

imposition; if for any other reason, the contract is declared invalid in a Court of justice, the decision of the Court pronouncing its invalidity should be entered on the margin of the register.

Another provision, by which the possibility of fraud in the registry would be prevented, is the following:—

The registry of a mortgage, or of any act which is to be registered for the purpose of giving notice to purchasers, or heirs, or incumbrancers, or an authentic copy of the registry, is not evidence of the act itself, but merely that the law, which directs registration, has been complied with; therefore the registry does not dispense with the production of the act itself, or legal proof of its existence. I am quite persuaded, that a proper system of transfer by what the French call notarial acts, which might easily be introduced, would win for him, who should introduce it, the lasting gratitude of his country, that it would make fraud almost impossible, that it would check litigation, and diminish the vexatious burdens and difficulties which every one who is, or wishes to be, a landed proprietor, has abundant reason to bewail, and it might be done without giving any body of men a more justifiable cause of complaint than physicians would have of the sanatary measures that put a stop to the progress of a pestilence.

A very grotesque trial, which illustrates the gross superstition of our forefathers, took place before Holt, in the year 1702. It was that of John Hathaway, for a cheat and imposter. This wretch had pretended to be bewitched, and under that pretence had committed many savage outrages on a helpless old woman, named Morduck, against whom he had done his best to inflame the populace. The imposture was detected once by the good sense of a physician. "But, notwithstanding this, the *people were dissatisfied*, and the patrons of Hathaway, irritated by his detection, pursued the poor old woman with more malice than before; they used her so barbarously, that she was forced to leave Southwark, where

she had lived many years, and all her employment, which had been profitable to her, and go to London; their malice pursued her there, and Hathaway was taken before an Alderman." Here, however, the wisdom of our ancestors displayed itself; instead of punishing Hathaway, the Alderman (Sir Thomas Lane) said he had had too great provocation, and ORDERED HER TO BE CARRIED UP STAIRS TO BE SEARCHED, TO SEE IF SHE HAD ANY TEATS, OR SIGNS OF A WITCH, AND PERMITTED HER TO BE SCRATCHED BY HATHAWAY, and then committed her for a witch, refusing 500*l.* bail, and dismissed Hathaway. In this manner was justice administered in the metropolis of England, in the age of Locke and Newton.

The counsel for the prosecution put in the record of Sarah Morduck at the Guildford Assizes, where she was tried for being a witch, and acquitted. They then endeavoured to prove the conduct of the mob, who were very outrageous, at the poor woman's acquittal. This was objected to, but Holt received it, for which he gave a solid reason. "This evidence is proper. He is indicted for a cheat, for endeavouring to beget an opinion in people by his fraudulent practices that he is bewitched. Now, Dr. Martin says, the people were still possessed with such a belief, and thereupon affronted him, because they thought he was instrumental in having the woman acquitted. Now, is not this an evidence, that his pretending himself to be bewitched, begat that opinion in the people?"

As specimens of what people stated in Courts of justice on oath in those days, I will quote some of the witnesses called in behalf of the prisoner, and if such scenes took place in London before such a magistrate as Holt, we may conceive what must have occurred at the Quarter Sessions of remote counties, before the foxhunters and game preservers, to whom the English law, with so much humanity and consideration, entrusted the liberties, fortunes, and character of so great a proportion of the lower classes.

Elizabeth Willoughby swore, "I have seen him (Hathaway)

when the breath came out of his mouth like the barking of a dog," &c.

L. C. J.—"How thick was it? Was it not like other folks?"

Willoughby.—"No."

L. C. J.—"Do you think he was bewitched?"

Willoughby.—"I believe he was, my Lord."

L. C. J.—"I suppose you have some skill in witchcraft? Did you ever see any body that was bewitched before?"

Willoughby.—"My Lord, I have been under the same circumstances myself when I was a girl."

L. C. J.—"How do you know you were bewitched?"

Willoughby.—"There was a woman taken up on suspicion of it."

Holt.—"FOR BEWITCHING THEE?"

Willoughby.—"Yes, my Lord."

Holt.—"Did you scratch her?"

Willoughby.—"My Lord, I had no power to do any thing. I FLEW OVER THEM ALL."

Holt.—"You say you flew. Did you fast, too?"

Willoughby.—"*One held me by one arm, and another by another, and another behind, and I flew sheer over their heads.*"

Holt.—"*Woman*, can you produce any of those women that *saw you fly?*"

Willoughby.—"They are dead."

Holt.—"What became of that woman, who made thee to fly?"

Willoughby.—"I cannot tell."

Serjt. Jenner.—"Call Flummery. [Who appeared]. Do you know this man?"

Flummery.—"Yes; I am a neighbour."

L. C. J.—"What is thy name?"

Flummery.—"Flummery. After Guildford Assizes I went to see him, and he was in a lamentable condition; he was like a stock or stone, blind and dumb. I went to see him——"

L. C. J.—"Did you ever see him before?"

Flummery.—"I saw him several times, but took no notice of it; but then his eyes stood wide open."

L. C. J.—"And yet you say he was blind; how could that be?"

Flummery.—"My Lord, I will tell you how; I tried him, I wagged the hair of his eye-lids, and put the candle to his eyes, and he took no notice of it."

L. C. J.—"How could you know that he did not see?"

Flummery.—"I tried him."

L. C. J.—"How did you try him?"

Flummery.—"I tried him with my fingers, and his eyes would not wag."

L. C. J.—"Did he not look then as he looks now?"

Flummery.—"No."

Mr. Broderick.—"Did you speak to him then?"

Flummery.—"Yes; but I could not make him hear nor answer me."

L. C. J.—"Could he speak then?"

Flummery.—"No, may it please your Lordship" (*l*).

The sagacious Alderman was called on behalf of the prisoner, and gave the following testimony:—

Sir Thomas Lane called and sworn:

Serjt. Jenner.—"Sir Thomas, be pleased to tell my Lord and the jury what you know of this man."

Sir Thomas Lane.—"It was above a twelvemonth ago that his master brought a woman before me, upon suspicion that she was a witch, and that she had bewitched his man: but there having been a trial, I shall wave that. I inquired 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

(*l*) State Trials, vol. 14, p. 671.

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 in earnest with me that I would command this woman to be scratched; 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 scratched her; and I pulled away her arm from him. The fellow had bread and cheese brought him; and as soon as he had scratched 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 asked 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 whipped."

L. C. J.—"The question is, not whether he shall be punished for a fool, but whether he be a knave. Whatever punishment he may suffer, if convicted, does not belong to you to determine."

One of the impostor's tricks was fasting. To prove this, his counsel called Dr. Hamilton. "You say," said the counsel for the prosecution to this witness, "that you reject everything except fasting?"

Hamilton.—"Yes."

Holt.—"Doctor, do you think it possible in Nature for a man to fast a fortnight?"

Hamilton.—"I think not."

L. C. J.—"Can all the Devils in Hell help a man to fast so long?"

In order to shew the fraud, evidence was offered of Hathaway's conduct after the time mentioned in the indictment. This was objected to. Again, under the auspices of Holt, common sense obtained a victory.

Serjt. Jenner.—"My Lord, the record bears date the first day of Term: all this is since the record."

Holt.—"It is to prove the imposture committed before now. What Mr. Kenry says of his pretending to fast twelve weeks, though two or more be not within the time of the information, I hope they may give it as evidence subsequent to prove what was done before . . . . It is an evidence of his cheating since that time, and that out of the information; but it is evidence also to prove that his pretended fasting was a mere deceit; for he then pretended to have fasted ten weeks before he came thither, and after pretends to continue fasting in the same manner. If that be proved to be a fraud, it is strongly to be inferred that this pretended fasting before was so too."

Serjt. Jenner.—"But then they may not give evidence in matter after."

Holt.—"*Matter afterwards, that proves a thing done before*; for if a confession be made subsequent to an indictment for a crime, shall not that confession after be brought as evidence of the thing done before? Sure, it may."

Serjt. Jenner.—"And will that prove what was before?"

L. C. J.—"It is certainly so. The thing is, whether I can give in evidence anything after to prove what was done before? If he pretends to fast twelve weeks, ten weeks before he came there, and the two weeks after, he did not fast but only pretended it: whether what he did after, be not evidence of what he did before? Sure, it is. For he that cannot hold out fasting two weeks, but was glad to eat, though he pretended to fast, may strongly be presumed to have eaten during the ten weeks, though then he pretended to fast" (*m*).

(*m*) State Trials, vol. 14, p. 665.

I have quoted this decision at length, because I have never seen it alluded to by any text writer, and because it goes far to settle a question of considerable importance. Holt's ruling is inconsistent with the decision of Lord Ellenborough in Taverner's case, but agrees with the decision cited by the same judge in Tattershall's case, where all the judges held, that the conduct of the prisoner on one occasion might be laid before the jury as a fact from which they might infer his knowledge on another. So, in Roberts's case (*n*), where the prisoners were indicted for a conspiracy to defraud tradesmen, by causing themselves to be believed persons of large property, Lord Ellenborough allowed evidence to be given of representations made to tradesmen at a time not mentioned in the indictment. So, on a charge of writing a threatening letter, other letters, written by the prisoner, may be read to explain the letter for which he is indicted (*o*). So, where the question was, whether the advice given by the prisoners to the prosecutor, to give some money to the mob, was bonâ fide advice, or merely a colour for robbery; it was held, that the conduct of the mob before and after that transaction, when any of the prisoners were present, in the course of the same day, was evidence (*p*).

Hathaway was convicted.

The cruel doctrine, of which so revolting an illustration was given by Chief Justice Kelyng, in the case of Messenger and Beasley, was again exemplified, though in a less shocking manner, (as the men were pardoned, and their conduct was more violent), in the case of Dammaree and Purchase. It is one of the doctrines laid down by Lord Coke, (3 Inst. 9), "That if any men levy war, to expel strangers, to deliver men out of prisons, to remove counsellors, or against any statute, pretending reformation of their own heads, without

(*n*) 1 Campbell, 399.
(*o*) Robinson's case, 2 East, 1110.
(*p*) Winkworth's case, 4 C. & P 444.

warrant, this is levying war against the King, because they take upon them royal authority. There is a diversity between levying war and committing a great riot. For instance, if three or four, or more, rise to pull down an inclosure in Dale . . . . . this is a riot, and no treason. But if they had risen of purpose to alter religion established within the realm, or to go from town to town generally, pulling down inclosures, this is levying war, though there be no great number of the conspirators, because the pretence is public and general, and not private or particular." The doctrine is vague, cruel, sophistical, pedantic, and absurd, revolting to plain sense and common humanity. It was, however, carefully repeated and deliberately upheld by Lord Ellenborough in Watson's case (*q*), and must, perhaps, be considered law at this day. Such lasting evils have the conceits of one writer as narrow minded and injudicious as Sir E. Coke, inflicted upon the inhabitants of this country. By the strange perverseness and infatuation, which our barbarous laws engender, the wisdom of Lord Mansfield was obliterated before it had left, unless in our commercial law, any lasting traces in our jurisprudence by his immediate successors, while the savage whimsies of Coke, one of our most barbarous writers, are transmitted from age to age with unabated veneration,—so congenial a soil has absurdity found in our Courts of justice, and so speedily, when liberality and scientific method have been transplanted

(*q*) "It is not absolutely necessary," said a constitutional and upright judge, "in order to constitute the offence of levying war against the King, that there should be a regular organised force, or that the persons should be in military array. If there is an insurrection, that is, a large rising of the people, in order, by force and violence, to accomplish or avenge, not any private objects of their own, but to effect any great public purpose, that is considered by the law as a levying of war. There must be an insurrection, force must accompany that insurrection, and it must be for an object of a *general* nature; but if all these circumstances concur, this is quite sufficient to constitute the offence of levying war." He then, in illustration of the doctrine, cites the case of Messenger and Beasley, and that of Damnaree. Bayley's Charge to the Grand Jury, Queen's Bench, 1817.

to that region, have we seen those generous fruits of disinterested learning and capacious thought droop and wither under the influence of that inhospitable climate. Absurd and pedantic maxims have been written by our lawyers on a substance more durable than brass, and the dictates of reason have been traced on the shifting sand, and on the flying waters.

Dammaree was tried at the Old Bailey, in 1710, for high treason. He had been the ringleader of the Sacheverell mob(*r*), when the English people shewed a fanatical zeal for bigotry in the Church and servitude in the State, that have rarely been equalled by the inhabitants of other countries in their struggles for emancipation from evils so detestable. He was tried before Lord Chief Justice Parker, Lord Chief Baron Ward, Mr. Justice Tracy, and Mr. Justice Bury.

General evidence was first given of the acts of the mob, and it was afterwards shewn that Dammaree led on the mob, but there was no attempt to prove any concerted scheme, or any resistance to the troops who were sent to quell the riot. It was shewn that Dammaree took an active part in destroying Daniel Burgess's meeting-house by fire. There was some evidence to contradict this, and to shew that Dammaree was not at the place where the Queen's witnesses swore they saw him; however, the evidence for the prosecution was probably accurate, and evidence was brought to shew that he (Dammaree) was drunk. This evidence, however, the Chief Justice told the jury to disregard. "They take notice of his being in drink; it is reasonable to think it was so; but that is not any excuse at all." Now, it may be quite right to lay down that drunkenness is no legal excuse for crime, and it is not uncommon to hear judges and counsel say, in the strain of those conceits, which, from the time of Lord Coke downwards, have clung like leprosy to the Bar, that one crime is not to be excused by another. But if the question be, whether there

(*r*) Sacheverell was a poor creature. In one of his printed Sermons he made use of this simile, "Like parallel lines they meet in a common centre!"

has been an intention to levy war against the Queen, which, of course, implies contrivance and preparation, it is difficult to imagine any proposition more ridiculously foolish than the assertion, that proof of the drunkenness of those who are guilty of the acts from which, by a very forced construction, treason is inferred, is to be laid out of the consideration of the jury. Reasonable beings ought surely to be asked, whether they thought a drunken waterman in the Queen's service, and famous in an age of loyal frenzy for loyalty the most extravagant, did mean to levy war against the Queen, and whether his conviction for such an offence, in defiance of all rules of plain sense and probability, would not be a lasting reproach, not, indeed, to English law, but to the tribunals of any country where law was administered on rational principles. Another doctrine is connected with this, so unspeakably absurd that it can hardly be read with patience, but yet it is formally asserted by Lord Coke, and has cost many wretched prisoners their lives; it is this, that if a man engages in an unlawful action, he is criminally responsible for all its consequences; for instance, if a man shoots at his neighbour's chickens (*r*), and by the merest and most improbable accident happen to kill his neighbour, he is guilty of murder. This is a genuine specimen of English jurisprudence, and I mention it to shew how tenaciously those in high judicial office among us (Lord Mansfield always excepted) have clung to every vestige of barbarity. Even now, I doubt if in any case not affecting life, there are

(*r*) "As, if a man shoots at a wild fowl, wherein no man hath any property, and by such shooting happens unawares to kill a man, this homicide is not felony, but only a misadventure or chance-medley, because it was an accident that happened in the doing of a lawful act; but if this man had shot at a tame fowl, wherein another had property, but not with intention to steal it, and by such shooting had accidentally killed a man, he would then have been guilty of manslaughter, because done in prosecution of an unlawful action, *viz.*, committing a trespass on another's property; but if he had had an intention of stealing this tame fowl, then such accidental killing of a man would have been murder, because done in prosecution of a felonious intent, *viz.*, an intent to steal." King, C. J., in Coke's case. Hawkins, vol. I, p. 178.

not judges who would insist upon it, from mere technical prejudice, shocking as it is to reason, and destructive as, if carried out, it would be to morality. The first question in a Court of criminal justice is, the intention of the accused; and to punish a man for what he did not intend, and had no reasonable cause to anticipate, is folly and injustice,—though while our law continues in its present state, even so plain a principle as this, which is the very corner-stone of jurisprudence, will often be disregarded. The case we are now considering, however, illustrates most strongly the inveterate disregard of truth which then pervaded all, and still pervades too many, of our legal proceedings. Dammarec was found guilty of compassing the Queen's death, because he was the ringleader of a mob, raised, as the Chief Justice himself said, if for any purpose at all, for the purpose of making her power absolute. There was not a human being who heard the evidence who could believe that he was otherwise than a loyal subject, or that the slightest intention hostile to the Queen or her authority had ever crossed his mind. Yet so despotic was the reign of folly in our Courts of justice, so utterly impossible was it even in the plainest and simplest case for men guided by the dictates of our law to arrive at a reasonable conclusion, that pulling down meeting houses was gravely held evidence of an intention to destroy the Queen; and instead of being punished for a riot, sentence was passed on him as a traitor, and this was done, not by an unjust judge or a packed jury, but from that astonishing and fatal bias against reason and principle, which a contemporary (*s*) of this trial has so well pointed out, and which has corrupted the very core of our jurisprudence. Lord Mansfield's efforts to reform such a chaos of folly were like a handful of salt thrown into the mouth of the Orinooko. Dammaree was pardoned. It was not, indeed, likely that such a sentence should be executed "under the gentle reign of good Queen Anne," a reign when the seed

(*s*) Swift.

sown by our Great Deliverer was blown into a smiling harvest; when the nation, in spite of the dishonesty of some of its rulers, was glorious abroad, and blessed with never-equalled happiness at home; when it was adorned by writers, if not of the most sublime genius, of what is now unknown among us, the most finished taste,—writers, with whom the happy ignorance, which is the providential compensation for the contented mediocrity that is our intellectual lot, can alone lead us to suppose, that we can compete; when the rural sceptre was still swayed with something like patriarchal indulgence, before the cold hands of a foreign Court had drawn "the gradual dusky veil" over all that might have been great and generous among us; before the grossness and stupid debauchery, which increased with every succeeding ruler of the new dynasty, had tainted our national character; before insolence, swaggering ridicule of what is elevated, hardness, and prejudice, were considered in the youth of both sexes, marks of patrician refinement; before booksellers had quite degraded literature, and politicians the service of their country, and attorneys the practice of the law, and the habits of society conversation itself, to a trade; and, above all, before the rapid increase of population and of debt, the selfishness of the higher, and the vices of the lower classes, had brought this country to a state which no thoughtful man can reflect upon without trembling, and for which

"The torrent's smoothness ere it dash below"

is, perhaps, only too correct an emblem. While as yet there was little leading into captivity, and no complaining in our streets. The scene we now approach is of a very different character.

CHAPTER VII.

GEORGE THE FIRST TO GEORGE THE THIRD.

Curibus parvis et *paupere* terrâ
Missus in imperium magnum.

THE accession of the House of Hanover to the throne of these islands, is an event which can hardly fail to awaken in the mind of every Englishman, sentiments differing according to the authors whom he has studied, and the train of political reasoning which he has been accustomed to pursue. In consequence of the custom which prevails among us, of entrusting the education of the upper classes exclusively to the clergy, a system which, though the reason for it is at an end, as the clergy no longer engross all the learning of the age as they did when Universities were first established, we still continue most obstinately to follow, there are some among us, no doubt, who regret that Divine right and passive obedience did not obtain another triumph; and that the nation was not once more delivered up to the Stuarts, without any sort of stipulation or security. Some, perhaps, may wish, that instead of calling upon foreign princes to govern us, we did not try whether the country of Elizabeth, of Hampden and of Cromwell could not furnish a ruler of its own; and others (though, I think, without much consideration of the feelings and tone of thinking peculiar to the English), may regret, with some few of the contemporaries of that event, that so good an opportunity of establishing a free republic was allowed to pass away. But whatever may be the

view which the reader of English history takes of these matters, to whatever cause he may attribute the succession of the new dynasty, and whatever may be his opinion of the national character which it exemplifies, there is one fact, which every man, Tory, Whig, or Republican, who does not shut his eyes to irresistible evidence, must admit; which is, that the Crown of England would have fallen from the heads of the first and second sovereign of the House of Brunswick, on which it often trembled, had it not been for the sagacity and address of the minister, whom, in spite of their numerous enemies, they had fortune enough to find, and whom, in spite of their ridiculous prejudices, they had understanding enough to retain.

If a question should be asked, as to the means by which Sir Robert Walpole accomplished this end, the answer is one which accounts in great measure for the degradation, and the coarseness, and the want of public spirit in England during the last century; it was achieved in part, no doubt, by mild and prudent government; but far more is it to be ascribed to the grand instrument by which Philip of Macedon boasted that he could subdue any city of Greece, into which he could drive an ass laden with gold,—to profuse, gross, undisguised, indiscriminate corruption. The scenes of dishonour and of meanness which the History of England exhibits from the year 1714 to the year 1830, are almost beyond belief, nor can any one who has not examined them, form an idea of what may be, even under free institutions, the selfishness of public men. During the greatest part of that period, no one ever pretended to public spirit; patriotism, and every magnanimous motive, would have exposed any one who dwelt upon them as a possible ground of action, not to the charge of hypocrisy, but to ridicule; and it is not too much to say, that during the reigns of the four first Georges, in spite of the splendid theatre for patriotic virtue which the deliberative assembly of a free people furnishes; in spite of the glorious rewards that await in every free country the man who gains the favour of his fellow citizens, there are hardly

four men, if indeed there are so many, to whom the word patriot can, with any show of probability, be applied. To accumulate wealth and titles seems to have been the sole object of our public men. "Etiam homines novi qui antea per virtutem soliti erant nobilitatem autevenire, furtim et per Latrocinia (railway directorship?) potius quam bonis artibus ad imperia et honores nituntur—proinde quasi consulatus et prætura atque alia omnia hujusce modi *per se* ipsa clara atque magnifica sint, ac non perinde habeantur ut eorum qui ea sustinent, virtus est."

The enormous and lavish grants of Parliament to the Crown were in fact voted to its own members, among whom, in various shapes and under different pretences, they were distributed. The manifest injustice and glaring violation of truth in the decisions of that body, surpass the most flagrant and infamous instances furnished by the conduct of their predecessors, and almost rival the decisions of their posterity on railway questions. In one case they voted forty a larger number than ninety; in another they disfranchised thousands of voters whose right of voting was confirmed by the express words of an act of Parliament. People grew ashamed at last of talking about right and wrong, and openly declared that they never considered the cause, but the end; and yet, said Lord Hervey, these same men "fancied that they should have had scruples about picking a pocket or robbing on the highway."

For many of these enormities Walpole was responsible; if peace, and order, and freedom for the upper and middle classes can be bought at too high a rate, the price he paid for them was too dear. To his incessant ridicule of all that was not base and sordid, as much as to his direct bribery, we owe those coarse habits of thought, and that mercenary disposition which has spread like a gangrene over the nation, and for which, among the countries of Europe, we are still, I fear, proverbial. But the best eulogy on Sir Robert Walpole is the history of what happened after his downfall. When we read an account of what happened under the Newcastles and Graftons, or, worse than all, under

Lord Bute; when we find, as was the case under the last minister, an English government, when we were at war with France, actually urging the French ministers to send better Generals against us, that they might have some excuse for surrendering advantages which our blood and treasure had been employed to purchase,—we feel grateful to Sir Robert Walpole, and acknowledge that the government of a Whig oligarchy is better than that of a Jacobite favourite. England was indeed given up to an oligarchy at this time—an oligarchy in great measure, as is proved by the immortal writings of Fielding and of Richardson, independent of the law. But that law, in return, lay with crushing weight upon the lower classes (*t*). During this century the English legislator wrote with the pen of Draco. To cut down a young sapling in a pleasure ground; to break down the mound of a pond; to steal to the value of twelve pence from the person, were capital offences. The last law—I mention the fact because it illustrates the spirit and genius of our legislation—kept its place in our statute book, thanks to our lawyers, our judges, and our representatives, from the time of Henry the First to that of George the Fourth. At the time when Blackstone wrote, one hundred and sixty of the actions that men are daily liable to commit, were visited with capital punishment. And these sanguinary laws, proposed, carried, and acted upon on the spur of an immediate impulse, without foresight and without reason, by our aristocracy, a body shamelessly indifferent to the morality and comfort of the people, always mistaking a love of detail (which in truth is hardly ever united with manly wisdom and statesmanlike capacity) for practical ability,—were passionately supported by all the judges and Court lawyers, who often witnessed their effects, till the reign of George the Fourth. And yet we obstinately persevere in applying exclusively to the judges on questions of Law Reform! though experience has

(*t*) The execution of Lord Ferrers is an exception which proves the rule. Count Horn, under the Regent Orléans, was broken alive upon the wheel, though connected with almost every reigning House in Europe.

shewn that, in most cases, to ask a judge or a Crown lawyer to reform the law, is to ask the Pope to abandon transubstantiation. In the mean time, have we any right to complain that a people, under the combined effect of so many demoralizing influences as were paramount in England during the last century, neglected by the Church, oppressed by the law, corrupted by the example of their superiors,—should become sordid, stupid, and ferocious? Sir Robert Walpole's main object was to keep power: he preferred his present interest to his future fame; he connived at every abuse, and distrusted all reformation. "He never," said his ablest follower, "would give the least encouragement to any emendation either of the law or the Church, though the *expense and hardship* of the first, and the tyranny and injustice of the last in the Ecclesiastical Courts, were got to an excess wholly unjustifiable and almost insupportable. From this way of reasoning, he opposed the inquiry into the South Sea affair,—the bill to vacate the infamous sale of Lord Derwentwater's estate,—the examination of the House of Commons into the affairs of the charitable corporations,—and abuses in the gaols."

The Act of Settlement, which may be considered the corner-stone of our constitutional law, and which was passed after the death of the Duke of Gloucester had destroyed all hopes of issue from the Princess Anne, made the judges immoveable. This most important measure, which, such is the servile ignorance of the English vulgar, has been incessantly ascribed, in episcopal sermons, in reviews, and in other productions of waiters on Providence, to George the Third, with as much truth as the abolition of the slave trade, of which he was the unflinching partizan,—was in reality carried during the reign of our illustrious Deliverer. It is true that he had rejected, by a most unhappy exercise of the prerogative, a bill containing a similar provision in 1692; but to whatever cause this was owing, it certainly must not be attributed to any wish of exercising any sort of improper influence over the judges.

The patents of all William's judges ran, "dum bene se gesserint." Nor was there ever a time when the Crown abstained more scrupulously from all interference with our tribunals. It would have been well for England and the administration of justice if this could be said with truth, either during the period we are now entering upon, or even during the early part of the present century. We have not always had, and it would be unreasonable to expect that we always shall have, men like Lord Denman at the head of the common law.

