

From: *Howell's State Trials*, Vol. 6, Page 951 (6 How. 951).

230. The Trial of William Penn and William Mead, at the Old Bailey, for a Tumultuous Assembly: 22 Charles II. A. D. 1670. [Written by themselves.]^[1]

[To the account printed in 1670 there is this Introduction : "As there can be no observation where there is no action; so it is impossible, there should be a judicious intelligence, without due observation. And since there can be nothing more seasonable than a right information, especially of Public Acts; and well knowing, how industrious some will be, to mis-represent this Trial to the disadvantage of the cause and prisoners, it was thought requisite, in defence of both, and for the satisfaction of the people, to make it more public; nor can there be any business wherein the people of England are more concerned, than in that which relates to their civil and religious liberties, questioned in the persons above named, at the Old-Bailey, the 1st, 3rd, 4th, and 5th, of Sept. 1670."]

PRESENT, Sam. Starling, mayor; Tho. Howell, recorder; Tho. Bludworth, William Peak, John Robinson, Richard Ford, and Joseph Sheldon, aldermen; John Smith and James Edwards, sheriffs; and Richard Browne.

Cryer. 'O Yes! Thomas Veer, Edward Bushel, John Hammond, Charles Milson, Gregory Walklet, John Brightman, William Plumsted, Henry Henley, Thomas Damask, Henry Michel, William Lever, John Baily, you shall well and truly try, and true deliverance make betwixt our sovereign lord the king, and the prisoners at the bar, according to your evidence. So help you God.'

The Indictment sets forth, 'That William Penn, Gent. and William Mead, late of London, linen draper, with divers other persons to the jurors unknown, to the number of 300, the 14th day of August in the 22d year of the king, about eleven of the clock in the forenoon, the same day, with force and arms, &c. in the parish of St. Bennet Grace-church in Bridge-ward, London, in the street called Grace-church street, unlawfully and tumultuously did assemble and congregate themselves together, to the disturbance of the peace of the said lord the king: and the aforesaid William Penn and William Mead, together with other persons to the jurors aforesaid unknown, then and there so assembled and congregated together; the aforesaid William Penn, by agreement between him and William Mead before made, and by abetment of the aforesaid William Mead, then and there, in the open street, did take upon himself to preach and speak, and then and there did preach and speak unto the aforesaid William Mead, and other persons there, in the street aforesaid, being assembled and congregated together, by reason whereof a great concourse and tumult of people in the street aforesaid, then and there, a long time did remain and continue, in contempt of the said lord the king, and of his law, to the great disturbance of his peace; to the great terror and disturbance of many of his liege people and subjects, to the ill example of all others in the like case offenders, and against the peace of the said lord the king, his crown and dignity.'

What say you, William Penn and William Mead, are you Guilty, as you stand indicted, in manner and form, as aforesaid, or Not Guilty?

Penn. It is impossible that we should be able to remember the Indictment *verbatim*, and therefore we desire a copy of it, as is customary on the like occasions.

Recorder. You must first plead to the indictment, before you can have a copy of it.

Penn. I am unacquainted with the formality of the law, and therefore before I shall answer directly, I request two things of the court. 1. That no advantage may be taken against me, nor I deprived of any benefit, which I might

otherwise have received. 2. That you will promise me a fair hearing, and liberty of making my defence.

Court. No advantage shall be taken against you; you shall have liberty; you shall be heard.

Penn. Then I plead Not Guilty in manner and form.

Clerk. What sayest thou, William Mead, art thou Guilty in manner and form, as thou standest indicted, or Not Guilty?

Mead. I shall desire the same liberty as is promised William Penn.

Court, You shall have it.

Mead. Then I plead Not Guilty in manner and form.

The Court adjourned until the afternoon.

Crier. O Yes, &c.

Clerk. Bring William Penn and William Mead to the bar.

Obser. The said Prisoners were brought, but were set aside, and other business prosecuted. Where we cannot choose but observe, that it was the constant and unkind practices of the court to the prisoners to make them wait upon the trials of felons and murderers, thereby designing, in all probability, both to affront and tire them.

After five hours attendance, the court broke up and adjourned to the third instant.

The 3d of September, 1670, the court sat.

Crier. O Yes, &c.

Clerk. Bring William Penn and William Mead to the bar.

Mayor. Sirrah, who bid you put off their hats? put on their hats again.

Obser. Whereupon one of the officers putting the prisoners hats upon their heads (pursuant to the order of the court) brought them to the bar.

Record. Do you know where you are?

Penn. Yes.

Record. 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.

Record. Do you not know there is respect due to the court ? —

Penn. Yes.

Record. Why do you not pay it then?

Penn. I do so.

Record. Why do you not pull off your hat then?

Penn. Because I do not believe that to be any respect.

Record. 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 Recorders am I fined also?

Record. 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. O fear the Lord, and dread his power, and yield to the guidance of his holy spirit, for he is not far from every one of you.

The Jury sworn again.

Obser. J. Robinson, lieutenant of the Tower, disingenuously objected against Edward Bushel, as if he had not kissed the book, and therefore would have him sworn again: though indeed it was on purpose to have made use of his tenderness of conscience in avoiding reiterated oaths, to have put him by his being a jurymen, apprehending him to be a person not fit to answer their arbitrary ends. The Clerk, read the Indictment, as aforesaid.

Clerk. Crier, call James Cook into the court, give him his oath.

Clerk. James Cook, lay your hand upon the book : ' The evidence you shall give to the court, betwixt our sovereign the king, and the prisoners at the bar, shall be the truth, and the whole truth, and nothing but the truth. So help you God.'

Cook. I was sent for, from the Exchange, to go and disperse a meeting in Gracechurch-Street, where I saw Mr. Penn speaking to the people, but I could not hear what he said, because of the noise: I endeavoured to make way to take him, but I could not get to him for the crowd of people; upon which capt. Mead came to me, about the kennel of the street, and desired me to let him go on; for when he had done, he would bring Mr. Penn to me.

Court. What number do you think might be there?

Cook. About three or four hundred people.

Court. Call Richard Read, give him his oath.

Read being sworn was asked, What do you know concerning the prisoners at the bar?

Read. My lord, I went to Gracechurch-Street, where I found a great crowd of people, and I heard Mr. Penn

preach to them; and I saw capt. Mead speaking to lieutenant Cook, but what he said, I could not tell.

Mead. What did William Penn say?

Read. There was such a great noise, that I could not tell what he said.

Mead. Jury, observe this evidence, he saith he heard him preach, and yet saith, he doth not know what he said.

Jury take notice, he swears now a clean contrary thing to what he swore before the mayor when we were committed: for now he swears that he saw me in Gracechurch-Street, and yet swore before the mayor, when I was committed, that he did not see me there. I appeal to the mayor himself, if this be not true. But no answer was given.

Court. What number do you think might be there?

Read. About four or five hundred.

Penn. I desire to know of him what day it was?

Read. The 14th day of August.

Penn. Did he speak to me, or let me know he was there? for I am very sure I never saw him.

Cler. Crier, call —— into the court.

Court. Give him his oath. —— 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 capt. Mead, I did not see him there.

Rec. What say you, Mr. Mead, were you there?

Mead. It is a maxim in your own law, 'Nemo tenetur accusare seipsum,' 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 insnare me with such a question? Doth not this shew thy malice? Is this like unto a judge, that ought to be counsel for the prisoner at the bar?

Rec. Sir, hold your tongue, I did not go about to insnare you.

Penn. I desire we may come more close to the point; and that silence be commanded in the court.

Crier. O yes, all manner of persons keep silence upon pain of imprisonment. Silence in the court.

Penn. We confess ourselves to be so far from recanting, or declining to vindicate the assembling of ourselves to preach, pray, or worship the Eternal, Holy, Just God, that we declare to all the world, that we do believe it to be our indispensable duty, to meet incessantly upon so good an account; nor shall all the powers upon earth be able to divert us from reverencing and adoring our God who made us.

Brown. You are not here for worshipping God, but for breaking the law; you do yourselves a great deal of wrong in going on in that discourse.

Penn. I affirm I have broken no law, nor am I Guilty of the indictment that is laid to my charge; and to the end the bench, the jury, and myself, with these that hear us, may have a more direct understanding of this procedure, I desire you would let me know by what law it is you prosecute me, and upon what law you ground my indictment.

Rec. Upon the common-law.

Penn. Where is that common-law?

Rec. You must not think that I am able to run up so many years, and over so many adjudged cases, which we call common-law, to answer your curiosity.

Penn. This answer I am sure is very short of my question, for if it be common, it should not be so hard to produce.

Rec. Sir, will you plead to your indictment?

Penn. Shall I plead to an Indictment that hath no foundation in law? If it contain that law you say I have broken, why should you decline to produce that law, since it will be impossible for the jury to determine, or agree to bring in their verdict, who have not the law produced, by which they should measure the truth of this indictment, and the guilt, or contrary of my fact?

Rec. You are a saucy fellow, speak to the Indictment.