That an inferior race of judges were now presiding in our Courts, appears from the trials of this time, and, I may remark, that the character of the judges is no bad test for that of the practitioners,—as emptiness (for that, I believe, is the right translation) calls on emptiness, mediocrity encourages mediocrity. A technical, prosaic judge, dreads, dislikes, and endeavours to stifle any symptom of genius. The trial of Layer took place before Pratt, a man whom his high station has not redeemed from insignificance, and who contrived by his pedantic folly to give the air of a martyr to a man who was in reality condemned on very conclusive testimony. The prisoner was brought to the dock in irons,—a piece of mere wanton brutality.

Prisoner.—"I hope, my Lord, the irons shall be taken off."

L. C. J.—"They shall now be taken off."

It then appeared, that owing to the irons, the prisoner had not been able to give his counsel any instructions before eleven on the preceding night. It might be thought that natural justice, where a man's life was at stake, required the delay of the trial. The Chief Justice, however, contents himself with making the profound remark, "It was an omission." Some discussion arising as to whether the jury should be called over in such a way as to give the prisoner the full benefit of his challenges, Pratt remarks, "It is dangerous to make a precedent, AN INNOVATION."

A witness was to call the statement made by the prisoner

before the Privy Council. It was shewn, that the prisoner's statement had been taken down, but had not been read over to him. The prisoner's counsel objected.

Pratt, C. J.—"You seem to mistake what it is that is contended by the King's counsel. They are not going to offer anything to be read in evidence. Your objection would prevail if they were going to read a confession as evidence, which was neither read to nor signed by him. But if there is no examination reduced into writing, and signed by the party, the consequence is, that the witness is at liberty to give an account of what was said, and he may look to his notes to refresh his memory . . . . . You say there is no precedent for it: for God's sake recollect yourself; it is done every day at the Old Bailey."

An attempt was made to impeach the character of one of the witnesses for the Crown, by proof of a particular fact. This was not allowed. The Chief Justice said, "You know what the rule of practice and evidence is when objections are made to the credit and reputation of a witness, you cannot charge him with particular facts. For, if that were allowed, it would be impossible for a man to defend himself."

This rule has continued, subject to one seeming exception. In cases of rape, where the prosecutrix denies criminal intercourse with the prisoner, or immoral conduct, such as endeavouring to attract men in the public street, evidence may be called to contradict her, because such evidence is said to bear upon the question before the Court.

Layer was convicted and executed.

In the same plot with Layer, a person was implicated of far greater importance, the famous Francis Atterbury, the idol of the High Church party, a graceful writer, an accomplished scholar, a restless intriguer, a quarrelsome bishop, an intolerant unbeliever, and a dishonest man. With every concession to the violence of party spirit, and the laxity of morals which it is apt to engender, when zeal in a particular

cause atones for every other crime, the disregard of truth in this man, bishop and partizan as he was, is really astonishing. He must have taken oaths over and over again with intent to violate them; and before the House of Lords he persevered, with surprising hypocrisy, in assuming the airs of injured innocence, and in solemnly denying facts, which not only the evidence, though not such as a Court of justice would act upon, and his subsequent conduct, but recent publications, prove beyond all shadow of question, to be true. The Stuart papers shew that his correspondence with the Pretender was close and intimate, and his letters contain declarations of unalterable fidelity and allegiance to the ruler, whom he had repeatedly called God to witness, that he renounced, and with whom he protested, before his peers, that he never had any communication. His defence, however, was feeble, and far below his reputation.

The case of Atterbury illustrates the necessity of the occasional interference of Parliament to chastise guilt, which Courts of justice cannot reach. The rules of Courts of justice must be constructed with a view to the general wants of society, and a Court of justice that, using a jury as an instrument, should act upon the evidence which established, beyond the possibility of doubt, the guilt of Atterbury, would expose to hazard the lives and liberties of the most innocent of mankind. To call upon juries to appreciate hearsay, to observe where it is, and where it is not, corroborated by circumstances that are confessed, to unravel the tangled web that artifice has spun, to trace under all its disguises the hidden thread, which is the clue to the prisoner's guilt, would be to require from them far more discernment and penetration than they possess. Fortunately for mankind it is not often that guilt has time, or reflection, or cunning enough to shroud itself in so much artifice. In this case, the bishop had dictated the letters containing the treasonable correspondence to a person named Kelly, and he had used various cyphers; the key to the

cyphers furnished by hearsay was applied, and it corresponded with the most minute circumstances of the bishop's life: it was clear with regard to the letters, that the person who dictated them was an acquaintance of Kelly's,—so was the bishop: it was clear that the person mentioned in the letters who went by the name of Jones or Illington, was a clergyman,—so was the bishop: it was evident that this person was a man of great credit and consideration, and looked upon by himself and others as a leader of his party,—so was the bishop: again, several occasions on which this person went out of town or remained in it, and was sick or well, exactly tallied with the transactions of the bishop's life, and the wife of this person was sick, and afterwards died, which also describes what happened to the wife of the bishop at the very time of the correspondence. The manner in which the true person to whom the names Jones or Illington referred was discovered is curious. A Mrs. Barnes was arrested, and taken before the Privy Council; she refused to disclose any thing that could, as she supposed, endanger her acquaintances; at last, she was asked, if a dog had not been sent to her from France? To which she replied in the affirmative. She was then asked, for whom the dog was intended? To this she answered without hesitation, as she thought it would do her friends no harm, that it was for the Bishop of Rochester. Now, the intercepted correspondence shewed that the dog was for the person called Jones and Illington. This was the first clue to the bishop's treason. The argument is put with great ability in the Report of the Committee of the House of Commons, which was probably drawn up by Pulteney; it is a document that will well repay perusal—all the common places against bills of attainder and circumstantial evidence, and cyphers were wielded with great force by Sir Constantine Phipps, the bishop's counsel, and the Duke of Wharton. The latter said, alluding to the decision of the Lords, by which they had resolved that the witnesses who explained the cyphers should not be

obliged publickly to reveal their means of knowledge: "The greatest certainty human reason knows is a mathematical demonstration, and were I brought to your Lordships' Bar to be tried upon a proposition of Sir Isaac Newton's, which he, upon oath, should swear to be true, I would appeal to your Lordships, whether I should not be unjustly condemned, unless he produced his demonstration that I might have the liberty of inquiring into the truth of it from men of equal skill." This speech was delivered in answer to Willis, Bishop of Salisbury, who made a very argumentative speech against Atterbury. This trial was illustrated by the presence of Pope, who was called by Atterbury to prove that political matters were altogether banished from his mind, and that his conversation turned exclusively on literary topics. Swift has also alluded to this trial in Gulliver's Travels, with his usual pointed satire. Yet, in spite of this support, and in spite of the solemn, and all things considered the appalling, asseverations of Atterbury himself, no reasonable person could have doubted as to his guilt. One circumstance alone is sufficient to put an end to all moral doubt about the matter: in a letter written in the bishop's hand, found among his papers, and sealed with his seal, and addressed to Mr. Dubois (a cypher for the Pretender) is this passage:—"I have heard nothing from you since the letter I had about two months ago by Mr. Johnson (Kelly), to which I immediately, in *his* hand, returned my answer." Of this letter neither the bishop nor his counsel attempted to give any explanation (*r*).

The evidence required to convict a man of murder was very much considered, and explained with great accuracy, by Lord Raymond, in the case of Major Oneby, who had killed Mr.

(*r*) I think Cicero puts the defence of bills of attainder, and of pains and penalties, in the true light. He condemns ex post facto laws. "Neque in ullâ præteritum tempus reprehenditur *nisi ejus rei quæ suâ sponte scelerata ac nefaria est ut etiamsi lex non esset magnopere vitanda fuerit.*" Verr. 2. 1.

Gower in a duel. The jury returned a special verdict, setting out the facts of the case, which were those of a duel in a tavern, in which Oneby was the aggressor, but in which the duel was conducted with perfect fairness. The judges held, in this case, that the principals in a regular duel are guilty of murder; and had not Major Oneby killed himself the night before the day fixed for his execution, he would have been hanged. George the Second, who had just succeeded to the Crown, obstinately refusing, with the want of benevolence, which was part of his nature, all solicitations for mercy, for an act that he considered meritorious. So that this man would have been hanged for a crime, which men in the highest stations at this day have committed, and challenged others to perpetrate; and which, from that time down to the last thirty years, was encouraged in the army by Kings and generals. Here, again, is an instance of the immorality produced by ignorance of legislation. I will not argue the question of duelling, though considering the churlish arrogance, or, as the Italians call it, the "prepotenza," which stamps the manners of the upper and middle classes among us, and which their education, both in precept and example, tends so carefully to encourage; perhaps it acts as a check, though far from an adequate one, upon brutality, for which the experience of every day shews us rank and station are here thought not an aggravation but an excuse. I doubt whether any one who reflects on facts very notorious in this country, and which have taken place even in our own memory, can think that we are civilized enough to give up a custom which, evil as it is, perhaps, prevents evils that are still more intolerable.

We cannot legislate for an Oxford Street upholsterer, whose great ambition is that his son may go to Eton, and be a gentleman commoner of Christ Church, and that his grandson may be a baronet and keep a pack of fox-hounds, as if he had a right to vote in the Ecclesia at Athens. We are Saxon empiricks, journalists, foxhunters, and empha-

tically, and above all, and in all classes, and always, and in everything—tradesmen; not Greeks, nor even Romans. Be this, however, as it may, the proper method of putting a stop to duelling is not by enlisting the sympathies of every man on the side of the person accused of it, nor by sacrificing once or twice a century a victim to law, who has only done what he has seen others, against whom no whisper is breathed, and who are the objects of general esteem, commit with the most perfect impunity. If your supposed wish is not mere grimace and transparent hypocrisy, like that of putting a stop to bribery, pass a law that no man who fights a duel shall serve her Majesty in any situation, nor be allowed to practice at the Bar, nor be eligible as a member of Parliament. Such a law would furnish an excuse which a brave man might adopt, and would be therefore far more efficacious than one which shocks the reason of all but lawyers, and which, if followed out, would place men of the highest honour, and the most known benevolence, on a level with the basest and most hardened of mankind.

The substance of Lord Raymond's judgment is in this sentence, "That the law of England permits the excess of anger and passion, in some instances, to extenuate the greatest of private injuries, that is, to take away a man's life. Yet, in those cases, it must be such a passion as for a time deprives him of his reasoning faculties; for if it appears reason has resumed its office—if it appears he reflects, deliberates, and considers before he gives the fatal stroke, which cannot be so long as the fury of passion continues, the law will no-longer, under that pretext of passion, exempt him from the punishment, so as to lessen it from murder to manslaughter. It plainly appears that this killing Mr. Gower was a deliberate act. But to recapitulate in short: after the words had passed, and the bottle was thrown by the prisoner, and swords drawn, —by the interposition of friends they sat down, and continued in company for an hour, [a reasonable time under those cir-

cumstances for the passion to cool]; and after that hour expired, the deceased says, 'We have had hot words, but you was the aggressor; but I think we may pass it over,'—and at the same time offered his hand to the prisoner; which was enough to have appeased the prisoner. To this Mr. Oneby answered, 'No, damn you, I'll have your blood!' words expressing malice, not passion. Then, when the company went out of the room, the prisoner stayed, and called the deceased back, 'Young man, come back, I have something to say to you.' The door immediately was shut, clashing of swords was heard, and the deceased received the mortal wound from the prisoner at the bar. The prisoner's words shew what was his intention, *viz.*, to take away Mr. Gower's life; and the killing him may properly be said to have been done upon deliberation and consideration."

A striking proof of the caprice of English law is to be found in the trial of Hugh Reacon and Robert Tranter. These two men, being bailiffs, committed as foul, and deliberate, and unprovoked a murder, as any of which the State Trials contain the account. The laws against debtors, at that time, were of the most savage and horrible description, and the men selected to arrest them were the vilest and most brutal among the vile and brutal functionaries who were then employed in all the lower departments of the law. To any one who has not studied the character of the English, the wanton cruelties and atrocious crimes perpetrated under colour of civil proceedings, and with the full knowledge of every judge and every barrister, and most men of the world, will appear almost incredible: men were arrested for debt, often where they owed nothing, on a false action, to gratify the malice of some adversary, flung into a loathsome prison, where they were surrounded by the refuse of mankind, obliged to submit to the most cruel extortion, any inquiry into which was always discouraged by our judges, and, in spite of the Habeas Corpus Act, released, if at all, with the greatest difficulty, after their health was

ruined, and at an enormous expense. The poorer classes were, at this time, exposed to the agonies of famine in those receptacles of pestilence. In the case which I have quoted, the sympathy of the judge, for legal cruelty, was placed in the clearest light. Sir John Pratt, a man who owed his elevation to his dulness and his ignorance, exerted all his understanding, and what was more considerable, all his authority, to save these savage wretches from the fate they merited. The jury found them, in spite of the clearest evidence, guilty of manslaughter only; and after suffering a nominal punishment, they were again let loose upon the unfortunate.

In the case of John Woodburne, and Arundel Coke, who were tried, convicted, and executed under the Coventry Act, for cutting Edward Crispe (the brother-in-law of Coke), with intent to disfigure him; the evidence proved, beyond all doubt, an intention not to disfigure, but to murder, the person who was injured. The attempt was frustrated, but the consequence was, that the face of Crispe was gashed and severed (*t*). The defence set up by the prisoner Coke, which would have been looked upon as insanity in any other country, was entirely conformable to the genius of English legislation, and makes the decisions and doubts in Crown Cases Reserved less surprising. He maintained, that as the indictment, that is, the written charge, drawn up in a barbarous terminology, charged him with an intention to disfigure, and that, as his real intention was to destroy his brother-in-law, he ought to be acquitted. He did not pretend that he had been misled in his defence, or that the evidence to prove both crimes was not in all respects the same, but he relied entirely on the fact, that three or four barbarous abbreviations of one sort had been used in the indictment, which, by the way, he was not allowed to see, instead of three or four barbarous abbreviations of another, and that, therefore, without any reference to his guilt, or his

(*t*) An attempt to murder was not capital; an attempt to disfigure was. This was English jurisprudence.

innocence, he ought at once to be declared not guilty. This argument, which might shock an Esquimaux, and which, *mutatis mutandis*, might now be used successfully, was the happy result of the studies followed by English lawyers.

The following luminous dialogue took place:—

Coke (the assassin).—"My design was TO KILL MR. CRISPE, and not to maim or disfigure him."

L. C. J.—"Supposing your design was to kill, yet your design might be likewise to maim, and this the jury must try. This is matter of fact for their consideration."

Coke.—"This is a very penal statute, I hope your Lordship will assign me counsel."

L. C. J. (a good deal puzzled).—"You say your intent was ONLY TO MURDER, but that is not yet agreed, or found to be the fact: it is the point now in trial, whether you did it not with an intention to maim or disfigure, and, according as that intention shall appear to the jury, so will they either acquit or convict you." Neither the Chief Justice nor the King's counsel insist on the answer which any jurist would give, that the act done, and to be proved, was the same, whether the prisoner meant to disfigure or to destroy his brother. That the prisoner knew what that act was, and that he could not therefore have been misled by the description of it, or the intention ascribed to the doer. Such would have been the answer of reason, but on that very account it was an answer that the English law studiously forebore to recognize. King summed up with great ability and fairness, and came at length to this notable defence.

"As for Mr. Coke, that which he principally put his defence upon is, that his intent was to kill and murder Mr. Crispe, but not to maim him, or to slit his nose, or to disfigure him in so doing; and, therefore, though in pursuance and execution of the attempt to murder Mr. Crispe, they slit his nose, or might thereby disfigure him, yet that not being their intention and design, he is to be acquitted on this indictment, wherein the intent of the party is one of the principal ingredients to make

him guilty. This same defence will serve also for Woodburne, that they intended to murder, but not to maim; and if they did maim, it was with an intention to kill, and not to disfigure. Now this indictment is, as I told you, founded on the 22 & 23 Car. 2, c. 1, for that on purpose, of malice forethought, and by lying in wait, the prisoners did unlawfully and feloniously slit the nose of Edward Crispe, with intention, in so doing, to maim or disfigure him. Woodburne is charged as the actor, or principal agent, Coke as being present, aiding, and abetting; which, in point of law, is the same, as to the guilt and conscience, both being in law principals.

"That this attempt on Mr. Crispe was designed, malicious, and by lying in wait, the evidence is very strong; there has been also very strong evidence given, that the nose of Mr. Crispe was slit by Mr. Woodburne, and that Coke was present on the same design with Woodburne.

"But the thing chiefly insisted on is, that the slitting of Mr. Crispe's nose was not with an intention, in so doing, to maim or disfigure him; and if it were not with that intent, then the prisoners will not be guilty upon this indictment.

"Now, gentlemen, what the intent of these persons was in slitting Mr. Crispe's nose, you are to try; this is a matter of fact for your consideration and determination: it is the same in other felonies, where the intent of the party makes the crimes. Burglary is breaking open a house in the night time, with an intent to commit a felony; though no felony be committed, yet if there was an intent to do it, it is burglary; which intent is to be tried by the jury. Larceny or theft, is taking away another man's goods, with an intent to steal; if it were without such an intent, it would only be a trespass, and no larceny; but whether it were or were not with such an intent, is a matter of fact to be inquired into and determined by the jury. Nay, the intent is so necessary in all felonies, that a person who hath no intent or design, as a madman, lunatic, infant, &c., cannot commit felony for that very reason;

because he cannot have any intent or design in his actions. So that in this case you are to try no other matter than what is tried in other felonies, *viz.*, the intent of the party.

"Now, how is the intent of the party discovered in other cases? By the facts themselves; by the precedent, concomitant, and subsequent circumstances of the facts; by the manner of doing, and the like.

"There are some cases where an unlawful or felonious intent to do one act, may be carried over to another act, done in prosecution thereof; and such other act will be felony, because done in prosecution of an unlawful or felonious intent

. . . . .

"The facts necessary to be proved on this indictment are, that on purpose, and of malice fore-thought, and by lying in wait, they unlawfully slit the nose of Mr. Crispe, with intention of so doing to maim or disfigure. As to the fact of slitting the nose, that is directly and positively sworn; there can be no doubt but that it was an unlawful slitting. Then the next thing for your consideration will be, whether this unlawful slitting was on purpose, of malice fore-thought, and by lying in wait? As to this, a great deal of evidence hath been given; and what passed before, and at the time of the fact, will guide you herein. And if, on a review of the evidence, you shall be of opinion that this unlawful slitting of the nose was on purpose, of malice fore-thought, and by lying in wait, then the next question will be, whether this was an intention to disfigure? Facts do in some measure explain themselves; and the circumstances proceeding and accompanying those facts, and the manner of doing them, do many times more fully explain and declare the intent of the party. The prisoner, Mr. Coke [which defence goes both to him and Woodburne], insists that their intention was to murder, and not to maim; and that if they did maim or slit the nose, it was with an intention to kill, and not with an intention to maim and disfigure. On the other side, it is insisted on by the King's

counsel, that though the ultimate intention might be to murder, yet there might be also an intention to maim and disfigure; and though the one did not take effect, yet the other might: an intention to kill doth not exclude an intention to maim and disfigure. The instrument made use of in this attempt, was a bill or hedging-hook, which in its own nature is proper for cutting and maiming; and where it doth cut and maim, doth necessarily, and by consequence, disfigure. The attempt intended on Mr. Crispe was immediately to his person, to do him a personal injury. Besides the manner of doing and perpetrating this fact, is proper to be considered, that it was done by violence, and in the dark, where the assailant could not make any distinction of blows, but knocked and cut on any part of Mr. Crispe's body, where he could, till he had sunk him down, and done to him whatever else he pleased. And if the intention was to murder, you are to consider whether the means made use of in order to effect and accomplish that murder, and the consequences of those means, were not in the intention and design of the party; and whether every blow and cut, and the consequences thereof, were not intended, as well as the end for which it is alleged those blows and cuts were given" (*s*).

The trial of John Matthews is remarkable, not only for the extreme cruelty of the sentence, but because the witness called by the counsel for the prisoner established the case for the prosecution. He was indicted under a statute passed in the sixth year of Queen Anne, by which it was provided, that any one who, after the 25th of March, 1706, should assert, maliciously, advisedly, and directly, by printing or writing, the Pretender's title to the Crown, should be adjudged a traitor, and suffer as if he had been convicted of high treason. Matthews was a printer; and the printed copy of a paper, in which the right of the Pretender to the Crown was distinctly asserted, was found in his house and upon him. It was proved

(*s*) State Trials, vol. 16, p. 78, 79.

that he had superintended the printing of this paper, and that it had been copied from a manuscript. There was, however, no evidence to shew that the manuscript was in the handwriting of the prisoner. Other papers to the same effect, and part of the same treatise, were found upon his person. His counsel called George Matthews, the brother to the prisoner, who was obliged to admit, on cross-examination (*t*), that a letter, in which the printing of the libel, and the receiving money for printing it, were confessed, was in the handwriting of the prisoner. This, said the Lord Chief Justice King, "proves the letter to be his, and makes it evidence." The poor boy—he was only nineteen—was convicted, and, to the very great disgrace of the government of that day, was executed. The rule as to proof of handwriting was thus laid down by the Chief Justice: "I take it, it is a common case. Suppose a trial between party and party, the common method of proving a man's hand is, a person is called who hath seen the party write. He is asked, whether do you believe it to be his handwriting, or no? Nothing more is expected, than that he hath seen him write, and believes it to be his handwriting. Mr. Matthews swears he hath seen him write, and he believes it to be his handwriting.

In answer to an objection, that there was no proof whom the prisoner meant, King said, "I take it, as to that, we are to understand it (the phrase) as all mankind do. You are to consider whether that book is written concerning the pretended Prince of Wales and his right to the Crown . . . That is the matter of fact you are to consider. Is it possible for men of common sense and understanding to imagine that this right is concerning anybody but the Pretender? If so, the defendant will be acquitted. . . . . In the next place, supposing it to be so, the next thing is, whether he has done maliciously and

(*t*) Hungerford, prisoner's counsel, said, as it stood before it could not be read, but we are so unlucky, that by plowing with our heifer they have got it to be read.

advisedly. The fact implies malice; and the doing a thing advisedly is doing it with thinking. The witnesses say, for several days they were desired to assist him."

There was nothing to find fault with in the summing up or in the conduct of the judge; but the execution of a sentence, so disproportioned and so savage, shews the coarseness and inhumanity of the age and country.

The standard of public honour was now levelled to the earth. A sordid traffic was carried on in the Houses of Parliament, as well as in the sanctuary of justice. The evils inseparable from the domination of an aristocracy composed principally of the rich, far from being diminished by the polished manners, or softened by the refinement of the ruling class, were aggravated by the coarsest debauchery, habits the most brutal, and immorality the most disgusting. One of the most striking proofs of the condition to which the nation was fast approaching, was the South Sea Fraud;—though the House of Commons *did* think fit, in those days, to expel such of its members as were notoriously agents in a system of peculation which had ruined hundreds of their fellow subjects. I doubt, however, if the corruption disseminated by the South Sea Scheme in both Houses of Parliament, was more mischievous and extensive than that recently carried on in railway committees, and by railway managers, among our contemporaries. It led certainly, perhaps from its novelty, to far more serious investigations, and, indirectly, was the cause of Lord Macclesfield's impeachment. It was proved that Lord Macclesfield, a cunning, acute, pettifogging, low-born, and uneducated lawyer, who ought to have been an attorney, or perhaps judge of a Court of Requests, and who became, like many others of the same cast of mind, Lord Chief Justice and Lord Chancellor,—had acted after his kind in the high office to which he had been elevated. He carried the habits, natural to his pursuits, extraction, and early associations, to the Bench. They who placed him there were more criminal than he. It was proved, that

he had carried on a regular system of traffic in the disposal of the offices of Masters of Chancery: that the Masters had bought their places with the suitors' money lodged in their offices: that they had speculated in South Sea Stock themselves, and lent money to those who gambled in such adventures. In this case evidence was admitted, that 5000*l.* had been paid to Lady Macclesfield; and her conversation on this occasion was received, and I think properly, against her husband. At the same time, the money in question was not distinctly traced to Lord Macclesfield, nor was it proved that Lady Macclesfield had been entrusted by her husband with the management of this negotiation. Lord Macclesfield, however, did object to the evidence that was offered, and to the questions of the managers.

The following case of Hall *v.* Hall, decided by Lord Raymond, (2 Strange, 1094), illustrates the legal rule:

"In an action for wages earned by the plaintiff's wife of the defendant's intestate, the Chief Justice would not allow the wife's owning the receipt of 20*l.* to be given in evidence against the husband."

The condition of the poor and of the lower classes in England, was now rapidly deteriorating. Wealth and influence might enable the upper ranks to struggle against the evils of laws so absurd, that it is scarcely conceivable how society should continue to exist under their influence. But the frightful instances I am about to quote, of cruelties, which the Barons of the dark ages could not have surpassed, inflicted by keepers of prisons on debtors entrusted to their custody, with almost perfect impunity, shew how utterly in vain he that had no helper, lifted up his voice to the barbarous edifice, surrounded by pitfalls and snares, which was the seat of English justice (*u*). The authority on which these cases rest

(*u*) Within a month from the time I am writing this, in Shropshire, the house of a supposed debtor, who was only waiting till he could procure an injunction in Chancery to stop the proceedings against him, was forced

cannot be disputed, for it is that of a report of the committee of the House of Commons, by which these horrours were at length, and to no very great purpose, brought to light; and it was with blank astonishment that I have read in histories of authority, passages which shew that this report, and the atrocious cases which corroborate it, had altogether escaped the research of their learned authors. These memorials furnish the clearest proof how absolutely the dupe of sounds and the merest prejudices, the English public is, and has always been; and that while boasting of trial by jury, of the absence of torture, of examinations in open Court, the judges and legislators allowed the keepers of prisons, animated by that fierce and sordid love of gain, which, in this same century, turned the most fruitful regions of the world into a wilderness, to torment with lingering agonies, and to destroy by deaths, far more cruel than those inflicted by the law on convicted murderers, innocent men, without trial, without appeal, and, such was the humanity of the judges, without redress. That the administration of law by the magistrates was thoroughly corrupt and arbitrary; that it exposed the lower class to all the evils that caprice, brutality, and ignorance could furnish, we know from the works of Fielding, who describes scenes that he had often witnessed—scenes that certainly the judicial annals of France, at the same time, could not equal. For there is a mixture of brutality with English corruption, and an affectation of justice, that gives to the hideous pictures, which the author of Amelia has drawn, and which are abundantly supported by the State Trials,—a transcendant deformity, and an abomination all their own. No evils (*v*) are so intolerable as those which are inflicted

open in defiance of law. The man was seized, handcuffed, and carried ten miles to the county gaol. If he sues his aggressor, he may be turned round by a special demurrer.

(*v*) "I do not know whether any grievance can be considered as intolerable, until it has been established by law." Burke's Speech on Acts of Uniformity; Works, vol. 10, p. 14.

by means of laws which are supposed to be the perfection of human reason. A minister in France, if he had the power, could not have the will, of tormenting many of his fellow citizens; but, in England, to say nothing of the system of pressing, so utterly revolting to the law of God and man, the prisons were crowded with wretches entirely dependant on the caprice of a savage gaoler, and if desperate from persecution, any of these prisoners appealed to the supreme Court, the report to which I have referred shews that the judges of the land, with truly English apathy and hatred of innovation, listened to the complaint, admitted its justice, and——sent the prisoner back to the power of the merciless and exasperated tyrants, whom they thus proclaimed irresponsible, there to writhe under the weight of chains, to suffer stripes, and to endure torments, from which he could only obtain deliverance by death! Such was the birthright of Englishmen; such the value of Habeas Corpus and the Bill of Rights. During the eighteenth century, the cells of the Fleet Prison, and of the Marshalsea, beheld scenes far more terrible than those of the Bastille. Tortures were inflicted by its keepers, in the reign of George the First, and George the Second, on men confined for debt, such as the subjects of Louis the Fifteenth, in the same condition, had no reason to apprehend, and as would not have been endured by the French people; and, with the single exception of one ruffian, who fled, English law and English judges, enabled the murderers to escape. I certainly believe, that considering merely the effect of government and legislation, and putting aside matters over which our rulers had no controul, such as the discoveries of art, and the conveniences furnished by physical science, that the condition of the lower classes (not actually villeins) under the two first Princes of the House of Brunswick, and the first ten years of the reign of George the Third, was far more deplorable, abject, and debasing, far more inconsistent with all that can make us what we ought to be, than under the dominion of the Tudors; nor will he who re-

flects on the reckless multiplication of capital punishments (*w*), and the character of those to whom the administration of our intricate law was in most cases entrusted, find much reason to question the accuracy of this conclusion.

Huggins, the warder of the Fleet Prison, and Arne, his deputy, the gaoler, were indicted for the murder of Edward Arne. Arne was a quiet, peaceable, inoffensive man. "I never saw him," said one of the witnesses, "do anything amiss to man, woman, or child." He was carried, by order of Barnes, into a vault like those in which the dead are interred, and where the dead bodies of those who died in prison were usually deposited; it had no chimney or fireplace, nor light, except what came through a hole, eight inches square, over the door; it was neither wainscotted nor plastered; it was built over the common sewer, and close to the sink where all the filth of the prison was cast. The witness then describes the fate of the innocent man, whom the law of England allowed to perish in torments without any accusation even alleged against him. "The prisoner continued in a good state of health till he was put into the strong room: from that time he altered every day; he grew hoarse; he could not speak: he then became delirious, and ript open his bed and crept into the feathers." The detail which follows is too loathsome to recite. The miscreant Huggins, whom our laws enabled to perpetrate his crimes with impunity, came and saw the poor wretch in this condition, looked at him for a few minutes, and turned away,—leaving him in the strong room, where he shortly died. On an inquiry how he came to creep into the feathers, it was proved that it was to avoid the intolerable cold. When Barnes was told that Arne was dying, he answered, "Let him die and be damned!" The witnesses proved that no man could live in the strong room for six weeks. Huggins, it should be observed, held the station of a

(*w*) Burke told Sir James Macintosh, he had always interest enough to get an offence made a capital felony.

gentleman. Sir George Oxenden, Sir John Hinde Cotton, and many other gentlemen, declared themselves his friends, and gave him of course an excellent character for humanity. The jury found a special verdict, and Huggins escaped altogether. And the Court, by a miserable quibble, held that the facts found did not amount to murder in Huggins; though he was the responsible manager of the prison,—though, fifteen days before Arne's death, he saw him shut up naked in this horrible place where he was illegally confined,—though it was his duty to have released him from that confinement,—though he allowed him to remain in it,—though Arne died in consequence. All these facts (*v*) were found by the special

(*v*) I extract these passages from the Report of the Committee, to shew what the English law allowed, and what English judges, because it was not Term, sent men back to suffer:—

"Captain John Mackpheadris, who was bredd a merchant, is another melancholy instance of the cruel use the said Bambridge hath made of his assumed authority. Mackpheadris was a considerable trader, and in a very flourishing condition until the year 1720, when, being bound for large sums to the Crown, for a person afterwards ruined by the misfortunes of that year, he was undone. In June, 1727, he was a prisoner in the Fleet, and although he had before paid his commitment fee, the like fee was extorted from him a second time; and he having furnished a room, Bambridge demanded an extravagant price for it, which he refused to pay, and urged, that it was unlawful for the warden to demand extravagant rents, and offered to pay what was legally due; notwithstanding which, the said Bambridge, assisted by the said James Barnes and other accomplices, broke open his room, and took away several things of great value, amongst others, the King's extent in aid of the prisoner [which was to have been returned in a few days, in order to procure the debt to the Crown, and the prisoner's enlargement], which Bambridge still detain. Not content with this, Bambridge locked the prisoner out of his room, and forced him to lie in the open yard, called the Bare. He sat quietly under his wrongs, and getting some poor materials, built a little hut to protect himself, as well as he could, from the injuries of the weather. The said Bambridge, seeing his unconcernedness, said, 'Damn him! he is easy. I will put him into the Strong Room before to-morrow;' and ordered Barnes to pull down his little hut, which was done accordingly. The poor prisoner, being in an ill state of health, and the night rainy, was put to great distress. Some time after this he was [about

verdict, and it was held that these facts were not evidence of murder. The sympathy of the law for those in authority was

eleven o'clock at night] assaulted by Bambridge, with several other persons his accomplices, in a violent manner; and Bambridge, though the prisoner was unarmed, attacked him with his sword, but by good fortune was prevented from killing him; and several other prisoners coming out upon the noise, they carried Mackpheadris for safety into another gentleman's room; soon after which, Bambridge coming with one Savage, and several others, broke open the door, and Bambridge strove with his sword to kill the prisoner, but he again got away, and hid himself in another room. Next morning, the said Bambridge entered the prison with a detachment of soldiers, and ordered the prisoner to be dragged to the lodge, and ironed with great irons; on which, he desiring to know for what cause, and by what authority he was to be so cruelly used? Bambridge replied, 'It was by his own authority, and damn him he would do it, and have his life.' The prisoner desired he might be carried before a magistrate, that he might know his crime before he was punished; but Bambridge refused, and put irons upon his legs which were too little, so that in forcing them on, his legs were like to have been broken, and the torture was impossible to be endured. Upon which, the prisoner complaining of the grievous pain and straitness of the irons, Bambridge answered, 'that he did it on purpose to torture him;' on which the prisoner replying, 'that by the law of England, no man ought to be tortured.' Bambridge declared, 'that he would do it first, and answer for it afterwards;' and caused him to be dragged away to the dungeon, where he lay without a bed, loaded with irons so close rivetted, that they kept him in continual torture, and mortified his legs. After long application, his irons were changed, and a surgeon directed to dress his legs, but his lameness is not, nor ever can be cured. He was kept in this miserable condition for three weeks, by which his sight is greatly prejudiced, and in danger of being lost.

"The committee find, that the said Bambridge hath, by himself and his agents, often refused to admit prisoners into the prison, though committed by due course of law; and in order to extort money from them, hath often, contrary to an act of the 22nd and 23rd of King Charles 2, without their free and voluntary consent, caused them to be carried away from the prison gate unto a public victualling or drinking house, commonly called a spunging house, belonging to him the said Bambridge as warden, and rented of him by Corbett his tipstaff, and hath there kept them at exorbitant charges, and forced them to call for more liquor than they were inclined to, and to spend more than they were able to afford, to the defrauding of their creditors, and the distressing of their families, whose substance they are compelled there to consume, and for the effectual

never more disgracefully conspicuous. The judges seem to have determined to counteract the benevolence of the Legislature. Bambridge, another gaoler, was indicted for the murder of Castell. After having extorted large sums of money from Castell, Bambridge, on his refusal to comply with his exorbitant demands, placed Castell, in spite of his earnest supplication, out of the prison in an infected house,

making them stretch their poor remains of credit, and to squeeze out of them the charity of their friends. Each prisoner is better or worse treated according to his expenses, some being allowed a handsome room and bed to themselves, some stowed in garrets, three in one bed, and put in irons.

. . . . . .

"Jacob Mendez Salas, a Portuguese, was, as far as it appeared to the committee, one of the first prisoners for debt that ever was loaded with irons in the Fleet. The said Bambridge one day called him into the gate-house of the prison, called the Lodge, where he caused him to be seized, fettered, and carried to Corbett's, the spunging-house, and there kept for upwards of a week, and when brought back into the prison, Bambridge caused him to be turned into the dungeon, called the Strong Room of the master's side.

"This place is a vault, like those in which the dead are interred, and wherein the bodies of persons dying in the said prison are usually deposited, till the coroner's inquest hath passed upon them. It has no chimney nor fire-place, nor any light but what comes over the door, or through a hole of about eight inches square. It is neither paved nor boarded, and the rough bricks appear both on the sides and top, being neither wainscotted nor plastered. What adds to the dampness and stench of the place is, its being built over the common sewers, and adjoining to the sink and dung-hill, where all the nastiness of the prison is cast. In this miserable place the poor wretch was kept by the said Bambridge, manacled and shackled for near two months. At length, on receiving five guineas from Mr. Kemp, a friend of Solas's, Bambridge released the prisoner from his cruel confinement; but though his chains were taken off, his terror still remained, and the unhappy man was prevailed upon by that terror, not only to labour *gratis* for the said Bambridge, but to swear also at random all that he hath required of him; and the committee themselves saw an instance of the deep impression his sufferings had made upon him, for on his surmising, from something said, that Bambridge was to return again, as warden of the Fleet, he fainted, and the blood started out of his mouth and nose."

where he died. A jury, in conformity with the strong and eager direction of Mr. Justice Page, a fit representative of the Scroggs's, acquitted the prisoner. The widow of the murdered man brought an appeal of murder, a proceeding which the law then allowed. Raymond summed up for a conviction; telling the jury, that if Bambridge had notice that Castell never had the small pox,—that he was afraid of catching it, and carried Castell against his will where the infection prevailed, he was guilty of murder. But it was too late; the jury acquitted this murderer a second time.

Nor were these murders confined to the Fleet Prison. William Acton was tried for the murder of Bliss, a prisoner. Bliss tried to escape; Acton (turnkey of the Marshalsea) seized him, and put on him a skull-cap, collar, *thumb screws*, and fetters. The wife came to see her husband; he spoke to her through the wall of his prison; he said to her, "this place, and the cruel usage I have had, will be the death of me!" He was beat so, *that his clothes were forced to be cut off.* His body and stomach were very much swelled. He was as black as possible with the marks of the bull's pizzle which Acton kept. Another witness said, "I saw him screwed down, and bleeding at his thumb nails. I gave him drink through a hole while he held his head backward; he could not take it himself because his hands were confined." Another witness said, "I saw Acton beat Bliss with a bull's pizzle then, and stamped upon his body several times, while Bliss was lying on the ground." Another witness spoke to the same fact; and said Bliss stood on one leg, for he could not set the other to the ground. I believe he died for want of food and being so treated. The prisoner was acquitted.

The same man, Acton, was tried for the murder of another prisoner. He was acquitted in defiance of the clearest evidence.

The same man was tried for the murder of a third prisoner, Robert Newton. He was again acquitted. The imagination

of a dramatist has seldom given a more heartrending description than the following: "Acton came and saw Newton locked in the strong room; he fell sick there; his body was covered with vermin. His wife and young child came to implore that he might be released; he was put in the sick-room, and died in three or four days. His wife broke her heart, and she and the child died in the same week. I was in the place at the same time. *There were two dead men in it.* I was sick for five months. It was infested with rats and vermin." All this infernal tyranny was unpunished. If we reflect that the men were debtors only, that they were heavily ironed, scourged, and murdered, we shall know what value to annex to the panegyrics on our constitution. The coarseness of a trading people, which leads them to think that no sufferings or punishment that a debtor can suffer is too severe, and to look with indulgence at any excesses committed by those who are entrusted with their custody, is most apparent in the result of these trials, which are as great a disgrace to the nation as the crimes disclosed in them. Laws are of little avail when men are under the dominion of an almost frantic respect for money. England is the only country where such criminals would have undergone a public and regular trial, and have been dismissed with absolute impunity. Similar tortures may, from bigotry, have been sometimes inflicted in the gloom of the Inquisition, but the English alone would allow them to be inflicted by avarice in the broad glare of noonday light. Here alone could there be laws to punish, publicity to disclose, and at the same time full impunity to the criminal.* In France, at the time of which I am speaking, such horrours were unknown. But that the reader may know how the desire of supporting authority can infatuate the judgment, he should recollect, that the worst of these crimes had been brought specially under the notice of the judges; that the judges, *after several meetings*, (during which the wretched prisoner was undergoing the tortures of which he complained), "*reprimanded* Huggins, (the

acquitted) and Bambridge, (the other man acquitted), and declared that a goaler could not answer the ironing of a man before he was found guilty of any crime;"—and then follows the conclusion, which so completely shews the character of our law and its administrators;—"but, *it being out of term*, they could not *give* the prisoner relief or satisfaction;" accordingly, he was actually sent back by the judges of the land, to suffer illegal tortures, with the full knowledge that he was to suffer them. Magna Charta, the Habeas Corpus Act, the Bill of Rights, had all been passed; the law had provided a redress for every injury, yet innocent Englishmen are flung into a pestilential cell, beaten almost to death, and loaded with irons; —these things are proved to the judges, who have several meetings about them, declare them illegal, and send the prisoner back to suffer them and to die, BECAUSE IT WAS OUT OF TERM. The history of English law, its barbarity, its abuses, its horrours, its expense, its falsehood, its inconsistencies, its chicanery, its inutility, except for the rich in some cases, openly stated by those in the highest judicial stations, and its cruelty to the poor in others, are accounted for in these words— In those days, form was on one side; the life and health of an innocent man on the other; the first consideration is that which rules the judge—in our days we are a little better, life is preferred even to form; but where form is on one side, and clear substantial justice on the other, let the reader of Meeson and Welsby's Reports say, which consideration rules the decision of the judge. When shall it be said, that where substantial justice is on one side, everything on the other is unavailing? When the New Rules give way to a fational system of proceedings, and special demurrers are thought of as we think of trial by battle. I add the result of this decision of the judges, which completes the picture of barbarity, oppression, and chicane:

"Notwithstanding this opinion of the judges, the said Bambridge *continued to keep the prisoner in irons* till he had

paid him six guineas; and to prevent the prisoner's recovering damages for the cruel treatment of him, Bambridge indicted him and his principal witnesses at the Old Bailey, before they knew anything of the matter; and to support that indictment he had recourse to subornation, and turned two of his servants out of places, which they had bought, because they would not swear falsely that the prisoner had struck the said Bainbridge, which words he had inserted in affidavits ready prepared for signing, and which they knew to be false. As soon as they were apprized of it, they applied to the Lord Mayor, who ordered the grand jury down to the Fleet, where they found that Bambridge was the aggressor. But the bill against the prisoners being already found, the second inquiry was too late.

"The prisoners being no longer able to bear the charges of prosecution, which had already cost 100*l.*, and being softened by promises, and terrified by threats, submitted to plead guilty, on a solemn assurance and agreement made with Bambridge before witnesses, of having but one shilling fine laid upon them: but so soon as they had pleaded guilty, Bambridge took advantage of it, and has continued harassing them and their securities ever since" (*w*).

It was held, in the case of Richard Franklin, who was indicted for a libel published in the Craftsman, that the question, whether the words imputed to the defendant, were libellous or not, was for the Court, and not for the jury. "This does not belong to the office of the jury, but to the office of the Court; because it is a matter of law, and not of fact; and of which the Court are the only proper judges; and there is redress to be had at another place, if either of the parties are not satisfied; for we are not to invade one another's province, as is now of late a notion among some people who ought to know better; for matters of law and matters of fact are never to be confounded" (*x*).

A case of great importance, on the principles of the law of

(*w*) State Trials, vol. 17, p. 304.
(*x*) State Trials. vol. 17, p. 672.

evidence, was decided about the year 1740. This was Warren *v.* Greenville (2 Strange, 1189). It arose from an objection, caused by the barbarous law of landed property, which is still very absurd, and which at that day resembled more the invention of a mischievous baboon, than the creation of human beings, however besotted by pedantic superstition. In order to shew that there had been a proper tenant to the præcipe, in levying a fine, in other words, that the defendant had a good title to his estate, the defendant offered the debt book of an attorney, in which the charges for doing the act that the plaintiff said had not been done, were inserted; and the book also shewed that these charges had been paid: after argument, the Court allowed this evidence, on the ground that it was free from suspicion; that if the attorney had been alive he might have been examined to the fact, and that this was the next best evidence. In Anne's time, Lord Holt had allowed similar evidence. This was the case of Price *v.* Lord Torrington, in which the evidence to charge the defendant was, that the usual way of the plaintiff's dealing was that the draymen came every night to the clerk of the brewhouse, and told him how much beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their hands; that the drayman had set his hand to this entry, and was dead; and this was held good evidence of a delivery.

This principle (*x*) was carried still farther in the case of Searle *v.* Lord Barrington. In this case, if interest had been paid, the plaintiff was entitled to recover on a bond; and it was held, that the indorsements of the *creditor* on the bond, were evidence in favour of the creditor to prove that the interest had been paid. On appeal, this decision was upheld by the House of Lords; but it is said in the Report, that the point which the creditor endeavoured to prove, was established there by other circumstantial testimony. Now, indeed, by the 9 Geo. 4,

(*x*) See Lord Hardwicke, Glyn *v.* Bank of England, 2 Ves. 241. I wonder this case is not more quoted.

c. 14, s. 3, it is enacted, that no indorsement on any note, bill, or writing, written by or on behalf of the person to whom such payment is made, shall be evidence to take the case out of the Statute of Limitations. But the cases of Warren *v.* Greenville, Searle *v.* Lord Barrington, and Price *v.* Lord Torrington, have been followed by a series of decisions which were reviewed with much care in Gleadow *v.* Atkin (*y*); and the result is, that the declarations of a person having peculiar means of knowledge, and having no interest to misrepresent, are admissible after his death; entries made by such a person in the course of his duty, are also then admissible (*z*); in short, that a minute in writing, made at the time when the fact it records took place, by a deceased person, in the ordinary course of his business, is admissible in evidence. I must add, that the distinction raised in the Sussex Peerage case, between declarations made against pecuniary interest, and those made against any other interest, appears quite untenable, and quite unworthy of any one acquainted with human nature (even in this country of tradesmen) or with the principles of jurisprudence.

Lord Hardwicke, in the case of Omichund *v.* Barker, (1 Atkyns), decided, that the deposition of a Gentoo, sworn according to his religion, might be read as evidence in the cause. Lord Coke had, indeed, laid it down, with other equally judicious and enlarged doctrines, "that an infidel (*a*)

(*y*) Gleadow *v.* Atkin, 1 C., M. & R. 425.

(*z*) It has been attempted to narrow this rule by the qualification, that the entries must be against the interest of the person making them. This has received some sanction from a nisi prius decision of Doe *v.* Vowles, 1 M. & Rob. 261, but it can hardly be maintained. The modern cases are, Doe *v.* Robson, 15 East, 33; Higham *v.* Ridgway, 10 East, 109; Middleton *v.* Melton, 10 B. & C. 317; Brain *v.* Preece, 11 M. & W. 776; Doe *d.* Turford *v.* Palteshall, 3 B. & A. 898; Chambers *v.* Bernasconi, 4 Tyr. 531; Poole *v.* Dicas, 1 Bing..N. C. 649.

(*a*) "All infidels are in law *perpetui inimici*, perpetual enemies [for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility] for between them, *as with the devils, whose subjects*

could not be a witness." Coke Litt. 6, b. "Lord Coke," said the Chief Justice Willes, "is a very great lawyer, but our Saviour and St. Peter are in this respect much better authorities." "The first author," said Lord Hardwicke, "whom I shall mention, is Bishop Sanderson, de juramenti obligatione. All that is necessary to an oath, is an appeal to the Supreme Being, thinking him the rewarder of truth and the avenger of falsehood, juris juramentum est affirmatio religiosa . . . . . It is laid down by all writers, that the outward act is not essential; all that is necessary appears in this case, an external act was done to make it a corporal act. The judges and sages of the law have laid it down, that there is but one general rule of evidence, 'the best that the nature of the case will admit.' The rule is, that if the writings have subscribing witnesses to them, they must be proved by those witnesses. The first ground judges have gone upon in departing from these rules, is absolute strict necessity; secondly, a presumed necessity. In the case of writings subscribed by witnesses who are all dead, the proof of one of their hands is sufficient to establish the deed. Where an original is lost, a copy may be admitted,—if no copy, then a proof by witnesses who have heard the deed; and yet it is a thing the law abhors, to admit the memory of man for evidence . . . . . It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking, and does not at all affect the conscience of the person administering it, nor does it in any way adopt such religion" (*z*).

The downfall of Sir Robert Walpole gave rise to vehement discussions, as to the propriety of a bill to indemnify the witnesses against him for their share in the guilt, which they were called upon to discover. I have already stated my opinion

they be, and the Christian, there is perpetual hostility, and can be no peace. And herewith agreeth the book in 12 Hen. 8, fol. 4, where it is holden that a Pagan cannot have or maintain any action at all." Calvin's case, Coke Rep. vol. 4, p. 1, Fraser's ed.

(*z*) See Bentham's Tract, "Swear not at all."

of the character of this able minister. Nobody can question the coarseness of his nature or the services he rendered to the House of Brunswick, at the expense of that public morality, for the loss of which a government of Phocions would be too poor a compensation. Nor will any one, not blindly credulous, suppose that the public good was at all the motive of the Yorkes and Pulteneys, his false friends and his bitter enemies. The moment they had overthrown his power (*a*), they quarrelled about the spoil. That he had incurred the penalties annexed by the letter of the law to corruption, was manifest; but these penalties were contrived only to impose on the people, and no public man of that day really believed integrity possible. Nicholas Paxton (*b*) was Solicitor to the Treasury during the transactions inquired into. On being asked as to advances of money by him, he answered, "I will not answer that question, as it tends to accuse myself." The committee appealed to the House of Commons, and, accordingly, a bill was brought in to indemnify any witness who, being examined by the committee, shall truly and faithfully discover, disclose, and make known any matter touching the corrupt and illegal disposition, by Sir Robert Walpole, of money voted by Parliament. The bill passed the Commons by a majority of 214 to 186, and was lost in the Lords by 109 to 57,—Lord Hervey and Lord Carteret speaking against the bill; the Duke of Argyle and Lord Chesterfield in its favour. After this, it was evident that the whole proceeding was a mockery, and that the motive of Sir Robert Walpole's adversaries was personal, not public,—the love of power instead of the hatred of corruption. The pro-

(*a*) This was the time

"When Sands in sense and person queer,
Jumped from a patriot to a peer;
No mortal yet knows why;
"When Pulteney trucked the fairest fame,
For a right honourable name
To call his vixen by."

(*b*) "'Tis all a libel, Paxton, Sir, will say."

ceeding against the obnoxious minister dropped; and in this, as in every other political struggle, from the days of Charles the Second to 1830, the shrewd remark of Sir W. Temple was verified, as might be expected in a country where the human intellect is considered as a gland for the secretion of money: "I have observed all set quarrels with the age, and pretences of reforming it by their own models, to end like the pains of a man in a little boat, who tugs at a rope that is fast to a ship; it looks as if he resolved to draw *the ship to him*, but the truth of his meaning is, *to draw himself to the ship*, where he gets in when he can, and does like the rest of the crew when he is there." A very able protest was drawn up on this occasion, which bears evident traces of Lord Bolingbroke's composition. The reader will find it in the Appendix.

The case of Elizabeth Canning, in 1754, illustrates the inveterate tenacity of popular prejudice. This girl, by the most flagrant perjury, had endeavoured to destroy two women, named Squires and Wells, from whom she never had received any injury or offence whatever. Canning had disappeared from home for four weeks, and in order to retrieve her character, she swore that she had been seized upon, carried to a house of ill fame kept by Wells, and there robbed by Squires, a gipsy woman, on which evidence Wells and Squires were capitally convicted, and were left for execution. In consequence of the entire retractation by a witness, Virtue Hall, of what she had been induced to say, suspicion was excited, and the women's lives were saved. The features of Squires were so peculiar, that to mistake her was impossible. "Look well at this face," she said to Canning at the trial, "for God Almighty never made such another." Elizabeth Canning was afterwards tried for perjury committed on this occasion, and found guilty on the clearest evidence. Not only did Squires prove, by witness after witness, that she was elsewhere at the time when Canning fixed the robbery, but the girl's own evidence was full of contradictions, and inconsistent with the laws of Nature.

Yet the populace took her part; and the Court, absurdly constituted as it was, for she was tried at the Old Bailey, divided upon her sentence,—the judges voting for transportation, and six aldermen for a milder punishment (*c*).

The case of Goodere, who was executed for the murder of his brother, Sir John Goodere, was tried before a wise and upright judge, afterwards Mr. Justice Foster, and then Recorder of Bristol. The good sense, firmness, humanity, and learning of this excellent magistrate, display themselves throughout this extraordinary investigation, and furnish a striking contrast to the general bearing and conduct of the judges of this and a later period. I cannot help looking upon the event itself, and the mode of its commission, as a proof of the depravity peculiar to the age, and of the impunity which was becoming common for the most enormous crimes. The prisoner was captain of the Ruby sloop of war, then lying in the port of Bristol. He seized upon his brother in broad daylight in the streets of Bristol, and carried him on board his ship, where he was murdered by two accomplices, while the prisoner guarded the door. The humanity of the judge displayed itself, in at once postponing the trial on the evidence of the physician. At the trial, the witnesses for the prosecution were, at the request of the prisoner, ordered out of Court. The prisoner endeavoured to prove that he was, after his brother's death, a baronet, and that the indictment, which did not so describe him, was bad.