Penn. I say, it is my place to speak to matter of law; I am arraigned a prisoner; my liberty, which is next to life itself, is now concerned: you are many mouths and ears against me, and if I must not be allowed to make the best of my case, it is hard, I say again, unless you shew me, and the people, the law you ground your indictment upon, I shall take it for granted your proceedings are merely arbitrary.

Obser. At this time several upon the Bench urged hard upon the Prisoner to bear him down.

Rec. The question is, whether you are Guilty of this Indictment?

Penn. The question is not, whether I am Guilty of this Indictment, but whether this Indictment be legal. It is too general and imperfect an answer, to say it is the common-law, unless we knew both where and what it is. For where there is no law, there is no transgression; and that law which is not in being, is so far from being common, that it is no law at all.

Rec. You are an impertinent fellow, will you teach the court what law is? It is 'Lex non scripta,' that which many have studied 30 or 40 years to know, and would you have me to tell you in a moment?

Penn. Certainly, if the common law be so hard to be understood, it is far from being very common; but if the lord Coke in his Institutes be of any consideration, he tells us, That Common-Law is common right, and that Common Right is the Great Charter-Privileges: confirmed 9 Hen. 3, 29, 25 Edw. 1, 12 Ed. 3, 8 Coke Instit. 2 p, 56.

Rec. Sir, you are a troublesome fellow, and it is not for the honour of the court to suffer you to go on.

Penn. I have asked but one question, and you have not answered me ; though the rights and privileges of every Englishman be concerned in it.

Rec. If I should suffer you to ask questions till to-morrow morning, you would be never the wiser.

Penn. That is according as the answers are.

Rec. Sir, we must not stand to hear you talk all night.

Penn. I design no affront to the court, but to be heard in my just plea: and I must plainly tell you, that if you will deny me Oyer of that law, which you suggest I have broken, you do at once deny me an acknowledged right, and evidence to the whole world your resolution to sacrifice the privileges of Englishmen to your sinister and arbitrary designs.

Rec. Take him away. My lord, if you take not some course with this pestilent fellow, to stop his mouth, we shall not be able to do any thing to night.

Mayor. Take him away, take him away, turn him into the bale-dock.

Penn. These are but so many vain exclamations; is this justice or true judgment? Must I therefore be taken away because I plead for the fundamental laws of England? However, this I leave upon your consciences, who are of the jury (and my sole judges,) that if these ancient fundamental laws, which relate to liberty and property, (and are not limited to particular persuasions in matters of religion) must not be indispensably maintained and observed, who can say he hath right to the coat upon his back? Certainly our liberties are openly to be invaded, our wives to be ravished, our children slaved, our families ruined, and our estates led away in triumph, by every sturdy beggar and malicious informer, as their trophies, but our (pretended) forfeits for conscience sake. The Lord of Heaven and Earth will be judge between us in this matter.

Rec. Be silent there.

Penn. I am not to be silent in a case wherein I am so much concerned, and not only myself, but many ten thousand families besides.

Obser. They having rudely haled him into the Bale-dock, William Mead they left in court, who spake as followeth.

Mead. You men of the jury, here I do now stand, to answer to an Indictment against me, which is a bundle of stuff, full of lies and falshoods; for therein I am accused that I met 'vi & armis illicite & tumultuose.' time was when I had freedom to use a carnal weapon, and then I thought I feared no man; but now I fear the living God, and dare not make use thereof nor hurt any man; nor do I know I demeaned myself as a tumultuous person: I say, I am a peaceable man, therefore it is a very proper question what William Penn demanded in this case, an oyer of the law, on which our Indictment is grounded.

Rec. I have made answer to that already.

Mead, turning his face to the jury, saith, You men of the jury, who are my judges, if the Recorder will not tell you what makes a riot, a rout, or an unlawful assembly, Coke, he that once they called the lord Coke, tells us what makes a riot, a rout and an unlawful assembly. A riot is when three or more, are met together to beat a man, or

to enter forcibly into another man's land, to cut down his grass, his wood or break down his pales.

Obser. Here the Recorder interrupted him, and said 'I thank you, sir, that you will tell me what the law is,' scornfully pulling off his hat.

Mead. Thou mayest put on thy hat, I have never a fee for thee now.

Brown. He talks at random, one while an independant, another while some other religion, and now a quaker, and next a papist.

Mead. 'Turpe est doctori cum culpa redarguit ipsum.'

May. You deserve to have your tongue cut out.

Rec. If you discourse on this manner, I shall take occasion against you.

Mead. Thou didst promise me, I should have fair liberty to be heard? why may I not have the privilege of an Englishman? I am an Englishman, and you might be ashamed of this dealing.