"It is a great mistake to say, that it is necessary to set forth in the indictment the addition of the person on whom the offence is supposed to be committed. The law requires no such thing, and the prisoners suffer no manner of inconvenience by leaving out the addition; because, on this indictment, if they should happen to be acquitted, or should be convicted of homicide under the degree of murder, they may plead that

(*c*) Foote brought the cross-examination of Willes, one of the counsel on this trial, on the stage. "Was the toast buttered on both sides?"

acquittal or conviction in bar of a second prosecution for the same fact, with an averment that the party mentioned in both indictments, though under different descriptions, was one and the same person. It is sufficient that the deceased is described by his Christian name, and the surname by which he was commonly called. The question proposed to the witness is improper, for it is not at all material in the present case whether Sir John was a baronet or no. I would not deny the prisoners any advantage they are by law entitled to, but I cannot admit of evidence which can serve only to amuse" (*d*).

Foster's summing up was excellent. It appears from it that the law of murder, and the law of evidence in criminal proceedings, stood very much, if not entirely, as it does now. He told the jury, that if Goodere stood at the cabin door in order to prevent any person coming who might have prevented the murder, or to encourage those within the cabin, he was guilty. A confession of Mahony, one of the prisoners, had been put in. "This, gentlemen, is very proper evidence, and ought to have its weight with you as far as concerns Mahony; but with regard to Goodere, you are to lay no manner of stress upon it; it is no evidence against him." Another question had been made, as to whether the place where the Ruby lay, on board of which the murder had been committed, was within the county of Bristol. "I think, indeed, some evidence was proper to be given for your satisfaction of that kind, and to that end, they have called two ancient officers, and they say, that King's road has always been returned within the county of Bristol; and they go farther, and say, that they have constantly, as occasion required, executed process of all kinds in the King's road,—warrants from the mayor and aldermen, process from the mayor and Sheriffs' Court, and warrants directed to the sheriffs of Bristol; and, gentlemen, I must say, that though another sort of evidence might have been given touching the bounds of this county by water, I know no

(*d*) State Trials, vol. 17, p. 1625.

evidence so proper as the constant exercise of jurisdiction in the place in question, where that sort of evidence can be had."

"You observe, gentlemen, the indictment charges that he was present, aiding and abetting the murder; and, therefore, however instrumental you may suppose him to have been in procuring the death of Sir John, by carrying him on board and treating him there in the manner you have heard, yet, if you have not evidence to induce you to believe that he was present, aiding and abetting at the murder, he will not be guilty on this indictment. But, gentlemen, you must not be deceived by the mere sound of words. It is not necessary, in order to render a person guilty as a principal in murder or other felony, that he should be in the same room, or on the very spot where the fact is committed, or even in sight or hearing of it: if he be engaged in the design, and posts himself at the time of execution in a proper station to give assistance, if need be, or to prevent a surprise, whereby the persons actually committing the fact are encouraged in the perpetration of it, he is in the eye of the law present, aiding and abetting, and equally a principal in the fact with those who actually commit it. An instance or two may make this rule better understood.—If several persons agree to commit a murder on the highway, or in the open fields, and one party of them undertakes to see the fact committed; the others disperse themselves to their several stations, and stand upon the watch to prevent a surprise: they are all equally guilty, and in the eye of the law present at the fact. So, if a number of people agree to commit a murder, and to that end break into a house, and then disperse themselves into several rooms; or if any of the company stand without, and keep the door while the murder is committed within, they are all equally guilty, and in the eye of the law present. Nay, though the original intention might be barely to commit a robbery, yet, if in prosecution of that design a murder is committed, the whole company, those who stood upon the watch, as well as

those who committed the fact, are all equally guilty, and principals in the murder. And, therefore, gentlemen, if, upon the evidence which has been given, you believe that the prisoner Goodere did stand at the door of the purser's cabin while the murder was committed, in order to encourage those within in the perpetration of the fact, or to prevent any assistance which might have come, you must find him guilty."

In the case of Timothy Murphy, where an attempt was made by an attorney, named Goddard, to put an innocent man (Nooks) to death, for a crime which Goddard's client had committed, an endeavour was made to exclude the evidence of Nooks, as the person falsely accused, in the prosecution of the real offender. In this case the objection was at once and peremptorily overruled, and the reasoning of Mr. Pratt, afterwards Lord Chief Justice, entirely adopted by the Court: "This I take to be a clear maxim and ground of law, and universal, that every man in this kingdom is a competent witness on behalf of the Crown, unless he is convicted or attainted of some scandalous offence," &c.

So the evidence of the accomplice in the crime of forging a will was admitted to prove, that he had forged the will by the prisoner's direction. * In this case, as the character of the witness had been assailed, it was held that witnesses might be called to establish it.

In the trial of McDaniel and others, the law as to accomplices is admirably laid down by Mr. Justice Foster. Mr. Hume Campbell cited the instance of Tarquin (liv. 1. 54), as of an accessory before the fact. Pedantry could go no further. A question had been made as to the evidence of fear; Mr. Justice Foster says, "Suppose a man stunned before he is aware, supposing him overpowered after a desperate resistance, is the robber to escape? The law will presume fear 'in odium spoliatoris,' an expression borrowed from the Canon law."* If such manly sense were common in 1836, in our judicial investigations, felons would not have been allowed to

escape, because the word wilfully or the word feloniously was left out of the indictment. It deserves to be mentioned, however, as an instance of the enlightened and philosophical principles on which justice was administered in England, that these prisoners, being indicted afterwards for a conspiracy of which they were convicted, were sentenced to the pillory; in which one of them was killed on the spot, and another so dangerously wounded by the brutalized rabble that his recovery was judged impossible. The punishment of the pillory was not, however, abolished, but was still suspended over the heads of those who wrote against the Government. De Foe (*c*) and Shebbeare (*d*) both underwent it, for writings not nearly so acrimonious as those of Swift; Horne Tooke might have suffered it: and it was reserved for Lord Ellenborough to inflict on his political adversaries. If we combine this punishment, which left the fate of petty offenders to the discretion of the lowest ruffians, with the prerogative reserved to the hangman, of tempering justice with mercy, or of inflicting, as he actually did on a learned and amiable man, convicted of high treason (*e*) in 1745, the most horrible tortures in the case of more important criminals, we may, perhaps, doubt whether in any country the path of the lower classes was beset with more snares, or, melancholy as it

(*c*) "Earless on high stood unabashed De Foe."
A line more disgraceful to Pope than to its object.

"One of these writers, the fellow who was pilloried, *I forget his name*, is so grave and sententious a writer, there is no bearing him." Swift's Sentiments of a Church of England man. This was De Foe.

(*d*) "De Foes! Shebbeares!
Hark to my call, *for some of you have ears.*"
Heroic Epistle to Sir W. Chambers.

(*e*) In 1817, Sir Samuel Romilly's bill for altering the horrible punishment of high treason, was rejected by a majority of 63, out of 113. This is an excellent proof of the progress of legislation among us. The consequence of our laws was, that in the last century it was safer to undertake a long journey by sea, than to travel ten miles from London. The nation was thoroughly demoralized. "If I am to be assaulted, pillaged, and plundered,—if I can neither sleep in my house, nor walk in the streets, nor travel in safety, is not my condition equally bad, whether a

is to confess the disgraceful fact, whether ignorance of all that it was most incumbent on them to know, and indifference to the well being of those over whom it was their immediate duty to watch, ever displayed itself more unequivocally among any legislators, than those to whom, during three-fourths of the last century, the interests of this country were committed (*f*).

This country presented the contrast of the evils that result from excessive corruption in one class, with those which the lowest brutality alone could generate in the other. The upper classes were corrupt, without refinement; the middle gross, without good humour, and the lower brutal, without honesty (*g*). And as I have reached the period to which this testimony applies, I will now quote the words of a man who was himself a lawyer, and an active magistrate, as well as a man of comprehensive thought, and almost unequalled knowledge of human nature. Fielding ascribes (and, I doubt not, with great truth) the increase of crime to the absurd laws of evidence. "There is no branch of the law," he says, "more bulky, more full of confusion and contradiction, I had almost said absurdity, than the law of evidence as it now stands. One rule of this law is, that no man interested shall

dragoon or a robber be the person who assaults and plunders me." Fielding's Increase of Robbers, vol. 10, p. 349. Shaw dwells on the miserable condition of the poor at this time, and doubts whether to ascribe it to the "natural inbred cruelty of the English, for which we are so famous," or the intolerance of our sects. Fielding admits our inhospitality to foreigners, and the scandalous condition of the poor. Vol. 10, p. 376.

(*f*) See Fielding's Works, vol. 10, p. 10.

A modern glossary:—

Judge, Justice. } An old woman.

Knave . . The name of four cards in every pack.

Patriot . . A candidate for a place at Court.

Riches . . The only thing on earth that is really desirable.

Virtue, Vice. } Subjects of discourse.

(*g*) See the Chapter on Hats, in Fielding's Jonathan Wild, which is worthy of Lucian or Cervantes.

be sworn as a witness. By this is meant *pecuniary* interest (we might suppose he had just been reading the Sussex case); but are mankind governed by no passion but avarice? Are not pride, hatred, and the other passions, as powerful tyrants in the mind of man? And is not the interest which these passions propose to themselves, by the enjoyment of their object, as powerful a motive to evil as the hope of any pecuniary interest whatever" (*h*)?

(*h*) Fielding's Amelia, Chap. 2. But the fourth of the same work contains a picture still more hideous of our institutions, which, for the lower classes, must have been almost the worst in Europe. "The case of this poor man is unhappy enough. He served his country, lost his limb, and was wounded at the siege of Gibraltar; he was apprehended and committed here on a charge of stealing; he was tried and acquitted,—indeed his innocence manifestly appeared at *the trial*,—but he was brought *back here* (jail) FOR HIS FEES, and here he has lain ever since." Is not this as bad as the lettres de cachet, and the Bastille, and the Inquisition?



CHAPTER VIII.

FROM LORD MANSFIELD TO THE PRESENT TIME.

"We do *not* sit here to take our rules of evidence from Siderfin and Keble." Lord Mansfield.

"We *do* sit here to take rules from the Year Books." Meeson and Welsby's Exchequer Reports, vol. 16, *passim*.

"Allargare la maniera."—*Inscription on Titian's Studio.*

THE greatest evils of the English law would have been mitigated, and the barriers between equity and common law have been silently removed, if Lord Mansfield had been succeeded by judges as enlightened, and, where the Crown was not concerned, as liberal as himself. From the study of the Roman law, of which he had acquired a deep and accurate knowledge, he had gained the habit of referring the cases, on which he was obliged to decide, to the master principles of jurisprudence, which, before his time, and long after it, were literally without effect or signification in our Courts of law. In the same school, he had also learnt to consider the maintenance of substantial right, as the chief aim to which the efforts of a judge ought to be directed, a disregard of forms that were not subservient to this great purpose, and a thorough contempt and abhorrence of the clumsy subtilties and stupid devices which the pedantry, corruption, ignorance, and dulness

of his predecessors had spread before the divine and resplendent countenance of justice, as a thick curtain, through the folds of which, accumulated by the misplaced toil of ages, if any flashes of light emanated, at intervals of centuries, they served only to shew the trifles and horrours with which her sanctuary had been profaned. For these idols of the den, which, instead of the deity herself, had become the objects of popular adoration, he lost no opportunity of exhibiting his aversion and disdain. After mentioning a preposterous decision of Flemings, the successful rival, be it observed of Lord Bacon (*a*), that "*from* the date," *in*cludes the day of making a deed; and "from the day of the date," *ex*cludes it, and a decision of Lord Coke's, that both meant exactly the same thing, and both were exclusive, he continues, "So it stood till the 24th of Charles the First . . . . . at that time, the sense of mankind began to revolt at such a doctrine," and after tracing the progress of absurdity, he says, the "decisions were grumbled at, as against the common sense of mankind, against convenience, and against justice, and founded upon subtleties (*b*), that even the schoolmen would be ashamed of." To a reader of the present day, this language is rather prophetic, than historical. He proceeds, as if he had just risen from perusing the decisions in the Privy Council on the Will Act, "For Courts of justice to determine words against the intention of the parties, and against the generally received sense and acceptation of the words themselves, is laying a snare to entrap mankind. Usage decides upon the force of language, and, with respect to this word, (from), has imprinted on the understandings of men in general, in their transactions in life, the sense that I now put upon it, while Courts of law understand it in a totally different sense."

"Thus stood all the authorities down to the year 1743, a period of two hundred years—not much to the honour of the

(*a*) Pugh *v.* The Duke of Leeds, Cowper, p. 721. His judgment is worth a Chancery Lane full of Term Reports.

(*b*) What would he have said of Meeson and Welsby?

learned in Westminster Hall, to embarrass a point which a plain man of common sense and understanding would have no difficulty in construing."

In Doe *dem.* Goodright *v.* Moss, reported in Cowper, Lord Mansfield laid it down, that the general declarations of a parent, on the answer of a parent in Chancery, are evidence after the death of such parent to prove that a child was born before marriage, but not to prove that the child born during wedlock was illegitimate. The first of these rules was carped at and narrowed by the cloud-compelling Eldon, in the Berkeley Peerage case (*c*), on which occasion a most unphilosophical opinion was delivered by Mr. Justice Lawrence (*d*). The rule, as it now stands, must be so qualified that such declarations are admissible, if made "ante litem motam," but inadmissible, if made afterwards. The rational doctrine, of course, would be, that the declarations should, in all cases, be admissible after the parent's death, but that the circumstances which make such declarations suspicious, should be left to the consideration of the judges or the jury; but it is not in the days of colour and special demurrers that we can expect this doctrine to be established.

(*c*) 4 Camp. 409.

(*d*) Mr. Justice Lawrence says, "The authorities being thus balanced," (what a condition of law on such a point in the nineteenth century!) "the point must be considered *without any decision!*" Then, he says, the declarations ought to be excluded, "because fabricated letters were given in evidence in the Douglas cause, and false declarations in the Anglesea cause." By parity of reason, because witnesses perjure themselves in the case of Caius, no witnesses are to be heard in the case of Titius. This is the true empirical reasoning of our legislators. It is paying too high a compliment to it, to call it the fallacy of an incomplete induction; it has not even the semblance of an induction. Thomas cheated me, and has red hair, therefore all red haired men are cheats. Again, the argument from the Douglas and Anglesea cases, proves directly the reverse of what it was cited to establish, for in neither case did the forgeries mislead,—they were detected and unsuccessful. Therefore the danger of admitting such evidence, because it may be false, is less than that of excluding it if it may be true.

The next of these rules is still law; "it is a rule founded in decency, morality, and policy, that parents shall not be admitted, after marriage, to say that they have had no connection, and, therefore, that the offspring is spurious, more especially the mother, who is the offending party."

In Abbott *v.* Plumbe, Lord Mansfield was compelled to uphold the technical doctrine, that the admission of the defendant (the obligor), that he has signed the bond on which the action is brought, is not sufficient proof of his signature, if there is a subscribing witness, but that the subscribing witness must himself be called. "To be sure," he said, "this is a captious objection, but it is a technical rule, that the subscribing witness must be produced, and it cannot be dispensed with, unless it appear that his attendance can be procured." This rule, which is at variance with common sense and experience, is still the law, and has been maintained by several decisions; it has been relaxed in the United States(*e*). But in Coghlan *v.* Williamson, he held, that if the handwriting of the defendant to the bond was proved, and the subscribing witness was beyond the jurisdiction of the Court, it was sufficient, and this decision was upheld.

In Hotham *v.* The East India Company, which is now overruled(*f*), Lord Mansfield said, in an action on a charter-party, "The charter-party is an old instrument, informal, and, by the introduction of different clauses at different times, inaccurate, and sometimes contradictory; like all mercantile contracts, it ought to have a liberal interpretation. IN CONSTRUING AGREEMENTS I KNOW NO DIFFERENCE BETWEEN A COURT OF LAW AND A COURT OF EQUITY; a Court of equity cannot make an agreement for the parties, it can only explain what their true meaning was, and that is also the duty of a Court of law."

"I care not," said Lord Mansfield, "for the supposed dicta

(*e*) Hall *v.* Phelps, 2 John. Rep. 451; Fitchorn *v.* Boyer, 5 Watts, 159.
(*f*) Thompson *v.* Brown, 7 Taunt. 756.

of judges, if they are contrary to all principle; they are, probably, misreported, and are, at all events, to be disregarded." And in Mostin *v.* Fabrigas, where one of the questions argued was, whether in any case an action could be maintained here for an assault at Minorca, Lord Mansfield said, "there is a formal and a substantial distinction as to the locality of trials. I state them as different things, the substantial distinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in a wrong place. That is the case of all ejectments." "There are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad, as in the case of specialties, where the date must be set forth. If the declaration states a specialty to have been made at Westminster in Middlesex, and upon producing the deed it bears date at Bengal, the action is gone, because it is such a variance between the deed and the declaration, as makes it appear a different instrument. But the law has invented in that case a fiction, and has said the party shall first set out the description truly, and then give a venue for form only, and for the sake of trial in the county of Middlesex, or in any other county. But no judge ever thought that when the declaration said in Fort St. George, to wit, Cheapside, that the plaintiff meant it was in Cheapside; it is a fiction of form, and it is a certain rule, that a fiction of law shall never be contradicted so as to defeat the end for which it is invented, but for any other purpose it may be contradicted (*g*). . . . . I am sorry to observe

(*g*) This is admirable sense, and directly the opposite to our practice, as may be seen in Bauerman *v.* Radenius, 7 Term Rep. 663, a miserable proof of the narrowness of our Courts of law, directly overruling the salutary principles of Lord Mansfield, and allowing a fiction of law to destroy justice altogether. The puerile and mischievous doctrine, that a Court of law will not take notice of an equitable right, so characteristic of Lord Mansfield's successors, is too absurd even for the age of the New Rules, in some cases. In Lamb *v.* Vice, 6 M. & W. 467, the Court took notice of an equitable right; and Lord Abinger stated another case, in

that some sayings have been alluded to inaccurately taken down, and improperly printed, where the Court has been made to say, that as men they have one way of thinking, and as judges another, which is an absurdity." He then proceeds to enumerate different cases in illustration of his doctrine, and ends by saying, "as to transitory actions there is not a colour of doubt, but that every action that is transitory may be laid in any county in England, though the matter arises beyond the seas; and when it is absolutely necessary to lay the truth of the case in the declaration, there is a fiction of law to assist you, and you shall not make use of the truth of the case against the fiction, but you may for every other purpose." Again, in a case where the plaintiff refused to produce a deed which he had in Court, Lord Mansfield insisted upon this, which many a judge would have said furnished no inference (and which in that very case Justice Yates did say) of the sort, as decisive against his claim. "The want of notice was no objection in this case, because they had the deed in Court; the refusal to produce it was an unfair attempt to recover, contrary to the real merits, and being a deliberate refusal by the advice of counsel, contrary to the recommendation of the judge, warranted the strongest presumption that the deed would shew that neither of the lessors of the plaintiff had any title." Lord Mansfield said, "that in civil cases the Court will force parties to produce evidence which may prove against themselves, or leave the refusal to do it as a strong presumption to the jury." So in an action for bribery, a voter, where three objections were made on behalf of the defendant: one, that it was not sufficiently proved that the voter had a right to vote when the bribe was given; a second, that there was no evidence that the person for whom the bribe was given was a declared candidate; and a third, that the

which mere shame must compel it not to keep its eyes closed against the truth. See Sims *v.* Thomas, 12 A. & E.; Boyd *v.* Mayles, 16 M. & W. 337. See also Damaye *v.* Chesneau, 13 M. & W. 796.

evidence only proved that the bribe was given to vote for Mr. Locker and his friend, without stating who the friend was. Lord Mansfield said, "I have no doubt as to any of the three objections that have been made; in penal actions, the material fact must be charged, and a fact must be proved, in such a manner that all those consequences will follow a verdict which ought to attend it. But aggravations, and all circumstances that do not vary the offence, are out of the case as to the necessity of proving them. A man who has given money to another for his vote shall not be admitted to say that such other person had no right to vote! Candidate is a vague term: no certain idea is fixed by law to it; but Mr. Lockyer was certainly a candidate, and this was a bribe to induce White to vote for him at least. Surely asking a vote for a man is enough to make him a candidate. Lockyer was clearly a candidate himself, and the bribe was to vote for him and his friend. The bribing to vote for one or both of these persons is criminal within the act, and if proved is sufficient, and here it is proved." In another part of this chapter I shall have another opportunity of tracing the law as to entries from Lord Mansfield's decisions, to which I have already adverted, in commenting on the case of Warren *v.* Greenville: but I will mention here the case of the King *v.* Morris, which is still law, and in which Lord Mansfield held, that in an indictment for perjury in an answer to a bill in Chancery, the fact of the defendant's swearing might be proved by evidence of the Master's handwriting to the jurat, and that it was unnecessary to call the Master himself for that purpose.

I now come to a case which, to the scandal of our jurisprudence, has been overruled; though I still hope, for the honour of the Bar, that such a triumph over reason will not be considered final. I allude to the case of Wright (*h*) on the demise of Clymer *against* Littler, in which Lord Mansfield admitted evidence of the dying declarations of a witness that he had

(*h*) 3 Burr. 1244.

forged a bond. Inconceivable as the narrowness of our judges often is, and shocking as the consequences are to which it leads, I do not know any case, from Lord Coke downwards, in the whole disgusting series of judicial bigotry, that exemplifies it in a manner more humiliating than that of Stobart *v.* Dryden (6 Mees. & Wels.), in which this case was overruled; and which, as I shall remark upon it presently, I now pass over without a more extended commentary.

Of the Douglas cause, in which Lord Mansfield took so great a part, "satius est silere quam parum dicere," I say, with unfeigned distrust of an opinion opposed to my Lord Campbell's, that, as far as I can judge, Lord Mansfield espoused the wrong side in this controversy. But every student of evidence ought to read the letters of Andrew Stuart, addressed to Lord Mansfield, on this question. Perhaps they have biassed me too much. If the facts stated in them are true, and I never heard them disputed, it appears to me that the conclusion to which they point is not to be avoided. But whichever side the reader may embrace on a question that may now, one would hope, be dispassionately considered, he cannot refuse his admiration to the performance that I have quoted.

In the case of Perrin *v.* Blake, if the object of law be to carry into effect the wishes of a testator, Lord Mansfield is right; if the object be to substitute the miserable whimsies of barbarous, contracted, and worse than illiterate pedants, every word of whose judgments shews the most absolute ignorance (an ignorance arising from the defect of the understanding, and carefully improved by all that could make that defect inveterate and incorrigible) of the rudiments of jurisprudence, —for plain sense and clear right, he was wrong. I should be sorry to be thought unjust (if my opinion were of any value) to Lord Mansfield's great antagonist—Mr. Justice Blackstone. Would to God that the grace, and ease, and perspicuity of his style had more admirers and imitators among us! Our literature would hardly then be in its present abject state. In

his days the tradition of the Souths and Atterburys had not given way to the mechanical drudgery of cramming; and Oxford, if she did not teach the student to think, at least taught him how to write. But since the present system has prevailed, she has not produced any one who can do either. "Sapere et fari" are alike unknown to the present system. Bad prose writers (*g*), bad verse writers, bad historians, worse preachers, are its growth. Its flowers are without roots; it has begun, continued, and, if it lasts till the end of time, will end in mediocrity in all but folly; mediocrity sometimes aiming at distinction by preposterous superstitions, sometimes

(*g*) The scholarship of the Hollands (last Lord), Carlisles (the last Earl), Cannings, Dudleys, and Coplestones, was of a different kind from the narrow casuistry, and affectation, and poverty of thought and style, which now prevail. They transferred some portion of the spirit of what they read to their speeches and writings, without which the study of classical writers is no more useful than the perusal of so many Turnpike Acts or tickets, which might equally well be the subject of University examinations; nay better, for to read great and beautiful writers incessantly, without any other but a mechanical object, without catching or wishing to catch the slightest spark of their genius, makes all future improvement in taste and style hopeless. When such cordials are used in youth without effect, the system is paralysed, and the man (though you may call him* by any name you please,—poet, orator, historian), incurable. Hence quotations from Leviticus and the Fathers in the House of Commons on questions of legislation. Hence sermons that evacuate churches.

"And worse than all, with all the cant of wit,
Without the soul, the muses hypocrite."

Verveless, tedious, vapid, affected circumlocution, in sentences where the conventional language of poetry and good writers is so used, as to make the reader wish to exchange it for the worst. "Un artiste," says Montaigne, "témoigne bien mieux sa bêtise en une riche matière." Is it possible to read Fazio, or Belshazzar's Feast, without exclaiming with Alceste,

"J'aime mieux ma mie,—oh Gai,
J'aime mieux ma mie."

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* "Nanum cujusdam Atlanta vocamus
Æthiopem Cygnum—parvam extortamque puellam
Europen—canibus pigris
. . . . . .
Nomen erit Pardus, Tigris, Leo."

content with the insignificance of all around it. Nor are Blackstone's merits those of a great writer only. He was an admirable scholar, by which I do not mean the modern definition—a man who writes Greek Iambics for the same liberal purpose that a grocer sells figs (*h*), till he is four and twenty, and never opens a Greek or Latin author afterwards. Nothing can be more felicitous than the illustrations he draws from general history, of which it is evident he was a consummate master. And his views were far more liberal than it is the fashion to suppose. He censures the multiplication of capital punishments with great severity, and repudiates (Oxonian and Fellow of All Souls as he was) the slavish doctrines of Divine right and passive obedience, which even some Whigs are now beginning to countenance, with becoming scorn and indignation. "Verumtamen hoc dico de toto genere," of accomplished English lawyers, and of Blackstone in particular, "tribuo illis litteras, do multarum artium disciplinam, non adimo sermonis leporem, ingeniorum acumen, dicendi copiam;" but philosophy and jurisprudence "nunquam ista natio coluit totiusque hujusce rei quæ sit vis quæ auctoritas, quod pondus, ignorant." To compare therefore Blackstone with Lord Mansfield, on a matter of jurisprudence, is ridiculous. It would be almost as absurd as to compare Lord Eldon, or any other pettifogger, raised by the knowledge of our barbarous law, and ignorance of everything else, to distinction,—with De Thou, L'Hôpital, or D'Aguesseau, or any other judge who, instead of prolonging and exasperating the miseries of his fellow citizens, and opposing every step of civilization, has advanced the good and happiness of mankind. "It would be strange," said Lord Mansfield, "to say to the testator,—now you have communicated your intention, and everybody understands what you mean, yet, because you have used a certain expression of art, we will cross your intention and give your will a different construction, though what you meant to do is

(*h*) Greek Iambics, said Porson, to be good for anything, must be a cento, and then they are good for nothing.

perfectly legal, and the only reason for contravening you is because you have not expressed yourself as a lawyer. My examination of this question always has, and I believe ever will convince me, that the legal intention is, when clearly explained, to controul the legal sense of a term of art unwarily used by the testator . . . . I do not doubt that there are, and have been always, lawyers of a different bent of genius and different course of education, who have chosen to adhere to the strict letter of the law, and they will say that Shelley's case is an uncontroulable authority; and they will make a difference between *trusts* and *legal estates*, to the harassing of a suitor: but if the Courts of law will adhere to the mere letter of the law, the great men who preside in Chancery will ever discover new ways to creep out of the lines of law, and will tamper with equity." I must say that Blackstone's argument (*i*), though admirably expressed, on the opposite side, is conclusive to my mind in favour of Lord Mansfield's view; nor do I believe that Swift himself could have written a more bitter satire on English law, than every man who has studied jurisprudence will perceive in the following words: "The law of real property in this country is now formed into a FINE ARTIFICIAL SYSTEM, full of UNSEEN connections" (how delightful for landed proprietors!) "and NICE DEPENDENCIES, and he that breaks one link of the chain endangers the dissolution of the whole"!!! Now this is much the same as to say, "You shall not perform the most ordinary duty,—you shall not move in the distribution of your estate, without danger of mistake. *Unseen* pitfalls are round you on all sides; the greatest dexterity, the utmost caution, are requisite to avoid the snares with which the law has taken care to beset your path." And this is supposed to be a panegyric on our institutions. A surveyor who, when a smooth open plain was

(*i*) Thellusson *v.* Woodford, 4 Ves. 329; Vauchamp *v.* Bell, *contrà*, Madd. & Geld. 343; Williams on Executors, vol. 2, p. 326. "Where the intention of the testator is plain, it will controul the operation of words, however technical."

before him, was to take credit for making his road as narrow and winding as possible, and for carrying it among precipices and deep waters, where a wrong step would insure the annihilation of the traveller, would act with exactly the same respect for the understanding of mankind. Imagine a shipwright boasting that he had constructed a vessel, in which hundreds of passengers were obliged to sail, in such a manner that it was barely possible for a most expert and dexterous navigator, aided by the most favourable weather, to escape shipwreck in her, and you have Blackstone's notion of judicious legislation.

The case of Johnson *v.* Smith, (2 Burr.), exemplifies the ideas with which Lord Mansfield was imbued, and which he endeavoured to introduce among us. The point upon which the judgment turned, was this:—By the practice of the Court, a fictitious date was sometimes given to writs; they were dated (tested) as if they had issued earlier than in fact they did; they were part of the record; and a record, says my Lord Coke (which, when he wrote, was an almost uniform mass of impudent falsehoods), imports absolute verity. Now, the defendant would succeed, if he might be allowed to shew the real times when the writ issued in contradiction to the record, and that the record, whatever verity it might import, was, in this instance, false. The plaintiff, on the other hand, succeeded, if he could seal up the defendant's mouth, and prevent him from disputing this fictitious statement; if, in short, proof could not be received to establish the truth—the investigation of which is the sole object of Courts of justice. Lord Mansfield decided that the true date might be shewn. "The Court would not endure that a mere form or fiction, introduced for the sake of justice, should work *a wrong*, contrary to the real truth and substance of the thing." "It was due," he said, "to the great and long litigation, which this question has undergone in Westminster Hall, to consider carefully everything that has been said, and to look into every case and authority

that has been quoted on the other side: I have done so; and upon the most minute examination am not able to find any principle of law, determination or authority, which contradicts the proposition I have endeavoured to prove,—that when the true time of suing out a *latitat* (the writ in question) is material, it may be shewn notwithstanding the date. The arguments against allowing such averments are drawn from rules and cases, the reason of which is not the same, though they bear a seeming similitude of sound. The reason why nobody shall be permitted to aver that a judgment was signed after the first day of Term, is because the fact is not relevant. The legal consequences do not depend upon the truth of the fact on what day the judgment was completed or the writ sued out, but upon the rule of law, that they shall be deemed complete, and bind, to all intents and purposes, by relation. The moment the law said judgments should bind purchasers only from the signing, it followed, that in the case of purchasers, the time of signing might be shewn."

If such doctrines had prevailed, men would not, in the nineteenth century, have lost their cause, because a pleader said that they were ready to do so and so, instead of saying that they were ready and willing to do it, nor because their pleader had used a denial called a negative pregnant; nor would the reason of mankind have been affronted by hearing the doctrine of "giving colour," the rankest growth of infatuated barbarism, gravely propounded in a Court of justice. But, unfortunately, they did not prevail; no sooner had the lawyers got rid of Lord Mansfield, than (like the Hottentot who, after a residence in England, was restored to his native country, and instantly stripped himself naked, ran to the woods, smeared himself with oil, put on a necklace of garbage, and associated with oran outangs), they returned with as much haste to their old barbarities, as after the restoration of the Stuarts they did to their Latin indictments and Norman French reporting. Thus the darkness returned, and settled over our Courts

of law thicker and heavier than before. The great object of Lord Mansfield's successors was to undo all that he did, to bind what he had loosened, to raise the obstacles he had levelled, and to create the confusion he had dispersed. Instead of allowing the common law—according to his beautiful expression—to work itself pure by rules drawn from the fountain of justice, they employed themselves in poisoning the scanty and hardly perceptible rivulet from that source, which faintly strayed among their parched inhospitable sands, with fresh infusions of chicane. But men may be judged of by their enemies as well as by their friends; and the eulogium (*k*) of Burke is scarcely more honourable to Lord Mansfield than the sneers and vituperations of the Eldons and the Redesdales.

I rejoice that my subject does not call upon me to dwell upon the political conduct of Lord Mansfield, which, indeed, too frequently presents a complete contrast to that of his judicial history.

"The statesman we abhor, but praise the judge."

Even there, however, his liberal notions of trade, and comprehensive views of toleration, fling no inconsiderable lustre over an otherwise dark and gloomy surface, and shew his great superiority to his competitors, wherever the inherent and hereditary love of absolute power, and of passive obedience, does not interfere with the exercise of his powerful and highly cultivated intellect. For the doctrine reserving in cases of libel the question of motive for the judge, Lord Mansfield is not altogether responsible. He received it from his predecessors, especially from Lord Raymond, one of those respectable, laborious, ill-read, narrow minded, and accurate men, whom England delights to honour. But if he had exerted in behalf of the liberty of the Press, one-third part of the courage which he displayed in breaking through the

(*k*) Report of Committee on trial of Warren Hastings.

trammels with which his predecessors had enveloped every organ of justice, or rather, if on this occasion he had not affected that reverence for traditional absurdity, which on other points he so carefully repudiated, his reputation as a judge would have been immaculate, and he never would have given Lord Camden (*l*), a man as inferior to him in knowledge and abilities, as he was superior to him in probity and the love of freedom, an opportunity of humbling him to the dust. But let us not dwell on the infirmities and faults of genius. Lord Mansfield's name deserves to be had in honour (*m*), by all who think with shame and sorrow on the scandalous condition of our law, and on its pernicious effects, for which no rank or wealth can compensate, on the minds of those practitioners who confine themselves to its assiduous and successful cultivation. The daily ruin of suitors, the daily defeat of justice, the daily triumph of chicane,—to sum up all, the "New Rules," which are the immediate and direct consequences of the reign of his antagonists, and of the doctrines that he exploded, are his durable and most glorious panegyric. After his death, the English law was again restored to the evils so powerfully described by Lord Bacon, and so passionately maintained by some of our judges. "*Casus et experientiæ vagæ, et inconditæ* (can Lord Eldon's judgments be better described?) *undis et ambagibus*—et *traditionum caligini*." To be tossed about, without a cynosure, without one fixed anchor, without one "master of its long experiment," on the perilous waves of judicial caprice. "Oras et littora circum."

Few cases have ever excited more interest than the trial of

(*l*) Lord Camden was the uncompromising supporter of the worst abuses in the law. See Bentham's Memoirs, and second Preface to his Fragment on Government.

(*m*) It is as certainly true that Lord Mansfield was the "Lord M." mentioned in the description of Lord Chatham's last appearance in the House of Lords, which Lord Brougham has denied, as it is certainly false that the connection between Madame Du Châtelet and Voltaire was strictly platonic, which Lord Brougham has asserted.

the Duchess of Kingston for bigamy, and none (not even one before the same assembly in modern times) ever placed the formal trifling so dear to this practical country in a clearer light. An august assembly was convened, the public time was occupied, the judges were consulted, the greatest lawyers of the day (Thurlow and Dunning) were employed, the guilt of the accused was proved, she was convicted by the unanimous vote of the nobles who had been called to sit in judgment upon her; and the result was, that, because she was a peeress, no punishment of any kind could be inflicted on the criminal. Such miserable pedantry, such empty form, such solemn mockery, a pageant so useless, such pompous insignificance, such elaborate folly, such a display of the partiality of the law, such a picture of grave futility was altogether suited to a country in which obstacles to justice are multiplied that the law may become an art, in which useless writs are still issued to exact fees from suitors, and special demurrers are still employed to prevent a cause from being decided on its merits. The case, however, deserves attention, both as it illustrates the abject condition of our jurisprudence, and as the absurd objections raised on behalf of the accused were the occasion of a luminous judgment of Lord Chief Justice De Grey, which, by a rare exception, was placed upon a sure and solid basis of principle. The Duchess of Kingston had been first married to Mr. Harvey, afterwards Lord Bristol. In order to set herself at liberty from this engagement she, collusively with Lord Bristol, instituted a suit in the Ecclesiastical Court against him for "jactitation of marriage," that is, a suit in which she complained "that Lord Bristol had falsely boasted that he was her husband, and that she, Elizabeth Chudleigh, (the Duchess), thinking herself injured, aggrieved, and disquieted by reason of the aforesaid boasting of the said Honourable Augustus John Harvey, complained to the judge of the Consistorial Court for a fit remedy." To this suit Lord Bristol made a collusive and fraudulent defence; and judg-

ment was accordingly given, that "perpetual silence as to the premises libellate was enjoined on Augustus John Harvey, and he was admonished to desist from his boasting and asserting that he was contracted to or joined with the said Elizabeth Chudleigh as aforesaid."

The counsel of the Duchess insisted, that this grotesque judgment, given in a collusive suit, instituted for the health of the souls of the parties to it, was conclusive and irresistible proof that the Duchess was not then married to Lord Bristol; that the House of Lords was estopped by it; that no inquiry could ever be set on foot as to whether the judgment was obtained by fraud or not; that the whole world were bound by it; and that the circumstance of the parties to that suit, not being the same as the parties to the suit in the House of Lords; and that the one was a civil, and the other a criminal proceeding, made no difference. Such a tissue of absurdities, such wild extravagance of folly, such an utter denial of all the principles on which human society must rest, was gravely upheld in an argument of two days before the first tribunal of this country, towards the close of the eighteenth century; and instead of expressing scorn, indignation, and surprise, at such an affront to their capacities, the Lords appealed to the judges on the question; nor, indeed, were the propounders of this strange doctrine altogether without authority. There is a case in Strange's Reports, p. 481, of the King against Vincent, which goes the full length of this absurdity. In this case it was gravely determined, in the case of a party charged with a forgery, that a document granted without inquiry on the oath of the very party to whom the forgery was imputed should be a conclusive bar to the prosecution. It was an indictment for forging a will of personal property,—the forgery was proved; but the prisoner produced a probate (*i*), that is, a document

(*i*) This is exactly the case which illustrates Lord Bacon's rule, "Non potest adduci exceptio ejus rei cujus petitur dissolutio." "It were impertinent, and contrary in itself, for the law to allow of a plea in bar of such

obtained on his own *ex parte* oath without inquiry; and it was held, that this was conclusive evidence to shew that he had not forged the will. From the very nature of the proceeding by which the probate had been obtained, it was impossible that any examination into the truth or falsehood of the prisoner's oath could have taken place, and the forgery was thus defended by its success; there was no statement of any trial or inquiry, but merely that the fraud, which the charge was intended to punish, had been successful. This was the voice of the common law, the perfection of reason, as delivered by one of its chief oracles. Armed with this authority, the counsel for the accused deliberately maintained, that a fraudulent and collusive judgment was binding upon public justice. Whether this was true or not, was the question which the judges were called upon to answer; and the Lord Chief Justice De Grey delivered their opinion, "that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and, therefore, the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the Court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers.

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another Court:

matter as is to be defeated by the same suit, for it is included." In fact, the weapon is too clumsy for any armoury but that of an English lawyer, which, though it contains no refined implements of dexterous sophistry, abounds in the rude devices and clumsy frauds of primitive barbarity.

secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment (*k*).

"But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without: although it is not permitted to shew that the Court was mistaken, it may be shewn that they were misled.

"Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal.

"In civil suits all strangers may falsify, for covin, either fines, or real or feigned recoveries; and even a recovery by a just title, if collusion was practised to prevent a fair defence; and this, whether the covin is apparent upon the record, as not essoigning, or not demanding the view, or by suffering judgment by confession or default; or extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas.

"In criminal proceedings, if an offender is convicted of felony on confession, or is outlawed, not only the time of the felony, but the felony itself may be traversed by a purchaser whose conveyance would be affected as it stands; and, even after a conviction by verdict, he may traverse the time" (*l*).

It is remarkable that, in this case, Thurlow commented with great severity on the practice of using written, instead

(*k*) State Trials, vol. 20, p. 538.
(*l*) State Trials, vol. 20, p. 544.

of oral, evidence. "The imperfect and wretched manner in which cross-examination is managed upon paper." He became Lord Chancellor, and yet did not make the least effort to alter the system which he so justly deprecated, and to which the ruin of hundreds,—under Lord Eldon of thousands,—of his fellow citizens might undoubtedly be attributed.

Another case, which establishes the degree of evidence, that affects trespasses, under the supposed authority of law, and which on that and other accounts deserves consideration, is that of Barker *v.* Braham and Norwood, reported in 3 Wilson, p. 368. Lord Chief Justice De Grey laid down the rule to be "that a sheriff or his officers, or any acting under his authority, may justify themselves by pleading the writ only, for that is their sufficient excuse, although there be no judgment or record to support or warrant such writ; but if a stranger interposes, and sets the sheriff to do an execution, he must take care to find a record that warrants the writ, and must plead it, and so must the party at whose suit such execution is made; no trespass can be excused that is not inevitable. . . . . To apply what is said and laid down in the books to the present case. Whoever procures, assents, assists, or commands, is a trespasser; here the client commands the attorney; the attorney commands the sheriff's officer. The real commander is the attorney; the nominal commander, is the plaintiff in the action. So attorney and client are both principals. Upon the whole Norwood (the attorney) in this case sued out the capias; and Mrs. Barker, the plaintiff, has been injured by false imprisonment, for which the law gives this action, in which all are principals. Upon this ground we are all of opinion that judgment must be entered for the plaintiff against Norwood, the real actor, and his client, the nominal actor." This case illustrates the effects of our law. A widow had been unjustly confined eight months in prison, simply by the will of an attorney; at last, and after a violent struggle, she obtained some little redress. But how many

captives may we suppose submitted in silence to their doom; how many pined away in hopeless anguish; how many were afterwards deprived of all redress by some miserable prevarication, some mistake of the pleader, some pedantry of the judge; how many found costs added to costs by vexatious litigation; how many, after struggling against the sickness of the heart, that arises from hope long delayed, at last perished unnoticed and forgotten victims of the savage law, and imprisoned by the arbitrary will of some rapacious pettifogger! "What the eye does not see the heart does not rue." "No where," says a great thinker (*l*), and a great writer, and a great jurist, "has this proverb been more fully understood, and more completely profited by than in the Great Hall at Westminster." Yes, if half the misery of the suitors ruined by the decisions on points of special pleading, recorded in Meeson and Welsby, could be presented to the view even of an English legislature; if half the torture, the suspense, the agony, the ruin of those whose destruction may be traced to the office of the Masters in Chancery, could be displayed to the eyes of a shuddering public, the blind hostility to improvement would cease, the system so skilfully contrived to distress and impoverish would be at an end, the chicane of the law would be seen in its true light, and England would be delivered from the greatest permanent evil by which a civilized country ever was afflicted. Fortunately, however, the miseries and iniquities of which the system of imprisonment (*m*) for debt was composed at this time have been, after

(*l*) Bentham.

(*m*) Till within a very few years, when by an act which reflects very great credit on the good sense and humanity of Lord Campbell, in spite of the most bitter and savage opposition, the law was altered. The English proceeding, as it affected debtors, combined everything by which the heart or head of man could be most disgraced. Unless a man was released by one of those truly characteristic proceedings of our legislature, those separate and exceptional proceedings called Insolvent Acts, by which a present evil was shaken off, and the principle which led to it more firmly rooted than before, or by something like a human feeling

a fierce struggle, abolished; they constituted a mass of abomination not to be matched, I say it advisedly, in any other clime, and were a source of profit as religiously protected as it was elaborately organized. Philosophers and moralists raised their voice in vain. Burke, Johnson, Goldsmith, Fielding, might as well have addressed the stones of the prisons in which the wretched victims of disappointed avarice were incarcerated, as the bosoms of the English public, in behalf of misery that did not strike the eye and obtrude itself upon the senses of the multitude. The absurdity of the system was transparent. If the debtor is criminal, what is the creditor? Is he not an accomplice in the crime? Does he lend to the debtor from any desire of the debtor's good, or for his own advantage? What right has he then to scourge misforture, or the improvidence which he has himself inflamed, with the scorpion lash, which the law withholds from all but the blackest and foulest crimes? To every shilling of the debtor's property he is entitled; but to claim the pound of flesh is cruelty and folly that no nation, however ignorant of jurisprudence, if it was not blinded by the love of gain, and governed by the maxims of bankers and attorneys, would, for a moment, think of, much less endure, for century after century, in spite of all reasoning, and in contradiction to all experience.

I have now reached the period at which the historical deduction of the rules of evidence, as they still exist among us, may be fairly terminated. It remains that those rules awakening in the mind of his creditor, the punishment for debt, in which a technical slip might plunge the most righteous suitor, was imprisonment for life. If a man was too poor to defray the expense of resisting an unjust demand, this might be his lot. No evidence was given as to the means of the debtor, as to his providence or improvidence, as to the conduct of the creditor, on which, if justice had been in any degree the object of our institutions, or humanity the guide of our legislators, it was incumbent that inquiries should take place. The crime of poverty was one for which our law had no forgiveness, and our people (as every page of the great novelist shews), no commiseration.

should be concisely stated, and presented to the examination of the reader. They have been formed by different degrees of wisdom, and have been interpreted by different degrees of skill. The phenomena of the visible world, which strike the senses, constitute not only a magnificent spectacle to the observer, but deep wisdom and instructive learning are concealed beneath them; they are conducted, adjusted, and arranged by wisdom that is unfathomable, and benevolence that is infinite. Very different, however, from the structure of the universe are the phenomena of daily life; and the events of social intercourse, connected together though they are by a chain, the links of which are to us invisible, and conspiring though they do by a wonderful dispensation to the great ends of Providence.—They appear, on the contrary, loose, vague, contradictory, incoherent, uncertain, capricious as the errors and infirmities of the actors by whom, in an everchanging succession, the business of life is carried on with the same zeal and activity, as if on this side the grave disappointment and satiety were unknown. But so far only as men have studied and observed their rules, and can interpret them, does life cease to be a mere tale of "sound and fury," and obtain its due significance. Though the death of any one person with the usual share of health cannot safely be predicted, the average rate of mortality in a certain number of individuals furnishes, as we see, the basis of accurate calculations. He who has never sought to trace events to their causes, is like one who hears a strange tongue, and understands nothing. General rules are requisite to make them useful and intelligible.

The reader who has followed me, in this attempt to trace the history of the law of evidence, will find, in the cases that I have commented upon, abundant matter for thought and argument. As no part of jurisprudence requires more certainty and simplicity in its provisions than this, it will naturally occur to him to ask, how it has come to pass, that this portion of our law challenges a pre-eminence in deformity,

even amid the uncouth and amazing absurdities which pervade the annals of every branch of English legislation? And on the answer to this question, a law reformer, by whom I mean an advocate, and an uncompromising advocate for codification, might rest his case. For the true reason is that given by Livingstone, namely, that with fewer exceptions than exist in any other division of our law, it has been abandoned for its creation and amendment to the caprice and vacillating authority of the judge, who, almost without any interference, engrossed to himself the supreme power of the Legislature. Thus, instead of a positive law easily understood, to be found in its proper place, comprised in a few lines, or, at most, in a few pages, and binding on the judges, as well as on the community at large, suitors have been harassed by judicial decisions, spreading over endless volumes of doubtful authority, corroborated, modified, overthrown and restored, according to the knowledge and liberality, or the ignorance and narrowness, which happened to prevail in our Courts of justice. Nor can I say, that even in the course of this century, the judge has always exercised the enormous and irresponsible power, which the joint operation of our law of pleading and evidence bestows upon him, with moderation and integrity. Partiality to some counsel, aversion to others, a strong desire to uphold authority; sometimes a desire to discourage innovation, even at the expense of justice, have displayed themselves unequivocally even in those heights, to which, it is taken for granted, that the din of human passions, and the mist of selfish interests, can never ascend. When I recollect a case, quoted in Coleridge's Blackstone, that was tried in this country, in which a murder was clearly proved, but in which the prosecuting counsel forgot to prove the Christian name of the person murdered, and the absolute and complete escape of the murderer, because the judge refused, after the counsel for the prosecution had said, "my case is closed," but before he had begun to sum up the evidence, to allow a witness to be called

to complete the technical proof, by proving the Christian name of the murdered man, it is very difficult to exclude from one's mind the belief that some motive, inconsistent with an impartial love of justice, could alone account for a prostitution of judicial authority, so revolting and so complete. So, too, when I recollect a case reported to me by one who heard it tried, also tried in the present century, though, of course, not by any judge, now upon the Bench, in which a murder was proved beyond the shadow of doubt, by the direct and *unquestioned and uncontradicted* evidence of a witness, who had sometimes preached at a dissenting place of worship, and in which the judge directed an acquittal at once, because he would not allow the jury to rely on the evidence of a person, who had assumed, without being ordained, the sacred functions of a preacher of the Gospel; and when I know that this flagrant insult to civil and religious liberty, this abominable mockery of justice, this gross and profligate wickedness, was dipt in Lethe, and so forgotten, was visited by no parliamentary impeachment or inquiry, I own I cannot help adopting the opinion, that excessive power, place it where you please, on the bench of justice or on the bishop's throne, will sooner or later be abused. Suspicion is a wretched substitute for defined and positive enactments.

Evidence, if distinguished according to the effect it produces on the mind, is either presumptive, direct, or conclusive.

1. Presumptive evidence (*n*), is that which directly proves one fact, which fact makes the existence of another fact, the

(*n*) The following extract on presumptive evidence of guilt, is from Sir S. Romilly's Speech on Lord Melville's impeachment :—

"I should think it could hardly be necessary to your Lordships collectively, I am sure it cannot be to many of you individually, to state what inferences Courts of justice always draw from the destruction of evidence. Most of the cases that have occurred of that kind, at least of those that I have known, are civil cases; but I know of no distinction in this respect between civil and criminal cases. The presumption in the one case is, as I conceive,—and I shall presently state why I conceive it is,—as strong as in the other.

specific object of investigation, probable. Of this evidence, of course, the degrees are infinite.

"My Lords, in civil cases, a party who destroys evidence of a transaction, is always charged to the full extent that it was possible that that transaction could have gone. I will state to your Lordships a very few cases, which have occurred upon questions of this kind. There is in Sir John Strange's Reports, a case which was decided at Nisi Prius, but which has been always recognised and acted upon as law,—Edwards *v.* Delamire. In that case a boy, in one of the most wretched conditions of life, happened to find in the street a ring; he carried it to the shop of some jeweller in the neighbourhood, and desired to know what the value of it was. The tradesman artfully took out the stone in it, told the boy it was of the value of a few half pence, which he tendered to him, and refused to give him any further account. The boy rejected the offer, and insisted upon having the gem restored to him. That was refused; an action was brought by some friend, who stood forward in behalf of the boy against the man who had so defrauded him, and the directions which were given by the judge to the jury were, to give the boy in damages the amount of the most valuable gem that could possibly have been placed in the setting, from which it had been removed.

"Another case of presumption is to be found in Peere Williams's Reports, Dalton *v.* Coltsworth. It was a bill filed against a man who had destroyed a deed under which the plaintiff claimed. The plaintiff claimed, under certain limitations, a real estate. The case was decided, I think, by Sir Joseph Jekyll, then Master of the Rolls. The defendant had destroyed the deed, and evidence was given on the part of the plaintiff, of the limitations in the deed; but the evidence, as the witness had given it, was of limitations which could not by law take effect: they were the limitations of a term of years after an indefinite failure of issue; and the Court in that case said, that as against the man who had destroyed the instrument, which would have shown what the rights of the plaintiff were, they would presume even what the plaintiff had not proved, and they would presume that the limitation was to take place after the failure of issue in the life of a person then in being. They did so presume, and the Court decreed the conveyance of the estate accordingly; presuming everything against the party who had in his power the means of shewing what the case was, and who had suppressed.

"There was a very recent case,—I am still speaking of civil cases only,—which came before Lord Eldon when he was Chancellor: it was a suit instituted between the executors of the late Duke of Newcastle, and the executors of Mr. Jackson, who was the Duke of Newcastle's steward. It was the duty of Jackson as the steward, and employed in various situations of trust for the Duke, to have kept accounts in which it would clearly

2. Direct evidence, is that which, if true, establishes or overthrows the fact under litigation.

have appeared what his demands were against the Duke, and the Duke's against him. He had acted for him as law agent in a great variety of transactions. It so happened that Jackson had kept no account; he thought it a more advantageous thing to set up some great and general demand, without having his accounts to produce. When the case came before the Lord Chancellor, he was of opinion that the Court ought to presume, without any evidence whatever, from the mere non-existence of the accounts,—which the steward ought to have kept, and to have produced,—all the demands which the steward had upon his Grace had been satisfied, though there was not the least evidence of it.