Rec. I look upon you to be an enemy to the laws of England, which ought to be observed and kept, nor are you worthy of such privileges as others have.

Mead. The Lord is judge between me and thee in this matter.

Obser. Upon which they took him away into the Bale-dock, and the Recorder proceeded to give the Jury their charge, as followeth:

Recorder. 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.

Obser. The prisoners were put out of the court into the Bale-dock, and the charge given to the jury in their absence, at which W. Penn with a very raised voice, it being a considerable distance from the bench, spake.

Penn. I appeal to the jury who are my Judges, and this great assembly, whether the proceedings of the court are not most arbitrary, and void of all law, in offering to give the jury their charge in the absence of the prisoners ; I say it is directly opposite to, and destructive of the undoubted right of every English prisoner, as Coke, in the 2 Instit. 29. on the chap. of Magna Charta.

Obser. The Recorder being thus unexpectedly lashed for his extra judicial procedure, said with an enraged smile.

Rec. Why, ye are present, you do hear, do you not?

Penn. No thanks to the court, that commanded me into the Bale-dock; and you of the jury, take notice, that I have not been heard, neither can you legally depart the Court before I have been fully heard, having at last ten or twelve material points to offer, in order to invalidate their Indictment.

Rec. Pull that fellow down, pull him down.

Mead. Are these according to the rights and privileges of Englishmen, that we should not be heard, but turned into the Bale-dock, for making our defence, and the jury to have their charge given them in our absence? I say these are barbarous and unjust proceedings.

Rec. Take them away into the Hole: To hear them talk all night as they would, that I think doth not become the honour of the court and I think you (*i. e.* the jury) yourselves would be tired out, and not have patience to hear them.

Obser. The Jury were commanded up to agree upon their verdict, the prisoners remaining in the stinking hole. After an hour and a half's time eight came down agreed, but four remained above; the court sent an officer for them, and they accordingly came down. The Bench used many unworthy threats to the four that dissented; and the Recorder, addressing himself to 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.'

J. Robinson. Mr. Bushel, I have known you near this 14 years; you have thrust yourself upon this jury, because you think there is some service for you: I tell you, you deserve to be indicted more than any man that hath been brought to the bar this day.

Bushel. No, sir John, there were threescore before me, and I would willingly have got off, but could not.

Bloodw. 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.

May. Sirrah, you are an impudent fellow, I will put a mark upon you.

Obser. They used much menacing language, and behaved themselves very imperiously to the jury, as persons not more void of justice than sober education: After this barbarous usage, they sent them to consider of bringing in their verdict, and after some considerable time they returned to the Court. Silence was called for, and the jury called by their names,

Cler. Are you agreed upon your verdict?

Jury. Yes.

Cler. Who shall speak for you ?

Jury. Our Foreman.

Clerk. Look upon the prisoners at the bar; how say you? Is William Penn Guilty of the matter whereof he stands indicted in manner and form, or Not Guilty?

Foreman. Guilty of speaking in Grace-church street.

Court. Is that all ?

Foreman. That is all I have in commission.

Rec. You had as good say nothing.

May. Was it not an unlawful assembly? You mean he was speaking to a tumult of people there?

Foreman. My Lord, This is all I had in commission.

Obser. Here some of the jury seemed to buckle to the questions of the Court: upon which, Bushel, Hammond, and some others, opposed themselves, and said, they allowed of no such word as an unlawful assembly in their Verdict; at which the Recorder, Mayor, Robinson and Bloodworth took great occasion to vilify them with most opprobrious language; and this verdict not serving their turns, the Recorder expressed himself thus:

Rec. The law of England will not allow you to part till you have given in your Verdict.

Jury. We have given in our Verdict, and we can give in no other.

Rec. Gentlemen, you have not given in your Verdict, and you had its good say nothing; therefore go and consider it once more, that we may make an end of this troublesome business.

Jury. We desire we may have pen, ink, and paper.

Obser. The Court adjourned for half an hour; which being expired, the Court returns, and the Jury not long after.

The Prisoners were brought to the bar, and the Jury's names called over.

Clerk. Are you agreed of your Verdict?

Jury. Yes.

Clerk. Who shall speak for you?

Jury. Our Foreman.

Clerk. What say you? Look upon the prisoners: Is William Penn Guilty in manner and form, as he stands indicted, or Not Guilty?

Foreman. Here is our Verdict; holding forth a piece of paper to the clerk of the peace, which follows.

'We the jurors, hereafter named, do find William Penn to be Guilty of speaking or preaching to an assembly, met together in Gracechurch-street, the 14th of August last, 1670, And that William Mead is Not Guilty of the said Indictment.'