"The case happens to be reported in the 8th volume of Vesey's Reports, p. 363; and your Lordships will find the terms of the Lord Chancellor's decree in these words: 'The order, as drawn up by the Lord Chancellor himself, declared, that under the circumstances of the case, it ought either to be presumed that the bills for business done by Jackson were paid, or, if not, that it is contrary to equity that any demand should be permitted to be made upon such bills against the estate of the late Duke of Newcastle; it having been the duty of Jackson, as the agent, steward, and solicitor of the Duke, to have kept, for the benefit of the Duke, such regular accounts of his receipts and payments, and dealings and transactions, as such agent, steward, and solicitor, as would have enabled the representatives of the Duke to know the true state and result of all such accounts between Jackson and the Duke; and, therefore, without prejudice to the effect of any bill that the representatives of Jackson may be advised to file, it was directed that the exceptions by the executors of Jackson should be overruled, and that they should stand as creditors upon the estate of the Duke for the balance, in respect of sums received and paid by Jackson since the death of the Duke, and by them since Jackson's death.'

"I have, however, hitherto only stated to your Lordships civil cases; but, my Lords, I am sure that no case occurs of any person convicted of an offence upon circumstantial evidence, in which the Court does not act upon presumptions exactly of the same kind. I will put a case to your Lordships,—I do not know exactly when it has occurred, but it may have occurred,—and that the decision would be such as that I am about to state to your Lordships, I think there can be no doubt. I would suppose, that a man were indicted for the murder of another, and that there were no evidence against him but that which is called circumstantial evidence, that is, evidence of conduct or of circumstances, which cannot be accounted for upon any hypothesis but that of the party being guilty; I will suppose a case of that kind, and then I would ask your Lordships, if

3. Conclusive evidence, (the præsumptio juris et de jure of the later civilians, not of the Roman law), is that which the law declares to be such proof of what it asserts, that so long as it exists unquestioned, in the manner pointed out by law, as that in which it ought, if disputed at all, to be questioned,—testimony is not allowed to be given in contradiction of it. On the production of certain evidence, the law commands (not belief, which would be absurd), but a particular decision, as the result annexed to the exhibition of such evidence.

The first general rule, says Mr. Justice Buller, is that you shall give the best evidence that the nature of the thing is capable of.

This rule, as laid down by Lord Hardwicke is, that you shall give the best evidence that the nature of the thing is capable of; the meaning of which is, that you shall not give evidence which supposes that it is in your power to bring better evidence than you have done. "For if the other greater evidence did not make against the party, why did he not produce it? As if a man offer a copy of deed or will,

evidence were to be produced, that the prisoner had destroyed the clothes which he wore upon the day upon which the man was murdered, whether a jury would not be directed to presume, or whether a jury would not presume, that the clothes so destroyed had been stained with the blood of the man that was murdered, and that they had been destroyed only for the purpose of suppressing that evidence? If a jury would not be expressly directed to presume guilt from this, I would ask, whether the party's having destroyed the clothes he wore upon the day on which the man was murdered, would not be considered as most material evidence in such a case? And whether it could be evidence, in any way but that in which I have stated, that it must be presumed that no innocent man would have destroyed that evidence, which would have contributed to his acquittal if innocent, and could contribute to his conviction only if he were guilty? I do not say, that from that circumstance alone you would infer that a man was guilty of a murder, neither do I desire your Lordships, from the single circumstance of all the vouchers being destroyed, to say that the noble Lord was guilty of this criminal connivance in the conduct of Mr. Trotter, or that he was applying all these sums of public money for his own benefit; not from that circumstance alone, but from that circumstance coupled with all the other facts."

where he ought to produce the original, this carries the presumption with it, that there is something more in the deed or will that makes against the party, else he would have produced it; and, therefore, the proof of a copy in this case is not evidence; but if he prove the original deed or will in the hands of the adverse party, or to be destroyed without his default, a copy will be admitted, because such a copy is the best evidence."

The rule, therefore, does not mean that you are bound to produce all the evidence in your power to establish the fact in dispute. For instance, in making out your title by deed, you are bound, if it is in your controul, to produce the deed itself. That is the best evidence; and to substitute inferior evidence for it would be illegal. But if there are two subscribing witnesses to it, you are not bound to produce both in order to prove its execution; the evidence of one for that purpose is sufficient. Again, if you want to shew that a letter is in the handwriting of Caius, you are not bound to call Caius himself.

This brings us to the great distinction which our law makes between *primary and secondary evidence.*

All evidence that falls short of primary evidence, and is admissible, is secondary evidence. The substitution of oral for written, and of hearsay, oral, or written, for direct evidence, are the heads into which this branch of the subject may be divided. Let us then inquire when the law insists upon written evidence, and when its production may be dispensed with.

First, wherever the law has required that an instrument shall be in writing; and, secondly, wherever the contract or statement, not being an *ex parte* memorandum, is in writing. Oral evidence cannot be substituted for such writings, unless the absence of the written instrument be legally accounted for.

But if a written communication be accompanied by a verbal one, the latter may be received, not as a substitute for the

written communication, but as independent evidence. The common example of this is, that though a receipt be taken, the payment of money may be proved by oral testimony. So an admission of a debt by a defendant may be proved, though he gave at the same time a written promise to pay, which, for want of a stamp, is inadmissible (*o*). So whatever a party says, or his acts amounting to admissions, are evidence against himself; even though such admissions involve what is contained in some deed or writing. Such evidence not being open to the presumption of untruth, arising from the very nature of the case where better evidence is withheld.

Again, the rule rejecting secondary evidence is qualified from regard to public convenience and necessity, in the case of judicial records, and of public books and registers, the removal of which would be attended with inconvenience to the community.

Where the existence of the record is denied, and this is the question at issue between the parties, the proof is by the production of the record itself, or by the tenor of it duly certified under a writ of *certiorari*.

Where it becomes necessary to prove a record, not as the

(*o*) Slatterie *v.* Pooley (6 M. & W. 664) settled (as far as anything can be settled on the Euripus of case law) this principle. R. *v.* Inhabitants of Basingstoke, Jurist, March 26, 1850, p. 246. It was held that acts of overseers amount to an admission of a certificate under 8 & 9 Wm. 3, c. 30. "The question comes to this, whether an admission by the parish officers of the existence of a certificate by their acts, is equally binding as such an admission by words. Their acts are evidence of an admission; and Slatterie *v.* Pooley decides, that if the admission relating to the contents of a deed is by words, it is not necessary to produce the deed, not however treating the words as secondary evidence of the contents of the deed; for it is well put by Mr. Smith in his Leading Cases, vol. 2, p. 237, that it is a species of estoppel which supersedes the necessity of evidence by shewing that the fact is already admitted." Patteson, J.

"If a man says, I have this day sent you a bond signed by me, and properly stamped, of such and such import, that is *original* evidence of his having bound himself by such a bond." Maule, J., Boulter *v.* Replow, ib. p. 249.

point immediately at issue, but as part of the case to be established, it may, of course, be produced; or it may be proved by an exemplification, or an examined copy.

The law divides copies of records into three classes:

1 A. Exemplifications under the Great Seal.

1 B. Exemplifications under the seal of a particular Court.

2. Copies made by an authorized officer.

3. Sworn copies.

1 A. Exemplifications under the Great Seal:

This must be either of a record of the Court of Chancery, or of a record removed thither by *certiorari*. Lord Coke lays down an absurd rule, that if a record be exemplified at all for purposes of evidence, the whole of it must be exemplified. This rule has, according to the fashion of the English law, received a vague and arbitrary modification.

1 B. Exemplifications under the seal of the Court:

The seals of the Queen's Courts prove themselves; and the exemplification of a record under the seal of any one of them is sufficient.

The seal of the city of London proves itself.

Where a record is completed, it may be proved by an examined copy; but the records of the superior Courts are not complete until they are inrolled. If an ancient record has been lost, it may be proved to the jury by parol or other testimony,—as by possession and user.

An office copy in the same cause, and in the same Court, is equivalent to the record itself. Out of that Court it must be proved to have been compared with the original; but a copy made by a person specially appointed to make copies, is admissible in evidence, without proof of an examination with the original. So the indorsement on a deed of bargain and sale inrolled according to the statute, made by the proper officer, is evidence of the inrolment; and the date, indorsed by the clerk of the indorsements, is conclusive. The 13th section of the 1 & 2 Vict. c. 94, makes copies of records, in the custody of the

Master of the Rolls, purporting to be sealed in the Record Office, evidence without further proof; and by the 8 & 9 Vict. c. 113, s. 3, all copies of private, local and personal acts, and of the parliamentary journals, or royal proclamations, purporting to be printed by the printers of the Crown, or of either House, are admitted as evidence.

Wherever an original is of a public nature and admissible in evidence, an examined copy is, for the sake of public convenience, allowed to be given in evidence. So parish registers of baptisms, marriages, and burials, entries of a public nature in books of public corporations; and, by 8 & 9 Vict. c. 113, s. 1, whenever, by an act of Parliament, any certificate, official or public document, or document or proceeding of any corporation or company, or certified copy of a document, bye-law, entry in a register or other book, or of any other proceeding, shall be receivable "in evidence of any particular," the same shall be admitted, provided it purports to be sealed, stamped, or signed as required or directed, without any proof of the seal, stamp, or signature, or official character of the person signing, and without any further proof thereof, in every case in which the original could have been received.

2. It is a rule—that evidence must be confined to the point at issue.

Whether the question be, or be not, relevant to the issue, must of necessity be left in great measure to the discretion of the judge.

It has been held that this rule, in an action for not supplying goods of proper quality, excludes evidence of the quality of the goods with which the defendant has supplied other persons. So where an acceptor of a bill of exchange defends an action on the ground of forgery, he has not been allowed to shew that the drawer has forged his name on other occasions. But, on the other hand, where the question is as to the meaning of a phrase in a libel, other libels, written by the same defendant against the same plaintiff, may be given in

evidence to explain it. So where the knowledge or intent of a person is in issue, evidence of other transactions, tending to shew such intent or knowledge, is admissible.

In the Queen's case, eleven of the judges laid it down as a rule,—that if a witness, on cross-examination directed against his credit, admits certain declarations, and states the motive of those declarations, in a conversation with a person not a party to the suit, all the rest of the conversation beyond this ought to be excluded as irrelevant. This was the rule with regard to conversations with third persons. But it was held, that where the witness had been cross-examined as to a conversation with a party to the suit, all the conversation, whether relevant or not to the subject-matter of inquiry, is thereby rendered evidence,—a doctrine which I have already discussed in the former part of this volume, and which is now happily overruled. As the judges declare what the common law—the imprescriptible inheritance of all Englishmen—is, that heritage varies considerably in amount and value: for without any legislative interference, the judges, some years after this decision, established a different rule, which, though of almost twenty years' standing, has not yet been superseded; and the rule now is,—that whether a witness be cross-examined as to a conversation with a party to the suit, or with a third person, his re-examination must be confined to matters connected with the evidence given on cross-examination, and tending to illustrate or account for it. Lord Denman held, that the witness might be asked as to everything that could qualify or explain the statement elicited on cross-examination; but that he would not be allowed to add any independent history of transactions altogether unconnected with it (*o*).

3. Another general rule is,—that it is sufficient if the evidence prove the substance of the issue. For instance, in an action on a bond, the condition of which is, that the person bound by the bond—in technical language the obligor—shall

(*o*) Prince *v.* Samo, 3 N. & P. 139.

not cut down any trees, if the plaintiff state, as a breach of the bond, that the obligor has cut down a hundred trees, he may prove that any smaller number was cut down. So if an indictment charge that Titius robbed Caius on the highway, and stole from him ten sovereigns, and the proof is, that a robbery was of five sovereigns, and in a field, this is sufficient. So in an action for a malicious prosecution, stating that the plaintiff was acquitted on a particular day, the time of acquittal is not essential. Every allegation that is essentially descriptive must be proved; and every allegation which narrows and limits what is essential, is descriptive: so in contracts, libels, and written instruments in general, every part is a description of the whole. Therefore, allegations of names, sums, magnitudes, dates, and so forth, if essential to the identity of the writing, must be literally proved. Thus, in an action on the case for deceit in a sale, by two defendants, proof of sale and warranty by one only was held a fatal variance. So in Bristow *v.* Wright (Doug. 665), it was held, in an action against the sheriff for taking goods without leaving a year's rent, that though the particulars of the demise need not have been set forth at all, yet, as they were set forth, they ought to be set forth accurately; and that as they were not proved in conformity with the statement, the variance was fatal. Lord Mansfield, after saying "that the strong bias of his mind was always to prevent justice from being defeated or delayed by formal slips," held, probably in deference to his brethren, for he had at first overruled the objection, that the strict rule must prevail, and nonsuited the plaintiff. "Contracts," said Mr. Justice Buller, a thoroughly corrupt but very able judge, speaking of this very case in Pepin *v.* Solomons (5 T. R.), "are in their nature entire, and in pleading they must be stated accurately; but as the evidence in the case of Bristow *v.* Wright did not accord with the contract stated in the declaration, and which was the foundation of the action, it was properly determined that a judgment of nonsuit should

be entered." The distinction then is, between what may, and what may not, be rejected as immaterial. If the whole averment might be struck out, leaving a sufficient cause of action, the variance was not fatal; but if it could not be struck out without carrying away a material part of the plaintiff's case, it was. One of the most grotesque decisions on this point is Harris *v.* Mantle (*p*), (3 T. R. 367.) The confusion and contradiction thus created might have satisfied Lord Coke himself. But fortunately the doctrine of variances is comparatively of little consequence; as, by the 3 & 4 Wm. 4, c. 42, s. 33, after reciting (as calmly as if it was not a national disgrace, and as if the evil had happened in the twelfth century, or in China) the delay and interruption of justice occasioned by these absurd quibbles, power is given to the judge "to cause the record, writ, or document in any civil action, information in the nature of a *quo warranto*, or proceedings on a mandamus, to be forthwith amended, when any variance shall appear between the proof and the recital or setting forth of any contract, custom, or prescription, or other matter," on certain terms. The 9 Geo. 4, c. 15, gave a similar power of amendment in any indictment or information for any misdemeanour; and the same power is now extended to indictments and informations for all offences whatever, by 11 & 12 Vict. c. 16, s. 4.

4. *Res Judicata* (*q*).

A judgment between the same parties for the same cause of action is conclusive, though the form of the action be different. It is evidence only of what is directly at issue, not of collateral matter only, nor of what may be inferred from it. If only offered in evidence, and not pleaded, it is not an estoppel; if pleaded, it is an estoppel in a second action.

(*p*) See notes to Goram *v.* Sweeting, 2 Wms. Saund. 199.

(*q*) Duchess of Kingston's case, 2 Smith's Leading Cases, note, p. 428. In Barrs *v.* Jackson, 1 You. & Coll. 585, the subject is thoroughly discussed and illustrated from the Roman law, in the elaborate judgment of the Vice Chancellor Knight Bruce. Livingstone, Code 658; Starkie, vol. 1, p. 193; Phillipps & Amos, p. 512; Greenleaf, p. 570.

Although it is the general rule that a person shall not be concluded by a judgment to which he is not a party; it is a rule to which, from the very nature of human affairs, there must be some exceptions.

Thus, where a Court (*r*) exercises a particular jurisdiction on a particular subject-matter, a judgment of condemnation or acquittal in the Court of Exchequer, where proceedings *in rem* have been instituted, is binding on all the world. So in cases of customs or tolls, verdicts respecting them, though the parties are not the same, are evidence; so a verdict as to a public right of way is evidence; and in all cases, where general reputation is evidence, a verdict on the right claimed is evidence even against strangers. Parties who claim in privity with others are in the same situation as those to whom they are privy in blood, in estate, or in law; of course the effect of the verdict must depend on the question, whether the same point is at issue. "Exceptio rei judicatæ obstat quoties inter easdem personas eadem quæstio revocatur, vel alio genere judicii." "Res judicata dicitur quæ finem controversiarum pronuntiatione judicis accipit."

Parol evidence is inadmissible to vary or contradict a written contract. This is the general rule on which numerous exceptions have been grafted. It has been held, that evidence of usage and custom is admissible to shew the sense in which particular words are used; in other words, to give them a sense different from that which they generally bear. In this way evidence has been admitted to interpret the words "barley"(*s*),

(*r*) "From the time of Lord Hale down to the present period, it has been clearly settled, that a sentence of condemnation in the Court of Admiralty, where it proceeds on the ground of enemy's property, is conclusive that the property belongs to enemies, and not only for the immediate purpose of such sentence, but is binding in all Courts, and against all persons. The sentence of the Court of Admiralty, proceeding *in rem*, must bind all parties, must bind all the world."

(*s*) Hutchinson *v.* Bowker, 5 M. & W. 53.

"Fairland" (*t*), "London" (*u*), "thousand" (*v*), "level" (*w*), "inhabitant" (*x*), "four miles across a country" (*y*). In one case Lord Mansfield allowed the tenant his right to an away-going crop, though the lease under which he held was silent altogether on the matter, saying, that the custom did not alter the lease, but only added something to it. That Lord Mansfield was right on the principle, that he who sows should reap, and that the custom was part of the contract, is certain; but it is difficult to say, that to add to is not to alter. "Terms," says Lord Ellenborough, "are to be understood in their ordinary, plain, and popular sense, unless they have generally, in respect of the subject-matter, and by the known usage of trade, acquired a peculiar sense." "Usage (*z*)," said Lord Lyndhurst, "may be admissible to explain what is doubtful, but not to contradict

(*t*) Udhe *v.* Walters, 3 Camp.

(*u*) Mallam *v.* May, 13 M. & W.; Evans *v.* Pratt, 3 M. & G. 759.

(*v*) Smith *v.* Wilson, 3 B. & Ad. 728. *One thousand means twelve hundred.*

(*w*) Clayton *v.* Gregson, 5 B. & Ad. 302.

(*x*) R. *v.* Mashiter, 6 Ad. & Ell. 153.

(*y*) Wiggleworth *v.* Dallison, 1 Doug.; 1 Smith's Leading Cases, by Keating & Willes, 306. If many such editors and text writers had written on our law, it would not be in its present barbarous condition. Scaliger said (very absurdly) of Casaubon's Persius, that the sauce was better than the fish. In this case the sauce is worthy of the fish; and it would be difficult to pronounce on any law book a higher panegyric. I feel sure, that to this passage of my work, at least, every lawyer will assent, and that it will not be suspected that my long and intimate friendship with one of the living contributors to it, or my sincere respect for the learning, abilities, and excellent qualities of another, nor even my affection for the memory of the dead, have carried me one step beyond the limits of impartial criticism; and let not this remark be ascribed to egotism, to a wish to obtrude my personal feelings on the reader, or to what I hope my friends would be still more unlikely to ascribe to me, the desire of illustrating my own obscurity with the associations of departed genius. Often in the course of this work has the past forced itself upon my thoughts; and even in the drudgery and toil of life, we turn, for a moment, as we pass on, to say Hail and Farewell!

(*z*) Blackett *v.* Royal Exchange Company, 2 Tyr. 266.

what is plain." The history of the law on this head will be found in Hutton *v.* Warren (1 M. & W. 466).

Evidence (*a*) of fraud of course is always admissible to set aside a writing. "Fraud," said L. C. J. De Grey, "vitiates the most solemn proceedings of Courts of justice."

Admissibility of Parol Evidence to explain or vary Written Documents.

The constant ambiguity, and wild confusion which pervade this part of the law are almost incredible. In one case, Beaumont *v.* Fell (Peere Williams), a rule was laid down of some liberality, and tending to give the will the testator thought he had made, some chance of execution. In Goblet *v.* Beechey, decided by Sir John Leach, a directly opposite principle was acted upon, and to such a pitch did the judge carry his ridiculous pedantry and narrowness, that in deciding on the will of Nollekens, the sculptor, he would not allow evidence to be given of what he meant by the word "mod.", though it was proved by evidence not disputed that the testator had said he meant his models by it (*b*). Such a decision appears too preposterous to be true, yet it is gravely reasoned upon as if it was entitled to more consideration than a judgment in Rabelais; or, as if it was the object of English law to obstruct, by every conceivable means, the purposes of justice: on exactly the same ground, if a sculptor were to leave his Venus Anadyomene, by Canova, the judge might refuse to ascertain what was meant by it. Such decisions are peculiar to this country. I have already stated Lord Bacon's rule as to patent and latent ambiguities; but our testamentary law is on a most uncertain and unsatisfactory footing (*c*).

(*a*) Small *v.* Allen, 8 T. Rep. 147.

(*b*) Goblet *v.* Beechey, 3 Sim. 26.

(*c*) The leading cases are, Doe *dem.* Chichester *v.* Oxenden, 3 Taunt. 147; Thomas *v.* Thomas, 6 T. R. 671; Miller *v.* Travers, 8 Bing. 244; Doe *dem.* Templeman *v.* Martin, 4 B. & Ad. 785; Doe *dem.* Gord *v.* Needs, 2 M. & W. 129.

With regard to the law of consanguinity, a rule so childish that it is scarcely possible to imagine how it could have been laid down to regulate proceedings in a civilized country, was established by "the oracle," Lord Coke, whose object really seems to have been to carry an experiment on the credulity and superstition of the English in adopting authorized absurdities, as far, in matters of law, as the Church of the dark ages had done on matters of faith. This rule, well known as the "quatuor maria" rule, established the maxim, that the child of every woman, whose husband was within the four seas at the time of its conception, was necessarily legitimate. This rule was not destroyed till the case of Pendrell *v.* Pendrell, in Lord Raymond, though Hale remonstrated against it. The law now is, that where husband and wife are not separated from each other by a sentence, the law will presume access, unless the contrary is proved, and the proof of the contrary must be clear and satisfactory; light presumptions will not be sufficient (*d*). A mere balance of probabilities is not enough.

We now come to the rule, that hearsay is no evidence—the term hearsay applies to written as well as spoken evidence—and before I enter upon the discussion of it, I will state that the opinion of Mr. Justice Buller coincides with that which I have ventured to express, and which Mr. Phillipps dissents from, namely, that hearsay may be admitted in corroboration of the witness's testimony, and to shew that he affirmed the same thing on other occasions, and that he is still consistent with himself. Livingstone, too, I see, adopts the same principle (*e*). "What a witness has said when not upon oath may be proved to shew that it was consistent or inconsistent with his testimony." Let us now see what the rule really is, and what are the exceptions to it.

(*d*) See the laborious and valuable Treatise of Mr. Hubback, on Succession. The leading cases are, the Banbury case, and Morris *v.* Davies, 5 Cl. & Fin. 214; judgment of Leach, V. C., 1 Sim. & Stu. 151.

(*e*) Page 291.

Rule :—

Hearsay evidence is inadmissible, because it is not upon oath, and because the party against whom that evidence is alleged, has not the opportunity of cross-examining the person whose expressions are recited.

Exceptions to this rule :

First. Oral hearsay evidence.

Hearsay is admissible, when it explains an act done—which act is relevant to the investigation then on foot; for instance, if a trader leaves his house, and the question is, whether, in so doing, he has committed an act of bankruptcy, his declarations, at the time of leaving it, are evidence to shew the motive of his absence.

So, if it be sought to recover back money paid by a bankrupt in contemplation of bankruptcy, evidence of what he said as to the state of his affairs, about the time of that payment, is admissible.

Is the question, "whether an insurance be fraudulent?" Evidence of the declarations made by the person whose life has been insured to the medical man, at the time when the insurance was made, is admissible.

In an action between Caius and Titius is the question, "How came Caius to trust Lucius?" Evidence that Caius said, at the time he gave the credit to Lucius, that he did so in consequence of the representations of Titius, is admissible. Hearsay, then, is admissible, when it is part of the transaction of the *res gestæ*. The question is, not whether what was said is *true*, but whether it was *said*. That it was said is a fact, in certain cases, and a fact from which, without any reference to the truth or falsehood of the statement in itself, very important consequences may be drawn. Stolen goods are found in a man's house. He may prove that the goods were left there by a third person, and he may prove what that third person said on leaving them.

Again, hearsay is admissible to prove public or general

rights. In a matter which concerns all, the assertion of any one is proof of reputation. Instead, however, of keeping to this broad principle, the unhappy love of trivial and minute distinctions, which Say and Bastiat ascribe to our political economists, and which is universal among our lawyers, has led judges to distinguish between public and general rights.

So in questions of pedigree, declarations of deceased persons are received; but they must be declarations of relations. This is an absurd restriction, supported by the truly English apotheghm, that there must be a line drawn; on this principle the rule might be laid down, that the declarations of no man with black hair should be admissible. Where is the necessity of drawing a line *à priori*, at random, which may, nay, which must (*f*), in the very nature of things, exclude the most trust-

(*f*) The leading cases on the subject of hearsay evidence on pedigree,—Berkeley Peerage case, 4 Camp. 421; Attorney General *v.* Monckton, 2 Russ. & M.; Whitelock *v.* Baker, 13 Ves. 514; Slaney *v.* Wade, 1 Myl. & Cr. 588; and Doe *v.* Moss, Lord Mansfield's decision. Publicity is one element, as a pedigree hung up, inscriptions on a tombstone, &c.; Slaney *v.* Wade; entries in any books made by deceased parents. The same traditional evidence, however, which may prove the time, has been most absurdly decided not to be evidence as to the place of birth. The absurd narrowness of the rule excluding evidence of all but relations in questions of pedigree, worked cruel injustice in the case of Annesley *v.* The Earl of Anglesea. The question was, whether Lady Altham ever had a child; and our judicious law excluded the evidence* of the declaration of the midwife, that she had brought the child into the world, and also the declaration of a lady, that she had been its godmother. Such folly is beyond the reach of argument, otherwise our legislators might have seen, that by excluding a whole class of evidence, they may exclude testimony that is conclusive. For instance, suppose the declaration of the midwife (next to the mother the most important of all witnesses), goes for nothing by itself, still, fortified by another declaration tending to the same fact from a different quarter, it becomes more

* If principle were considered at all in our law, one might ask how this decision can be reconciled (not in *letters*, for one witness admitted was a surgeon, and the other excluded was a midwife;—the name of the suitor in one case begins with A, and in the other with H, but) in principle with Higham *v.* Ridgeway.

worthy and conclusive evidence, and admit the most worthless and insignificant testimony? Everybody's experience will suggest hundreds of cases, in which the evidence of a "garrula nutrix,"—the doting chronicle of family traditions, of a confidential servant, of an intimate friend, of a physician, would be far more valuable than that of a cousin, especially in England, where the custom of primogeniture has done so much to cancel and tear to pieces the bonds of blood; and first cousins do not consider each other of the same family. The just rule would be, that the evidence should be received in all cases, and that the value of it should be sifted and pointed out.

Secondly. That the declarations should be made "post litem motam," after the controversy has begun; otherwise, the rule of exclusion prevails. This rule is equally foolish with, and rather more cruel than the first. It was established (by Lord Eldon chiefly) in the Berkeley Peerage case; it contradicts the spirit, if not the letter, of Lord Mansfield's decision in Goodright *v.* Moss, and is shocking to common sense and common morality; it enables a profligate litigant at once to exclude the evidence he has most reason to dread. In the case before cited, the evidence of a father, as to his marriage with the mother of the claimant, was excluded. Will it be said, because that evidence might be false? See where that will lead you; that is a reason why the circumstances under which it is given should be remarked upon, not why it should be excluded altogether. Is there no alternative between the "blaze of noon" and the darkness of midnight? There is a chance that any witness may commit perjury; do

important; like drops of rain that mix together and strengthen the current. All circumstantial evidence rests on this principle,—separately taken facts mean little; taken together they are conclusive. I cannot conclude this note without referring gratefully to my lamented friend Mr. Richard Gresley's excellent and judicious work on Evidence in Courts of Equity. The edition to which I refer is that of Mr. Christopher Calvert, and the notes of the editor are very valuable.

you, therefore, exclude all evidence? Knowledge and probity make a perfect witness; in this case the knowledge is complete; but you suspect the probity. What course do you take? Do you examine the motives of him who makes the statement, the circumstances under which it was delivered, the purpose to which it was addressed, and then decide upon its value? No, the judicial lawgivers of England reject it altogether. The suspicion that honesty may, by possibility, be wanting, induces them to reject information, which, if the honesty be not wanting, is the most conclusive and satisfactory that human testimony can furnish. Because the sun is not in his meridian (*g*) they insist on groping their way in utter darkness,—the carefully bandaged leaders of the blind.

This part of my subject brings me to another decision, which, besides the presumption that it exhibits in overruling a decision of Lord Mansfield precisely on the point where that illustrious jurist and great judge was most invulnerable, is, perhaps, the most remarkable proof of inveterate narrowness and thoroughly unphilosophical habits of thought, that the volumes of Meeson and Welsby, fruitful as they are in specimens of such really indigenous qualities, can supply. I allude to the case of Stobart *v.* Dryden (*h*); it shews that the incapacity for large and liberal views, and for reasoning on general principles, which the study of our law developes, becomes, after a certain time, incorrigible. Lord Mansfield, as I have mentioned, had, in the case of Clymer *v.* Littler (*i*), admitted the solemn declaration of a dying man that he had forged a will. Mr. Justice Heath, in a case cited, with appro-

(*g*) A curious instance of negative evidence in a pedigree case, occurs in the case of the Chandos Peerage. Mr. Hasted, author of the History of Kent, proved that he had conversed and corresponded with Mr. Bridges, the father of the claimant, on the subject of his pedigree, and that, in speaking of his own family, he had not said a word of his descent from the House of Chandos. Hubback, p. 707.

(*h*) 1 M. & W.

(*i*) 3 Burr. 1244.

bation by Lord Ellenborough, admitted the dying declaration of a man, who called upon God to pardon him for having forged a bond; it seems difficult to conceive any understanding so constituted as not to perceive the importance of such testimony. The ground upon which these cases were placed, was not the narrow and sandy basis suggested by the Court of Exchequer; but the deep, broad, adamantine foundation, which alone can support the pillars of jurisprudence. The reason of its admission was drawn from the principles of our common nature,—principles attested by those for whom the heart of man had no secrets, and whom age after age had revered as the almost inspired oracles of all the hopes, fears, wishes, and intentions, that had ever fluttered and throbbed within it. These great men did not think with the Barons of the Exchequer, that the declarations on a death-bed are lightly made and heedlessly repeated: they thought that

"The tongues of dying men
"Enforce attention, like deep harmony."

They did not agree with those learned persons, the disciples of Coke, and Saunders, and Chitty, that such declarations were likely to be false, if they did not relate (observe, reader, the profound knowledge of man, which the exception shews) to the murder of the dying man. They said,—then it is that the heart is laid bare; then it is that deceit is useless; then it is that the most guilty secrets are disclosed; then it is that conscience is almighty:

"*Nam veræ voces tum demum pectore ab imo*
Eliciuntur—et eripitur persona, manet res."

Strangers to the opinions of Popham and Gaudy, not being enlightened by the deep wisdom of the Year Books, or the masculine sense which the perusal of Tidd's Practice, and the notes to Saunders, enlarge and fortify; little read in the statutes; with but a superficial knowledge of special pleading,

moralists, and philosophers, have, in all ages, arrived at a conclusion directly the reverse of that which the Barons of the Exchequer have done what they could to brand upon the law of England, by the decision in Stobart *v.* Dryden,—that monumental proof of judge made law! For the Court of Exchequer were not content without a flimsy distinction: covetous of technicality, they have actually decided that dying declarations are admissible precisely where they are most suspicious; though they are inadmissible on all other occasions, they may be used to shew how the dying man came by his death, and for no other purpose; but this must now be considered law.

The testimony given by a witness in a former suit may be proved if he is dead or kept out of the way; declarations that qualify an act are admissible (*k*); and declarations against the interest of the deceased maker, *e. g.*, declarations of an occupier of land, that he holds it under a particular person (*l*); the admissions of a party to the suit, even though they relate to a written deed or paper, are evidence (*m*).

Written Hearsay Evidence.

In Marsh *v.* Collnett (Doug. 593), it was held by Lord Mansfield, that copies of the books of the Bank were admissible in evidence. The reason of this decision was, that the books being of great concern to the public, the removal of them would be inconvenient, and that, therefore, the introduction of secondary evidence might be allowed. This principle has been adopted in a variety of cases. Copies of the Journals of the House of Commons were rejected by the same judge in Lord George Gordon's trial, and on the trial of Lord Melville.

(*k*) Doe *v.* Arkwright, 5 C. & P. 575.

(*l*) Clack *v.* Watson, 4 Taunt. 16; Carne *v.* Nicoll, 1 N. C. 430; Crease *v.* Barrett, 1 C., M. & R.; Doe *v.* Langfield, 16 M. & W. 497.

(*m*) Slatterie *v.* Pooley, 6 M. & W. 664.

But, on the other hand, copies of the Books of Customs and Excise were received by Lord Kenyon. Formerly, the actual production of an answer in Chancery was required; but the removal of these documents was at last forbidden, and an office copy received in evidence. And in Mortimer *v.* Macallan (*n*), in order to prove the identity of the party who had accepted stock, parol evidence was received to shew that the entry in the books of the Bank of England was in his handwriting. "The principle of law," said the consummate master of his art who then presided in the Court of Exchequer, "is, that where you cannot get the best possible evidence, you must take the next best; and where the law has laid down that you cannot remove the document in which the writing is made, you are to be entitled to the next best evidence of it, by proving whose writing it was."

The hearsay of deceased persons making entries in the regular discharge of their duty (*o*), and the hearsay of deceased persons making entries against their own interest (*p*), is admissible. The former head includes the latter, and the technical reason, which is even more than usually valueless, assigned for the admission of the latter, may be set aside. The true reason is, that supposing the evidence what it purports to be, it possesses that quality which, of all others, is most valuable to an inquirer,—undesignedness (*q*); and to exclude it would be to shut your eyes against the light. Wherever any glimmering of truth breaks upon the judicial inquirer, and from whatever quarter, he ought to trace it up and follow it to its source. Thus, and thus alone, can the testimony of facts, as they are

(*n*) Mortimer *v.* Macallan, 6 M. & W. 69.

(*o*) Doe *v.* Turford, 4 B. & Ad. 890; Gleadow *v.* Atkin, 1 C., M. & R. Smith's Leading Cases, ed. Keating & Willes, vol. 2, p. 193, note.

(*p*) Barker *v.* Ray, 2 Russ. Rep. 67, note; Higham *v.* Ridgway, 10 East, 109; Smith's Leading Cases, ed. Keating & Willes, vol. 1, p. 139, note.

(*q*) This is the great merit of the kind of evidence so unfortunately rejected in Doe *dem.* Tatham *v.* Wright, 2 B. N. C.; Paley, Horæ Paulinæ,

offered to our senses by the fabric and constitution of worldly things, interwoven and connected with each other as they are, and embodied in one inseparable mass, in Montaigne's language, cette connexité et cousture indissoluble, carry with it the sure information that it was intended to convey, and furnish instruction for the guidance of human life. If we shut our ears to the language of facts, we close them against the voice of Nature and of truth. "Res ipsa loquitur quæ semper valet plurimum."

A letter sent by plaintiff to defendant with the bill of exchange on which defendant is sued, may be read by plaintiff (*q*).

Onus probandi.

"Ei incumbit probatio qui dicit non qui negat," is the usually quoted rule of the civilians. The first observation upon it is, that when that rule was composed the confrontation of the parties *coram judice*, that master principle of justice, the want of which is sure to cause delay, vexation, and expense, was an invariable feature of the Roman method of proceedings. The parties met together to settle, as we should say, the issue, —to determine what the fact was which one party was to establish or the other to contradict; and thus obtained in ten minutes, without the expense of a sesterce, what, at the end of three years (if the Master is scrupulous and active), and at the expense of twice as many hundred pounds, (if fortune is your friend, and the parties to the suit are not changed), you may obtain in equity,—and what, in half a year, by the outlay of thirty or forty pounds (unless you are ruined by the supposed breach, on the part of one of your legal advisers, of some never propounded rule, lodged in the bosom of a pleading judge), you may succeed in finding out at common law. The second reflection is, that the passage quoted is a fragment only, torn from the system to which it belonged, and of which it

(*q*) Bruce *v.* Henly, 1 St. 24; Kent *v.* Lowen, 1 Camp. 177.

contributed to the harmony, in a degenerate age, by the corrupt hands of Justinian's parasites(*r*).

The rule ought to be, that the burden of proof should be flung on him to whom (the cause alone considered) it is easiest. The affirmative or negative form depends, not on the nature of the fact, but on the management of the alphabet. The consequence of our method of proceeding is, that the "*onus probandi*" must have been one of the circumstances present to Lord Rosslyn's mind when he uttered the sentiment, so dignified in itself, so creditable to the English law, and so well becoming the first magistrate in the land, "That no cause ought to be given up as desperate." It is, as Bentham says of another part of our detestable system of special pleading, a gulf into which many fortunes are destined to be thrown, but which no number of fortunes is sufficient to fill up. As far, however, as any rule can be laid down, it is this,—that the *onus probandi* lies on him who asserts substantially the affirmative of the issue. The judges have cut the knot in actions for personal injuries, libel, and slander, by deciding that in them the plaintiff is to begin. The exceptions to this rule are, where the plaintiff grounds his action on a negative allegation—as a prosecution without probable cause. Another exception is, where a fact is peculiarly within the knowledge of one party, as where a license is required to justify certain conduct (*s*), which the party, if he has it, can immediately produce. Another is, where criminal

(*r*) English writers talk of the Institutes, Pandects, and Code, as if they were of equal value. I might as well talk of Falconer's Shipwreck, Milton's Paradise Lost, and Milman's Lord of the Bright City, as great epic poems. The Institutes (of Justinian, I mean) are not worth a great deal. The Code bears evident traces in its verbose, affected, pompous, and trivial diction, in its scantiness of thought, and utter want of original genius, of the age when it was written. The Pandects are the mutilated fragments of mighty artists.

"Invenies tamen hic disjecti membra poetæ."

(*s*) R. *v.* Turner, 5 M. & S. 206; 2 East, Pleas of the Crown, 782; 4 B. & Ald. 140; 1 B. & C. 150; 3 B. & C. 242.

neglect of duty is imputed to any one, for the law will presume the contrary. One case which carried this doctrine to an was *Williams* v. *The East India Company* (*t*). information against Lord Halifax (*u*) for not delivering up the Rolls as Auditor of the Exchequer, the prosecutor was required by the Court to prove the negative. Where infancy, insanity, the illegitimate birth of the child of married and not divorced parents are alleged, the person making the allegation, whether the form in which he makes it be negative or affirmative, is required to prove the fact (*v*).

The most beneficial act that has ever been passed on the subject of evidence, is that known by the name of Lord Denman's Act, the 6 & 7 Vict. c. 85. It provides, that no person offered as a witness shall hereafter be excluded by reason of incapacity, for crime, or interest, from giving evidence, and has thereby rescued our proceedings from one of its greatest evils, and one which put prodigious power into the hands of an unjust or capricious judge. "Whoever," says Livingstone, "has opened one of the English treatises on evidence, whoever has looked into an index to a volume of reports, or into any of its abridgments, and examined its contents on that subject, will have seen how large a proportion is occupied with cases in which the competence of witnesses is discussed, not only for causes which would disqualify generally, but for those which make them incompetent to particular points, or in particular suits, most of the arguments depending on nice and often fanciful distinctions, and the decisions doubted, confirmed, or overruled, according to the judgment or caprice of a succeeding judge, and according to his respect for, or jealousy of his predecessor." One step more is wanting to extricate

(*t*) 3 East, 192.

(*u*) Buller's Nisi Prius, 298.

(*v*) Greenleaf on Evidence, 91; Gresley on Equity Evidence, 390, note; Phillipps, 830; Edmunds *v.* Groves, 2 M. & W. 642; Indorsee *v.* Maker of a Promissory Note. Plea given for gaming and taken after notice by plaintiff. No evidence at trial. Verdict for plaintiff held right.

completely the law of evidence from the absurdities in which "the judicial lawgivers of England," to borrow an expression of the same great authority, have involved it, and that is to allow the examination of parties to the suit in Courts of common law. Setting aside the recent alterations made by the County Court Act, which make the refusal of the privilege a solecism of the most startling absurdity, a party may, by an expensive proceeding in a Court of equity, obtain answers on oath to his questions from the adverse party. Now, as the objection to such evidence is, that it would lead to perjury, one would suppose that as the danger from perjury increased, the precautions against it would be most anxiously enforced. *Vivâ voce* examination, and the power of cross-examination, are looked on as the most effectual means of eliciting truth and exposing prevarication. But so perverse is English indifference to the common rudiments of jurisprudence, so disposed are our practitioners, from mere habit, to deny the efficacy of those institutions, which, on other occasions, they are so eager to applaud, that precisely where the temptation to perjury is greatest, the protection against it is taken away. The Courts in which a party may be called upon to give evidence are those in which *vivâ voce* examinations, and anything like an effectual cross-examination, are forbidden and unknown. It should not be forgotten that if the parties to a suit are most strongly tempted to conceal, or alter the facts, they are best able to point it out. It is the will, not the power, that is the question. How is this difficulty encountered? You allow the party to ponder over a written interrogatory, to call in the assistance of counsel to assist him in framing such an answer as may enable him to graze the edge of falsehood without incurring the punishment of perjury. This is attested in the presence of a person who is not to judge the suit, and who has no motive for fixing his attention upon the words or demeanour of the deponent, and, unless contradicted by two witnesses, or by one witness, with strong circumstances, or written proof, this statement is conclusive. In short, you do

everything that can fortify and corroborate the most suspicious of all witnesses in his design of falsehood, by multiplying the chances of escape, and removing everything that you look upon, and declare to be, the most effectual method of detection.

In general the English law has not defined the amount of evidence that shall be requisite to convict in criminal, or to justify a verdict in civil, cases. Some unfortunate exceptions, however, there are, arising out of a superstitious adherence to the ignorance of our ancestors, and from the narrow range of those among us to whom the task of legislation has been entrusted.

The first of these exceptions is, that the parties shall not be themselves examined at common law,—a rule which it will be impossible even for legal bigotry to uphold much longer against the beneficial effects of an opposite practice: yet, to take every chance of error, and to combine every conceivable method of oppression, and every preposterous anomaly, the law which forbids a party to the writ to be examined, where he is controuled by publicity, and subject to the test of cross-examination, allows him to make evidence for himself by affidavits made in secret, dictated by counsel, and not exposing him to cross-examination, and also allows a party, by an expensive process in another Court, to obtain answers on oath to such question as he may propose to the adverse party; but lest something like substantial justice should be done, the answers are not *vivâ voce*, and spontaneous, nor delivered before the judge, who is to pronounce upon the merits of the cause; in short, it takes every possible precaution to make the right so dearly purchased ineffectual. If you wanted to devise a scheme to make interrogation illusory, you could hardly contrive a more effectual scheme than to take care that every answer shall be strained through the mind, if it is not dictated by the caution, of a skilful lawyer, before it reaches the tribunal that is to act upon it. Let the system be tried at common law, where, at any rate, the judge sees the demeanour of the witness. Place a barrister, well acquainted with the case,

under the witness box, and let him dictate the answer: is there any one foolish enough to suppose that this method would elicit truth? Yet this method would be free from many of the worst defects of that now pursued in Chancery, where, as if for the express purpose of inviting falsehood, you tell the deponent,—mind, whatever you say shall be taken for truth, unless it can be contradicted by two witnesses, or by one corroborated by strong circumstantial proof. And this brings me to another anomaly in our law, which is the cause of perpetual injustice, both from the encouragement it holds out to falsehood, and from the subsequent impunity it extends to it. I mean, the puerile law, that to convict a man of perjury, two witnesses, or one witness corroborated by almost irresistible evidence, shall be requisite. Neither in perjury, nor in any other case, ought any person to be convicted on doubtful evidence. Where the evidence is doubtful this principle is a sufficient guard for the accused. A man accused of perjury requires no more protection than a man accused of theft. The rule adequate to protect the one, is adequate to protect the other. The rules of probability do not vary, because the word perjury is written down on parchment, instead of the word steal. But this law, coupled with the ridiculous technicality of our indictments, gives almost absolute safety to the perpetrators of a very odious crime (*w*).

Another rule of oral evidence, is that which makes the husband and wife incompetent witnesses (unless in cases of necessity) for or against each other. Livingstone's arguments against this rule, appear to me unanswerable.

By the 11 & 12 Vict. c. 12, s. 4, the act, which, I think, from a very mistaken policy, makes "open and advised speaking," in certain cases, felony,—two witnesses, or the confession of the accused, are requisite for conviction. By the 8 & 9 Vict. c. 10, s. 6, an order of affiliation cannot be grounded on the evidence of the mother only, unless she is corroborated in some

(*w*) R. *v.* Mayhew, 6 C. & P. 315, Lord Denman; R. *v.* Parker, C. & M. 646, Tindal, C. J.

material part of her evidence. Two witnesses are still requisite in cases of treason, 7 Wm. 3, c. 3. But a recent and salutary statute, 11 & 12 Vict. c. 12, has filled up the gap between high treason and sedition, by making various acts against the government, felony, and visiting them with transportation and imprisonment. The manners of the age will probably prevent, in ordinary times, the infliction of the punishment of death for any offence arising from political opinions, however dangerous and mistaken; nor will the judicial annals of this country be again disgraced by such scandalous proceedings as occurred at the trials of Hardy and of Tooke, whom Lord Eldon, and the government of that day, relying on the worst prejudices of the people, endeavoured to destroy on evidence the most inadequate, and even ludicrous. The barbarity of our legislators is, however, clearly established by the fact, that between, 1547 and 1791, seventy-four statutes were passed on the single question we are now considering; and until the 9 Geo. 4, such was the enlightened spirit which governed our proceedings, if the evidence of a Quaker or a Moravian was requisite to convict a murderer, the murderer escaped; for it was only by the 9 Geo. 4, c. 15, s. 1, that their evidence was made admissible in criminal proceedings. So judicious, rational, and enlightened, were the laws of England, and so generous and patriotic was the wish for national improvement among its rulers, in whom "the qualities requisite for supremacy, wisdom, goodness, and power, were," as Blackstone has it, "most likely to be found." If our ministers had been chosen by the neighing of a horse, instead of by a majority in Parliament, could the statute book teem with more mischievous absurdities?

General Considerations.

No writing can in itself be evidence of the truth of that which it contains; it can shew that certain covenants are written and certain names are annexed to those covenants; but it cannot attest the identity of the parties by whom those covenants were written, and those names were subscribed.

To give them effect recourse must be had to extrinsic evidence. This evidence, in the case of records, of office copies, of exemplifications, is supplied by the credit which the law gives to the seal of the Court, or the signature of a public officer. But in the case of private deeds and covenants no such test exists. Some proof of their execution, and of the identity of the parties signing them, must be produced. This is in general the testimony of the subscribing witness, or, if he is dead, of some one who knows his signature. It would greatly diminish the expense of suitors, if we were to adopt the provisions of the code of Louisiana more entirely than we have done, and oblige the party, whenever a suit is brought on an instrument under private signature, at common law to acknowledge or deny it. An evasive answer should be looked upon as an admission; or if the signature be not his own, but that of some one by whose signature he would be bound, and with whose handwriting he is acquainted, he should be obliged to admit or deny the signature to be genuine: if acknowledged, the proof is sufficient; if not acknowledged, it must be proved; and the expense of the proof should fall on the party by whom the necessity has been imposed, or his antagonist. Nothing has contributed more to increase litigation, and to blunt the effect of the natural feelings of probity in legal transactions, than the detestable fictions which are allowed in our Courts of justice, and which sear men's mind to the shame and crime of falsehood that judicial authority is so often employed to sanction. And the habit, equally detestable, of flinging upon the attorney the defence of a suit, who thus denies, without censure, what his client could not directly deny without shame. Few men would venture deliberately to deny, either upon oath or not upon oath, their own signature. But our law contrives that a good man, without shame, and for the sake of guarding against some technical unjust advantage, may, and often must, deny or (if that makes it better) put in issue what he knows is true. In many cases he would incur the chance of ruin if he did not. Hence, the attorney of a dishonest client, transferring the

principle, which, acted upon in one case, cannot be rejected in another, denies, or puts in issue, or compels his adversary to prove, such are the phrases in which the substantial fraud is wrapped up, his client's signature. If the client were to deny it out of a Court of justice, he would be a ruined man: if the attorney were to pledge his character for his belief of what he has assisted or induced his client to plead, he would be struck off the Rolls; but, as matters are managed among us, the client keeps his character, and the attorney very often wins his cause; and encouraged by success proceeds

"To-morrow to fresh fields and pastures new."

The barrister, of course, is not responsible; he only speaks from his instructions: the attorney is not responsible; he has only employed the law in defence of his client; and the client is not, in the eyes of the world, responsible, as he only has done, in the case of a bill of exchange or a deed, what the most upright of mankind would be obliged to do in an action on the case, or a case of trespass,—he has put the fact asserted by his adversary in issue; in other words, he has told a falsehood; but falsehoods on parchment, and in Courts of law, are not only innocent, but necessary for the pure administration of justice. I do not see what evil would happen, except, indeed, the evil which hitherto has made all attempts substantially to improve the law, fruitless,—the making some of the gibberish, which our judges take for learning, useless; if the members of an honourable profession were no longer to serve as a cloak to falsehood, and if shame should be annexed to him who deliberately asserts what is untrue, by word of mouth, or in writing, in person, or by proxy, in a Court of justice.

As to the claim of the profound Lord Hobart, "These things exist that the law may be an art," (words which I could never read without amazement at the impudence of the utterer, and the apathy of the hearers), and the injury sustained by those who grow rich from the evils of the law, and the right of such bodies of men to compensation, if these abuses are removed; they

remind me of what I have read somewhere, of the injury sustained by the shark which bit off the sailor's wooden leg, and the right of that much injured and disappointed animal to the sound one.

Under a philosophical system of jurisprudence, the law of evidence ought to contain only general rules, applicable to the different classes and degrees of evidence, and not particular rules preventing the manner of proving each particular action. To point out the facts that must be proved to recover possession, to enforce payment of a debt, to obtain damages for an injury, can only be requisite where the civil code, or the rules of civil proceeding, are, as they are with us, altogether barbarous, inconsistent and unintelligible. The code of proceeding ought to instruct every one what the circumstances are which give him the right he seeks to establish, or entitle him to reparation for the injury that he declares himself to have sustained. The code of evidence ought only to point out the manner in which those circumstances are to be established. But the effect of our worse than absurd, and more than unjust system of special pleading, especially since its evils have been inflamed and aggravated by the New Rules, which have had the same effect upon suitors as a lasting blight upon the air, the water, or the earth would have had, has extended itself to the law of evidence. The rules of pleading and the law of evidence have been mixed up and confounded together in one chaos of iniquity, and the result has been, as Livingstone observes, that the English law of evidence is so voluminous and so uncertain. What ought to be the objects of the legislator in providing a mode for the decision of litigated questions? They are two, to prevent the delay of a just, and the commencement of an unjust, action. Now, how are these objects to be attained? Is it probable that they will be attained where the plaintiff can say, I never saw the statement of any case that in my name has been given to my adversary; or, what is the same thing, I did see it, but, "Davus sum non

(Edipus," it was impossible for me, or any man not a lawyer, to comprehend the meaning of a single syllable that it contained? Whether it is true or false I cannot tell? and where the defendant says, with equal truth, that it was not possible for him to know the meaning of the words in which his defence is stated? Or are these objects more likely to be attained where the language of law proceedings is clear, simple and precise, not enveloped in technical imposture, nor surrounded by barbarous fictions, where every one may understand what he is obliged to say, and what is addressed to him, and where dishonesty can find no shelter in the labyrinth of distorted technicality? We carry the acknowledgment of absurdity so far, that besides the statement drawn out on parchment of money had and received, the plaintiff is actually compelled to give to his adversary a statement on paper, called particulars of demand, containing, in intelligible language, the very identical statement which it ought to be the object of the statement drawn out on parchment to convey. Now, though the parchment statement is utterly unintelligible to any one but a lawyer, the slightest error in it, an error which can mislead nobody, may be fatal to the most righteous cause, and may give a triumph to the most wicked, fraudulent and abominable defence. Thanks to the parental care of the authors of the New Rules, the most trifling cavils, the most ludicrous quibbles, are still important in English law. The omission or insertion by a pleader of the letters "o, n, t, h, e, c, a, s, e," about which judges themselves perpetually differ, over which the unhappy client has no controul, which convey no knowledge, and give no benefit to his antagonist, is more to be dreaded than the utter want of all substantial right. It is only the other day that the Court of Exchequer held, that because so trifling a clerical error as this had been committed, namely, because, instead of writing the words, "and of this the defendant puts himself on the country," the pleader had written, "and of— the defendant puts himself on the

country," that the defendant was to lose his cause; the omission of the word "this," could deceive nobody; its insertion could assist nobody; every lawyer would understand what was meant, just as well in one place as in the other. No one but a lawyer would look at the writing. The judges, nobody can doubt, acted from the best motives, and like Sterne's accusing angel, gave their suffrage in with blushes

"That made the scarlet pale,"

and the ermine "one red;" unfortunately the tears of suitors that fall upon such words do not "blot them out for ever," but confirm and render the scandal to reason everlasting and indelible. To such a state of otherwise inconceivable prejudice and infatuation, can the habit of studying trifles (*x*), and of gravely debating quibbles, reduce acute and vigorous intellects; so narrow and contracting are the tendencies to the effect of which men called upon to decide questions of English law, are perpetually exposed. Is it likely that under such a system expense and delay and injustice will be avoided? Nay, so far is this anomaly carried, that where you go the full length of allowing a party to give evidence for himself, as in affidavits before the Courts of common law, you do not give the opposite party any means or opportunity for cross-examination. But the whole doctrine is preposterous; it is contradicted by theory, and it is now refuted by experience. Reason and law, and even instinct, alike proclaim the absurdity of saying, that the search after truth, under precisely the same circumstances, shall be regulated in County Courts upon one principle, and in the Superior Courts upon another. If the parties to suits ought not to be examined, examine them in neither; if they ought to be examined, examine them in both. If the examination of the party assists a judge in discovering truth where twenty pounds are at stake, it will assist him where thirty-five pounds are at stake also; and none

(*x*) "Turpe est difficiles habere nugas
Et Stultus labor est ineptiarum."

but those who are deaf to reason, insensible to shame, and who set truth openly at defiance, will continue to dispute a proposition so self-evident; meanwhile, in all cases in which the affidavit of any person is made the foundation of any order, or proceeding whatever, the party making the affidavit should be cross-examined before the judge, called upon to make such order, and to sanction such proceeding, reasonable notice of the time and place of cross-examination, and a copy of the affidavit, before the application of the party making such affidavit is granted.