Foreman Thomas Veer, Edward Bushel, John Hammond, Henry Henley, Charles Milson, Gregory Walklet, John Baily, William Lever, Henry Michel, John Bnghtman, James Damask, Wil. Plumsted.

Obser. This both Mayor and Recorder resented at so high a rate, that they exceeded the bounds of all reason and civility.

Mayor. What, will you be led by such a silly fellow as Bushel? an impudent canting fellow? I warrant you, you shall come no more upon juries in haste: You are a foreman indeed, addressing himself to the foreman, I thought

you, had understood your place better.

Recorder. Gentlemen, you shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and tobacco; you shall not think thus to abuse the court; we will have a verdict, by the help of God, or you shall starve for it.

Penn. My jury, who are my judges, ought not to be thus menaced; their verdict should be free, and not compelled; the bench ought to wait upon them, but not forestal them. I do desire that justice may be done me, and that the arbitrary resolves of the bench may not be made the measure of my jury's verdict.

Recorder. Stop that prating fellow's mouth, or put him out of the court.

Mayor. You have heard that he preached, that he gathered a company of tumultuous people, and that they do not only disobey the martial power, but civil also.

Penn. It is a great mistake: we did not make the tumult, but they that interrupted us: The jury cannot be so ignorant, as to think, that we met there, with a design to disturb the civil peace, since (1st) we were by force of arms kept out of our lawful house, and met as near it in the street as their soldiers would give us leave; and (2dly) because it was no new thing (nor with the circumstances expressed in the indictment), but what was usual and customary with us: it is very well known that we are a peaceable people, and cannot offer violence to any man.

Obser. The court being ready to break up, and willing to huddle the prisoners to their gaol, and the jury to their chamber, Penn spoke as follows:

Penn. The agreement of 12 men is a verdict in law, and such a one being given by the jury, I require the clerk of the peace to record it, as he will answer it at his peril. And if the jury bring in another verdict contradictory to this, I affirm they are perjured men in law; And looking upon the jury, said, You are Englishmen, mind your privilege, give not away your right.

Bush. &c. Nor will we ever do it.

Obser. One of the jury-men pleaded indisposition of body, and therefore desired to be dismissed.

Mayor. You are as strong as any of them; starve them; and hold your principles.

Recorder. Gentlemen, You must be contented with your hard fate, let your patience overcome it; for the court is resolved to have a verdict, and that before you can be dismissed.

Jury. We are agreed, we are agreed, we are agreed.

Obser. The court swore several persons, to keep the Jury all night without meat, drink, fire, or any other accommodation; they had not so much as a chamber pot, though desired.

Crier. O Yes, &c.

Obser. The court adjourns till 7 of the clock next morning (being the 4th instant, vulgarly called Sunday, at which time the prisoners were brought to the bar: The court sat, and the Jury called to bring in their verdict.

Crier. O Yes, &c. — Silence in the court, upon pain of imprisonment.

The Jury's names called over:

Clerk. Are you agreed upon your verdict?

Jury. Yes.

Clerk. Who shall speak for you?

Jury. Our foreman.

Clerk. What say you? Look upon the prisoners at the bar; is William Penn guilty of the matter whereof he stands indicted, in manner and form as aforesaid, or Not Guilty?

Foreman. William Penn is Guilty of speaking in Gracechurch-Street.

Mayor. To an unlawful assembly?

Busk. 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.

Blood. I knew Mr. Bushel would not yield.

Bush. Sir Thomas, I have done according to my conscience.

Mayor. That conscience of yours would cut my throat.

Bush. No, my lord, it never shall.

Mayor. But I will cut yours so soon as I can.

Recorder. He has inspired the jury; he has the spirit of divination, methinks I feel him; I will have a positive verdict, or you shall starve for it.

Penn. I desire to ask the Recorder one question, Do you allow of the verdict given of William Mead?

Recorder. It cannot be a verdict, because you were indicted for a conspiracy, and one being found Not Guilty, and not the other, it could not be a verdict.

Penn. If Not Guilty be not a verdict, then you make of the jury and Magna Charta but a mere nose of wax.

Mead. How! is Not Guilty no verdict?

Rec. No, it is no Verdict.

Penn. I affirm, that the consent of a jury is a Verdict in law; and if William Mead be Not Guilty, it consequently follows, that I am clear, since you have indicted us of a conspiracy, and I could not possibly conspire alone,

Obser. There were many passages, that could not be taken, which past between the Jury and the Court. The Jury went up again, having received a fresh charge from the Bench, if possible to extort an unjust Verdict.

Cry. O Yes, &c. Silence in the Court.

Court. Call over the Jury. Which was done.

Clerk. What say you? Is William Penn Guilty of the matter whereof he stands indicted, in manner and form aforesaid, or Not Guilty?

Forem. Guilty of speaking in Gracechurch-street.

Rec. What is this to the purpose? I say, I will have a verdict. And speaking to Edw. Bushel, said, You are a factious fellow; I will set a mark upon you; and whilst I have any thing 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.

Penn. It is intolerable that my jury should be thus menaced: Is this according to the fundamental laws? Are not they my proper judges by the Great Charter of England? What hope is there of ever 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 render one of them worse than a felon? And do you not plainly seem to condemn such for factious fellows, who answer not your ends? Unhappy are those juries, who are threatened to be fined, and starved, and ruined, if they give not in Verdicts contrary to their consciences.

Rec. My lord, you must take a course with that same fellow.

Mayor. Stop his mouth; gaoler, bring fetters, and stake him to the ground.

Penn. Do your pleasure, I matter not your fetters.

Rec. Till now I never understood the reason of the policy and prudence of the Spaniards, in suffering the inquisition among them: And certainly it will never be well with us, till something like unto the Spanish inquisition be in England.

Obser. The jury being required to go together to find another Verdict, and stedfastly refusing it (saying they could give no other Verdict than what was already given) the Recorder in great passion was running off the bench, with these words in his mouth, 'I protest I will sit here no longer to hear these things;' at which the Mayor calling, Stay, stay, he returned, and directed himself unto the Jury, and spoke as followeth:

Rec. Gentlemen, we shall not be at this trade always with you: you will find the next sessions of parliament there will be a law made, that those that will not conform shall not have the protection of the law. Mr. Lee, draw up another Verdict, that they may bring it in special.

Lee. I cannot tell how to do it.

Jury. We ought not to be returned, having all agreed, and set our hands to the Verdict.

Rec. Your Verdict is nothing, you play upon the Court; I say you shall go together, and bring in another Verdict,

or you shall starve; and I will have you carted about the city, as in Edward 3rd's time.

Forem. We have given in our Verdict, and all agreed to it ; and if we give in another, it will be a force upon us to save our lives.

Mayor. Take them up.

Offic. My Lord, they will not go up.

Obser. The Mayor spoke to the sheriff, and he came off his seat, and said,

Sher. Come, gentlemen, you must go up; you see I am commanded to make you go.

Obser. Upon which the Jury went up; and several sworn to keep them without any accommodation, as aforesaid, till they brought in their Verdict.

Cry. O yes, &c. The Court adjourns till tomorrow morning, at 7 o'clock.

Obser. The prisoners were remanded to Newgate, where they remained till next morning, and then were brought unto the Court, which being sat, they proceeded as followeth.

Cry. O yes, &c. Silence in the Court, upon pain of imprisonment.

Cler. Set William Penn and William Mead to the bar. Gentlemen of the Jury, answer to your names; Tho. Veer, Edw. Bushel, John Hammond, Henry Henly, Henry Mitchell, John Bnghtman, Charles Milson, Gregory Walklet, John Baily, William Leaver, James Damask, William Plumstead. Are you all agreed of your Verdict? —

Jury. Yes.

Cler. Who shall speak for you?

Jury. Our foreman.

Cler. Look upon the prisoners. What say you? Is William Penn Guilty of the matter whereof he stands indicted, in manner and form, &c. or Not Guilty?

Foreman. Here is our Verdict in writing, and our hands subscribed.

Obser. The clerk took the Paper, but was stopt by the Recorder from reading of it; and he commanded to ask for a positive Verdict.

Foreman. That is our Verdict; we have subscribed to it.

Cler. How say you? is William Penn Guilty, &c. or Not Guilty.

Foreman. Not Guilty.

Cler. How say you? is William Mead Guilty, &c. or Not Guilty?

Foreman. Not Guilty.

Cler. Then hearken to your Verdict; you say that William Penn is Not Guilty in manner and form as he stands indicted; you say that William Mead is Not Guilty in manner and form as he stands indicted, and so you say all?

Jury. Yes, we do so.

Observ. The Bench being unsatisfied with the Verdict, commanded that every person should distinctly answer to their names, and give in their Verdict, which they unanimously did in saying, Not Guilty, to the great satisfaction of the assembly.

Rec. I am sorry, gentlemen, you have followed your own judgments and opinions, rather than the good and wholesome advice which was given you; God keep my life out of your hands, but for this^[2] the Court fines you 40 marks a man; and imprisonment till paid. At which Penn stepped up towards the bench, and said:

Penn. I demand my liberty, being freed by the Jury.