It is the remark of an excellent writer, that however perverted from accident, or enfeebled by sickness, the organs of animals may become, no one looking at the frame of animated bodies can say that the structure was intended originally to bring about pain, or to perpetuate disease. No one can imagine that such an organ was intended to produce such a kind of suffering, and such an one another; that such a gland was meant to secrete such a tormenting humour, and such a duct to diffuse it over the body.

Directly the reverse is true of English legislation. We could imagine,—nay, judging from the effects, it is very difficult not to imagine,—an opposite purpose in its founders. A calm and disinterested observer would naturally say, this rule was established to justify chicane, that to accumulate costs; this was a device to protect fraud, that to increase perplexity; this was to torment the suitor, that was to bewilder the public; this had for its object expense, that was calculated for delay; this doctrine makes the judge a legislator, that prevents the triumph of substantial justice; this class of quibbles was intended to give improper power to the Court, that was designed to secure a race of pettifoggers at the Bar; this mode of proceeding was intended to lock up the estates of the rich, that ridiculous doctrine was designed to complete the ruin of the poor." This inconsistency, this confused statute, these contradictory decisions, these election and railway committees,

tend to work the very objects of the contrivance, namely, the pain and misery of the suitor. Absolute denial of justice to the poor, and the precarious distribution of it to the rich, were the very purpose of the institution; it was created to harass, annoy, torment, and ruin those who have recourse to it, and to give wealth and power to those employed in its administration. If, when we look at instruments of torture, we may say, this was intended to dislocate the joints, that to crush the bones, that to rend the sinews, that to scorch the soles of the feet, we may legitimately argue, when we read the decisions in our Courts, and when we look at our statute books, and when we cast our eyes over bills of costs, that to drain the suitor's purse, by every means not absolutely incompatible with the existence of social order, to increase the power of the wealthy, to treat poverty as a crime, and to reduce it from insignificance to abject imbecility and helplessness, was the intention of our legislators. The argument from final causes was never more conclusive; if these were the objects, the means were admirably selected for the end; if they were not, all the prejudice, bigotry, selfishness, and ignorance that every page of legal history is polluted with, are not more than sufficient to account for them. If any one were to sit down, *à priori*, and devise a scheme of laws in civil cases, which, hurrying family after family to destruction, should not destroy the sense of personal security, and partly from the absence of direct pecuniary corruption in the judges, partly from the character of the people among whom it prevailed, should be compatible with increasing civilization and a sense of personal security; if any one were to contrive such a scheme as this, which should unite the most opposite evils of the most distant periods, ecclesiastical prevarication and Gothic ferocity, subtlety and coarseness, pedantry and ignorance, uncertainty, and a superstitious regard for the most ridiculous precedents, laxity where precision is important, and punctilious adherence to literal superstition, the most systematic indifference to substance, and the most idolatrous reverence of form, when the utmost latitude might safely be allowed, narrow

without precision, and vague without liberality, he would find that he was transcribing the system of special pleading, and the law of evidence as grafted upon it, in this country.

The consequences of the technical system which so long prevailed among us, and the worst part of which is still endured in this country, must be evident to any one who has perused the preceding pages, unless he be one of those on whose mind, prepossessed with prejudices and warped by habit, all reasoning and all experience would be flung away. But from the days of Lord Coke, who affirmed in his time of the English law, (which, if it had been the contrivance of malevolent goblins, could not have been framed more studiously for the defeat of justice, and which, but for its incomprehensibility, would have destroyed society), "that the wisdom of all the wise men in the world, if they had met together at any one time, could not have equalled it;" to the present hour; the language of most lawyers (*y*), of those deeply versed in its intricacies, as of those almost as ignorant of it, as of every other branch of human knowledge, of the Camdens, the Dunnings, the Kenyons, and the Ellenboroughs, as well as of the Bests and Garrows, and Parks, has been, that all idea of improving so admirable a system, was wicked and ridiculous, and could arise only from gross stupidity, or odious malevolence, or hypocrisy still more detestable. Even now there are men who dwell upon the few instances in which justice triumphs, notwithstanding that constellation, or rather milky way of injustices and absurdities, our preposterous system of special pleading, and insist that what has happened in spite, has happened in consequence of its regulations. A father compels his children every day before their dinner to utter a certain amount of falsehoods and imprecations. The children grow strong and healthy, and become persuaded that lying and blasphemy are essential to their existence. They are not more unreasonable,—nay, their pre-

(*y*) I am happy to except, which I do from personal knowledge, most of the leading advocates at the common law Bar from this censure.

judice is more excusable, inasmuch as good has at any rate followed these preliminaries in their case, whereas evil, and frightful evil, is the general concomitant of ours,—than he who insists on falsehood, expense, and delay, as necessary to justice in this country. A man to whom I lent my horse refuses to return it, why is the record which "imports absolute verity" to say, in defiance of truth, that the horse was lost, and that he casually found it? My tenant refuses to give up possession of my house at the end of his term, why am I to tell a string of falsehoods about two persons, one of whom turned the other out of it? And why is the language of justice, which ought emphatically to be simple, clear, and true, to be perplexed, obscure, and false, and such as it is impossible for any layman to understand (*x*)? Is not this to tamper with public morality? And has not the effect of such contrivances been most pernicious? When justice herself distinguishes between falsehoods, and if she punishes one class, obliges those who have recourse to her to tell another, can any one suppose that the crafty will

(*x*) The only excuse for fiction in legal proceedings is to evade partial and cruel laws. Hence the fictions of the Roman jurists in the early times of the commonwealth; hence the doctrine of our common recoveries to prevent land from becoming perpetually unalienable. This produced the fiction in Taltarum's case (Edward 4), by which the tenant in tail of the freehold and inheritance, or with consent of the freeholder, might alien absolutely. The evil, however, is, that in a refined age these fictions, which were the support, become the hindrances of justice. Succeeding times are hampered by technicalities, and it is difficult to distinguish cases which are within the letter—but not the spirit, within the false reason given—but not within the real object of the invention. Nobody who studies the law of real property among us can want an illustration of the terrible evils that arise from this form of the conflict between light and darkness. But they shew that in legislation, as in every other sphere of the moral world, escape from temporary difficulties is, in the end, dearly purchased by falsehood; and that nothing can be depended on which has not truth for its foundation. It is far better to wait till the evils arising from a bad law are manifest, and it can be directly subverted, than to allow them to be mitigated by subterfuge and evasion. Half the dreadful abuses of our law may be traced to the disregard of this principle.

overlook, or that the weak will resist, so strong a sanction for fraud, and so good an excuse for prevarication?

Before the recent statute, when the testimony of an Aristides as rich as Crœsus might have been excluded in a cause where his interest to the amount of a farthing was at stake, the parishioner could not give evidence in behalf of the parish to which he was rated (*y*). In some case—say St. George's in the

(*y*) As a sample of the implacable aversion to a fixed or comprehensive principle among our legislators, take the following acts. By the 3 Wm. and Mary, c. 11, s. 12, they went the length of making the evidence of parishioners admissible in actions against churchwardens or overseers for misappropriation of parish money;—there the matter stood till, *by the* 27 *Geo.* 3, c. 29, the principle was a little extended. At last, by the 54 Geo. 3, rated inhabitants were made competent witnesses. Such is the progress of legal improvement, and such the way in which we have allowed ourselves to be governed! So the examination of witnesses resident in India was made evidence, under certain circumstances, by the 13 Geo. 3, c. 63, s. 40; but it was not till the 1 Wm. 4, that this principle was extended to the colonies. There are no less than seventy-three particular cases for which a rule of evidence, confined exclusively in its operation to that particular case, is laid down by act of Parliament. The inrolment of inclosure awards, registry of parish apprentices, books of turnpike trust, endless rules for bankruptcy cases, trials relating to the excise, Crown lands, Savings' Banks, malicious injuries, charities, workhouses, newspapers, Parkhurst Prison, pluralities and residence, tithes, inclosures, stage coaches, emigration, railways (by scores), joint stock companies, friendly societies, drains, seamen, cemeteries, and quantities of other cases, have all a particular and exceptional law. In short, the strongest proof that can be found on record of ignorance, narrowness, inconsistency, short-sightedness, and legislative incapacity, (to say nothing of corruption), is furnished by the English statute book. Nothing is more common than to find a favoured class wholly exempt from the operation of laws binding on the rest of the community. Thus magistrates are released from special pleading when actions are brought against them for misconduct in their office; they may state generally they are not guilty, and give the special fact in evidence. If this contributes to justice, why should not other people be allowed to do the same? If it does not, why are they allowed to do it? So special pleading is put aside where title to land is in question: for what reason, that is not applicable to cases where other property is in dispute? And this at the special desire of the judges, who allow that special pleading in actions for land would put to hazard every estate in the kingdom.

Fields—the absurdity of this rule became so notorious, that a law was passed making all rated parishioners competent witnesses for their respective parishes. Now suppose that instead of applying the law to all England, the legislator had applied it to St. George's parish only; and that on the next occasion of a failure of justice for a similar cause—say in St. Pancras—another law had been passed, enabling the parishioners in St. Pancras to give evidence for St. Pancras, and so on successively for each successive parish throughout England,—this would be an exact specimen of the course pursued by the reformers of our law. Nothing comprehensive, nothing luminous; no appeal to principle, no general amendment; registration in one county, not in another; one law for wills in this Court, another in that; depositions allowed to be taken from Englishmen in India, as if it might not be necessary to take depositions of Englishmen in America; one mode of discovering truth where the property amounts to twenty pounds, another where it is nineteen. A man commits a theft on the 1st of December; he may be tried by a judge who never opened a law book in his life, and never could have understood a page of one if he had devoted his bucolic or ritual mind to nothing else,—full of local prejudices, and, it may be, his personal enemy. He commits the same offence in March, and a man of long experience, probably of great acuteness, with no conceivable motive to go to the right or left, whose whole life has been devoted to the study of our law, of totally different habits, thoughts, and occupations, must of necessity be his judge; and if any one else were to attempt the task the nation would be in an uproar.

Cicero, in one of his most beautiful passages, compares those philosophers who would rank pleasure among the virtues, to those who would introduce a harlot among a company of matrons, "tanquam meretricem in matronarum chorum." Is this more shocking and more indecent than the conduct of those who would bring falsehood into the company of justice,

not even as her companion, but as her mistress and her queen? Not content with the bringing of the harlot among the choir of matrons, we have placed her in the sanctuary itself, as the goddess to whom every knee should bow.

But if the law was so rude, barbarous, and intricate, how did it hold society together? Was not an alteration of it matter of absolute necessity? No doubt it was. And this alteration it received, not from the judges of common law, who with unexampled wickedness and stupidity baffled all attempts at improvements, but from another class of judges brought up in an opposite and hostile school,—from the equity judges (*z*), who imported just enough foreign law to prevent the evils of the English system from becoming intolerable, and to furnish an excuse for the opponents of reformation. Common law refused a remedy altogether—equity granted it after long delay, at an enormous price, and after volumes of written evidence had been accumulated at the expense of suitors, who were told, as they are now, on the other side of Westminster Hall, that *viva voce* examination in open Court was the pride of Britons, and the sole guarantee for the security of life and property. And this while Englishmen were disgusting and wearying all mankind by their boastings, which are still supposed a test of patriotic feeling, of our institutions and our laws. English-

(*z*) *e. g.* Courts of equity decree a specific performance of contracts, considering only whether the transaction is a binding agreement for a specific object, whatever may be the form or character of the instrument. So a bond with a penalty, to convey lands at a fixed price, will be deemed in equity an agreement from which the payment of the penalty will not exonerate the party covenanting; (Sugden Vend. and Pur. c. 4; 7 Bli. Rep., p. 50). He will be obliged to convey the land at all events. Why should not this be the rule in Courts of law? Why should a Court of law be inadequate to decree a specific performance? What consolation does the repetition of such an absurd phrase afford the suitor, who is ruined because a Court of law is so inadequate? The evils and pedantry of the common law gave the jurisdiction to decree a specific performance of covenants to Courts of equity. It is recognised in the Year Books, 8 Edw. 4; 1 Fonbl. Treat. Eq., c. 1, s. 5; 8 Ves. 559; 13 Ves. 76.

men who were thrice and four times happy if they could escape from Scylla on one side and Charybdis on the other, could keep their bodies from law and their estates from equity; as if the right of the richest were a whit better, in the eyes of the legislator or the moralist, than the right of the strongest; or as if, among all odious extortions, fees wrung from a suitor in a Court of justice were not the most intolerable.

Our minority has been long enough; let us at length

> "Leave the rudeness of that antique world
> To them that lived therein in state forlorn,"

and accommodate our rules, our forms of proceeding, and our laws of evidence to the increasing wants and exigencies of society. In law, as in literature and manners, simplicity is the mark of true refinement, and visible artifice is the badge of half knowledge and vulgarity. The motions and bearing of a savage are more graceful than those of a shopkeeper. Nations, when they first emerge from barbarism, imagine that forms can never be sufficiently multiplied, that the reverse of wrong is right, and that everything, as it departs most widely from primitive simplicity, is accurate and just. They have not yet been taught that to guard against every cavil and objection is impossible; and that the more men strive to go beyond perspicuity, the more they multiply the chances of mistake and the causes of litigation. So the first observations on the heavenly bodies, which amused the leisure of the shepherd on the plains of Babylon, led to the notion that every planet moved in an exact circle of which the earth was the centre. Difficulties arose as observations multiplied, and facts were discovered that were incompatible with this hypothesis. Men had recourse to new schemes to reconcile what they saw, with the theory which they were determined to maintain. Line was added to line, and sphere to sphere,

> "With centric and eccentric scribbled o'er,
> Cycle and epicycle, orb in orb;"

and the labyrinth was contrived in which Bacon (*a*), and even Tycho Brahe were content to wander. At last there came one who swept away all these creations, and substituted an ellipse for the complicated phenomena by which former generations had been bewildered. So the English lawyer of the dark ages, trained in the philosophy of the schools, "fierce with dark keeping," and bred to habits of great subtlety, instead of abandoning an absurd system, invented fiction after fiction for its support, and concentrated whatever abilities he possessed, to contrive legal cycles and epicycles, to save phenomena never thought of by the founders of the theory to which he had pawned his faculties, and to maintain the maxims, subtleties, and distinctions, that narrow and disgrace our law. To these forms substance was subordinate. But it is time that the staff and astrolabe of the shepherd astronomer should give place to the quadrant and the telescope of more refined and scientific observation. The sun of justice has gone round the inferior planet long enough; it is time that the cold and lifeless earth of form should revolve round the source of all that can make it fit for the relief and comfort of man's estate; it is time that some one should arise among us to do for a great moral science what Kepler did for Astronomy,—to obliterate all these vain devices, the puerile inventions of comparative barbarity, to point out to us the real orbit in which Astræa moves with that balance in which no false weight can stay; and to teach our judges that the greatest reproach to the law of any nation is the constant defeat of substantial justice.

(*a*) There are several passages impugning the Copernican theory in Lord Bacon's Works. "Atque harum suppositionum absurditas in motum terræ diurnum, *quod nobis constat falsissimum esse*, homines impegit." De Aug. lib. 3, p. 196, ed. Amsterdam. And De Aug. lib. 4, p. 235, "Constat similiter sententiam Copernici de ratione terræ (quæ nunc quoque invaluit) quia Phænomenis non repugnat, ab astronomicis principiis non posse revinci, a naturalis tamen Philosophiæ principiis, recte positis, *posse*."

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APPENDIX.

"*King James I. to Sir G. More, Governor of the Tower.*

"[without date].

"Good Sir George,

"I am extremely sorry that your unfortunate prisoner turns all the great care I have of him not only against himself, but against me also, as far he can. I cannot blame you that you cannot conjecture what this may be, for God knows it is only a trick of his idle brain, hoping thereby to shift his trial; but it is easy to be seen that he would threaten me with laying an aspersion upon me of being in some sort accessory to his crime. I can do no more [since God so abstracts his grace from him] than repeat the substance of that letter which the Lord Hay sent you yesternight, which is this: if he would write or send me any message concerning this poisoning, it needs not be private; if it be of any other business, that which I cannot now with honour receive privately, I may do it after his trial, and the turn as well; for except either his trial or confession precede, I cannot hear a private message from him, without laying an aspersion upon myself of being accessory to his crime, and I pray you to urge him by reason, that I refuse him no favour which I can grant him, without taking upon me the suspicion of being guilty of that crime whereof he is accused; and so farewell.

"JAMES R."

"*King James I. to Sir G. Moore.*

"[without date].

"Good Sir George,

"For answer to your strange news, I am first to tell you, that I expect the Lord Hay and Sir Robert Carr have been with you before this time, which if they have not yet been, do you send for them in haste, that they may first hear him, before you say anything unto him; and when this is done, if he shall still refuse to go, you must do your office, except he be either apparently sick

wits, in any of which cases you may acqu int
th may adjourn the day till Monday
and which time, if his sickness or madness be
d, it will manifestly appear. In the mean time, I
ot but you have acquainted the Chancellor with this
ge fit of his, and if upon these occasions you bring him a
de later than the hour appointed, the Chancellor may in the
mea time protract the time the best he may, whom I pray you to
acquaint likewise with this my answer, as well as with the
accident. If he have said anything of moment to the Lord Hay,
I expect to hear of it with all speed; if otherways, let me not be
troubled with it till the trial be past. Farewell.

"JAMES R.

"[superscribed in another hand].

"To our trusty and wellbeloved Sir George More, Knt.,
"our Lieutenant of our Tower of London"

"*King James to Sir George More.*

"1616, May 9.

"Good Sir George,

"As the only confidence I had in your honesty made me, without the knowledge of any, put you in that place of trust which you now possess, so must I now use your trust and secrecy in a thing greatly concerning my honour and service. You know Somerset's day of trial is at hand, and you know also what fair means I have used to move him by confessing the truth to honour God and me, and leave some place for my mercy to work upon. I have now at last sent the bearer hereof, an honest gentleman, and who once followed him, with such directions unto him as, if there be a *spunke* of grace left in him, I hope they shall work a good effect. My only desire is, that you would make his convoy unto him in such secrecy, as none living may know of it, and that, after his speaking with him in private, he may be returned back again as secretly. So reposing myself upon your faithful and secret handling of this business, I bid you heartily farewell.

"JAMES R.

"[indorsed in Sir G. More's hand],

"9th of May, about one of the clock in the afternoon, 1616."

"*King James I. to Sir G. Moore.*

"Good Sir George, "1616, May 13.

"Although I fear that the last message I sent to your unfortunate prisoner shall not take the effect that I wish it should, yet I cannot leave off to use all means possible to move him to do that which is both most honourable for me, and his own best. You shall therefore give him assurance in my name that if he will yet before his trial confess clearly unto the Commissioners his guiltiness of this fact, I will not only perform what I promised by my last messenger, both towards him and his wife, but I will enlarge it, according to the phrase of the civil law, Quòd gratiæ sunt ampliandæ. I mean not that he shall confess if he be innocent, but you know evil likely that is, and of yourself you may dispute with him, what should mean his confidence now to endure a trial, when as he remembers that this last winter he confessed to the Chief Justice that his cause was so evil likely, as he knew no jury could acquit him. Assure him I protest upon my honour, my end in this is for his and his wife's good; you will do well, likewise, of yourself to cast out unto him, that you fear his wife shall plead weakly for his innocency, and that you find the Commissioners have, you know not how, some secret assurance that in the end she will confess of him; but this must only be as from yourself, and therefore you must not let him know that I have written unto you, but only that I sent you private word to deliver him this message. Let none living know of this, and if it take good effect, move him to send in haste for the Commissioners to give them satisfaction, but if he remain obstinate, I desire not that you should trouble me with an answer, for it is to no end, and no news is better than evil news; and so farewell, and God bless your labours.

"JAMES R.

"[indorsed in Sir G. Moore's writing].

"13 May, 1616."

Protest on the Rejection of the Bill for giving Indemnity to the Witnesses against Lord Orford.

"Dissentient.

"1. Because the rejecting of this bill, founded, as we conceive, upon reason and justice, warranted by precedents, authorized by

necessity, and called for by the general voice of the nation, may appear a manifest obstruction to public justice, in the present great and important case, and a most certain defeat of it for the future, in all cases of the like nature.

"2. Because it is an uncontroverted maxim of the law of England, that the public has a right to every man's evidence, and yet, by the same law, no man is obliged to accuse himself; and as the accomplices of guilt are frequently the only witnesses of it, we conceive, that both prudence and justice point out this method of impunity to some, as absolutely necessary towards discovering the guilt of others; and thereby dissolving those confederacies, which, formed by common guilt, can only subsist while they are cemented by common danger. From these undeniable principles we apprehend this bill ought to have passed, in order to preserve the right of individuals.

"3. Because this bill is justified by many bills of a much stronger nature, in cases of much less consequence to the public; such as the cases of Sir Thomas Cooke, the Masters in Chancery, Sir Robert Sutton, Thompson, and others, in some of which, the persons indemnified in order to give their evidence were at the same time compelled, under severe penalties, to give it. And as there is a power, not only of indemnifying, but rewarding, necessarily lodged in the Crown, in order to bring criminals to justice, by evidence known to, and within the reach of the laws, so we apprehend that, in an inquiry after crimes that may affect the being of the whole, the people have a right to the exertion of that power with which the Legislature is undoubtedly vested, to come at such evidence as may make that inquiry effectual to their future security.

"4. Because the Legislature has exercised this power in many instances relating to particular branches of the revenue, in order to prevent frauds, the persons concerned in such frauds being not only indemnified, but rewarded also; and for the private utility of one company, the Legislature, by the 9th of King George the First, after forbidding any person to be concerned in promoting an East India Company in the Austrian Netherlands, gives to our East India Company a power to prosecute by bill in Chancery, or Court of Exchequer, any person whom they shall suspect,

obliging such person to make discovery upon oath, though such discovery subjects him to a forfeiture. As also for the better discovery of felonies, the Legislature has thought fit by an act, the 5th of Queen Anne, to pardon any person, not only of the felony discovered, but of all other felonies he has ever been guilty of, upon his making a discovery of two persons who shall thereupon be convicted of any burglary or felony, and that discoverer is also entitled to a reward.

"5. Because the rejecting this bill may prove a dangerous precedent of fatal consequence to this constitution, since, whenever this nation shall be visited by a wicked minister, those who shall have served him in defrauding and oppressing the public, and in corrupting individuals, will be furnished with an excuse for refusing their evidence, their danger will produce his security, and he may enjoy with safety the plunder of his country; nay, we even apprehend, that the rejecting of this bill may be misunderstood by those who can make any discovery, as if this House designed to discourage any evidence whatsoever that could affect the person whose conduct the Secret Committee was appointed by the House of Commons to inquire into. A minister may be removed from his place, and not from his power; he may be removed from both, and not from the favour of his prince; nay, he may be deprived of all three, and yet his successor may think his interest and future safety, and his prince may imagine his authority, concerned in protecting him from either punishment or inquiry. In any of which cases all written evidence, all office proofs, will be secreted or refused; and if verbal evidence be rendered impracticable too [which the rejecting of this bill will furnish a precedent for], we conceive we might as well have passed an act of indemnity to all future ministers.

"6. Because we can by no means agree to the argument principally urged against this bill, that there were not proofs of guilt against this person sufficient to justify the passing it; whereas, in our humble opinions, the voice of the nation, the sense of the other House, and the lamentable situation of this kingdom, both at home and abroad, create suspicions, which not only justify, but even call aloud for inquiry; which inquiry must necessarily

prove ineffectual, unless the proper methods are taken to support it; of which we apprehend this bill to be one, and a proceeding so just, that no innocent man would desire to avoid it, and no guilty one ought to escape it. Moreover the reasons assigned by the persons whose behaviour gave rise to this bill for refusing their evidence, is a sufficient implication that it would affect the Earl of Orford, since they admit it would affect themselves.

"7. Because we conceive that the rejecting this bill may create great disaffection in the nation, to the diminution of the credit, and consequently of the authority, of this House, when the people find themselves disappointed in their just expectations of having a strict inquiry made into the conduct of the Earl of Orford, which they have so long called for in vain, and hoped they had at last obtained. Groaning under the undiminished load of national debts and taxes, notwithstanding a long peace; trembling under the terrors of multiplied penal laws; deploring their sacrificed honour and their neglected interests; the balance of Europe overturned abroad, and the constitution endangered at home; they call for inquiry; they seek for justice; they hope for redress: the other House has taken the proper steps to answer their expectations: the inquiry begun there could only have been rendered effectual in one material point by this bill; which being rejected by this House, from whence they expect justice and redress, we fear their blasted hopes, which, for a time, may seem sunk into a slavish despondency, may at last break out into disorders, more easy, possibly, to foresee than to remedy."

THE END.

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