Mayor. No, you are in for your fines.

Penn. Fines, for what?

Mayor. For contempt of the Court.

Penn. I ask, if it be according to the fundamental laws of England, that any Englishman should be fined or amerced, but by the judgment of his peers or jury; since it expressly contradicts the 14th and 29th chapters of the Great Charter of England, which say, 'No freeman ought to be amerced but by the oath of good and lawful men of the vicinage.

Rec. Take him away, take him away, take him out of the Court.

Penn. I can never urge the fundamental laws of England, but you cry, Take him away, take him away. But it is no wonder, since the Spanish Inquisition hath so great a place in the Recorder's heart. God Almighty, who is just, will judge you all for these things.

Observ. They hauled the prisoners into the Bale-dock, and from thence sent them to Newgate, for non-payment of their fines; and so were their Jury. But the Jury were afterwards discharged upon an Habeas Corpus, returnable in the Common-Pleas, where their commitment was adjudged illegal.

See the next Case.

The following Article was subjoined to the account of this Trial printed in 1670:

An APPENDIX by way of DEFENCE for the prisoners, as what might have been offered against the Indictment and illegal Proceedings of the Court thereon, had they not violently over-ruled and stopped them.

UPON a sober disquisition into the several parts of the Indictment, we find it so wretchedly defective, as if it were nothing else but a mere composition of error, rather calculated to the malicious designs of the judges, than to the least verity of fact committed by the prisoners.

To prove this, what we say will be a main help to discover the arbitrary proceedings of the bench in their

frequent menaces to the jury; as if it were not so much their business to try, as to condemn the prisoners; and that not so much for any fact they had committed, as what the court would have suggested to the jury to have been their fact.

Sec. 1. It is the constant common law of England, that no man should be taken, imprisoned, amerced, disseized of his free-hold, of his liberties or free customs, but by the judgment of his peers, which are vulgarly called a Jury, from *Jurare*, because they are sworn to do right.

Sec. 2. The only assistance that is given the Jury, in order to a verdict, is:

First, the Evidence given of the fact committed, by the person indicted.

Secondly, the knowledge of that law, act of statute the Indictment is grounded upon, and which the prisoners are said to have transgressed.

Sec. 3. We shall neglect to mention here how much they were deprived of that just advantage the ancient equal laws of England do allow, designing it for a conclusion of the whole, and shall only speak here to matter of fact and law.

Sec. 4. The evidence, you have read in the trial, the utmost import of which, is no more than this; That William Penn was speaking in Gracious-street, to an assembly of people, but knew not what he said, which is so great a contradiction, as he that runs may read it: for no man can say another man preaches, and yet understand not what he saith: he may conjecture it, but that is a lame evidence in law; it might as well have been sworn, that he was speaking of law, physic, trade, or any other matter of civil concernment. Besides there is no law against preaching what is truth; whether it be in the street, or any other place: nor is it possible, that any man can truly swear that he preached sedition, heresy, &c. unless he so heard him, that he could tell what he said.

Sec. 5. The evidence further saith, that William Mead was there, but till being in Gracious street be a fault, and hearing a man speak the witness knows not what, be contrary to law, the whole evidence is useless, and impertinent: but what they want of that, they endeavour to supply with Indictment; whose parts we proceed to consider.

Exceptions against the Indictment.

Sec. 6. It saith, that the prisoners were met upon the 15th day of August 1670, whereas their own evidence affirms it to be upon the 14th day of August, 1670.

Sec. 7. [That they met with force and arms] which is so great a lye, that the court had no better cover for it, than to tell the jury, it was only a piece of form, urging that the man tried for clipping of money, this present sessions, had the same words used in his indictment. But that this answer is too scanty, as well as it was too weak to prevail with the jury: we desire it may be considered, that the same words may be used more of course, and out of form at one time, than at another; And though we grant they can have little force with any jury in a clipper's case for meer clipping; yet they are words that give so just a ground of jealousy, nay, that carry so clear an evidence of illegality where they are truly proved and affirmed of any meeting, as that they are the proper roots from whence do spring those branches which render an indictment terrible, and an assembly truly the terror of the people.

Sec. 8. [Unlawfully and tumultuously to disturb the peace] which is as true, as what is said before, (that is, as

false) this will evidently appear to ail that consider how lawful it is to assemble, with no other design than to worship God, and their calling a lawful assembly an unlawful one, no more makes it so, than to say light is darkness, black is white, conclude so impudent a falsity true.

In short, because to worship God can never be a crime, no meeting or assembly, designing to worship God, can be unlawful. Such as go about to prove an unlawful assembly must prove the assemblers intent not to worship God, but that no man can do, because no man can know another man's intentions, and therefore its impossible that any should prove such an assembly unlawful. That is properly an unlawful assembly, according to the definition of the law, when several persons are met together, with design to use violence and to do mischief; but that dissenters meet with no such intention, is manifest to the whole world, therefore their assemblies are not unlawful; he that hath only right to be worshipped, which is God, hath only right to institute how he will be worshipped; and such as worship him in that way they apprehend him to have instituted, are so far from being unlawful assemblers, that therein they do but express the duty they owe to God.

[Tumultuously] imports as much as disorderly, or an assembly full of noise, bustle, and confusion, using force and violence, to the injury of persons, houses, or grounds. But whether religious dissenters in their peaceable meetings, therein desiring, and seeking nothing more than to express that duty they owe to God Almighty be a tumultuous action, or meeting in the sense expressed (and which is the very definition of the law) will be the question. Certainly such as call these meetings tumultuous, as to break the peace, offer the greatest violence to common words, that can be well imagined: for they may as rightly say, such persons meet adulterously, thievishly, &c. as to affirm they meet tumultuously, because they are as truly applicable; in short, such particulars, as are required to prove them such meetings in law, are wholly wanting.

Sec 9. [To the disturbance of the peace.] If the disturbance of the peace be but matter of form with the rest, as is usually pleaded; leave out this matter of form and then see what great matter will be left.

Certainly such assemblies, as are not to the breach and disturbance of the pence, are far from being unlawful or tumultuary; but if the peace be broken by them, how comes it the evidence was so short? We cannot believe it was in favour of the prisoners. This may shew all the reasonable world, how forward some are to brand innocency with hateful names, to bring a suspicion, where there was none deserved.

Sec. 10. [That the said Penn and Mead met, by agreement before hand made.]

But if persons that never saw each other, nor converse together, neither had correspondence by any other hand, cannot be said to be agreed, to any action, before it be done; then the prisoners were far from an agreement; for they had never seen, conversed, nor corresponded, directly, nor indirectly, before the officers came to disturb the assembly: We well know how far they would have stretched the word 'Agreement, or Conspiracy;' but God who brings to nought the councils of the wicked, prevented their cruel designs.

Sec. 11. [That William Mead did abet the said William Penn in preaching.]

No man can be said to abet another, whilst they are both unknown to each other, especially in this case, where abetting follows agreeing, and agreeing supposes fore-knowledge. Nay the word abet in law signifies to command, procure or counsel a person, which W. Mead, could not be said to do, in reference to W. Penn, they being so great strangers one to another, and at so great a distance; for the evidence proves that he was with lieutenant Cook, and lieutenant Cook swears he could not make his way to W. Penn, for the croud.

Sec. 12. [That W. Penn's preaching and speaking caused a great concourse and tumult of people, to remain and continue a long time in the street.]

But this is so improbable to believe, that the very nature of a tumult admits of no such thing as preaching; but implies a disorderly multitude, where all may be said to speak, rather than any to hear.

Sec. 1. [In contempt of the king and his laws.]

They are so far from contemning the king and his laws, that they are obliged and constrained by their own principles, to obey every ordinance of man for the Lord's sake, but not against the Lord for man's sake, which is the question in hand. Besides, their continuance there, was not in contempt, but by the permission of the chief officer present, that came there by the king's authority; nor is it for the honour of the king that such persons should be said to act in contempt of his laws, as only meet to honour God and his laws.

Sec. 2. [And to the great disturbance of the king's peace.]

It is far from disturbing and breaking the king's peace for men peaceably to meet to worship God; for it is then properly broken and invaded, when force and violence are used, to the hurt and prejudice of persons and estates; or when any thing is done that tends to the stirring up of sedition, and begetting in people a dislike of the civil government: But that such things are not practised by us in our assemblies, either to offer violence to mens' persons and estates, or to stir up the people to sedition, or dislike to the civil government, is obvious to all that visit our assemblies.

Sec. 3. [To the great terror and disturbance of the king's liege people and subjects, and to the evil example of all others in the like case offending, against the king's peace, his crown and dignity.]

Were these black criminations as true as they are wretchedly false, we should give as just an occasion, to lose our liberties, as our cruel adversaries, are ready to take any to deprive us unjustly of them. O! How notorious it is to all sober people, that our manner of life is far from terrifying any; and how absurd to think that naked men, in the generality of their conversation, known to be harmless and quiet, should prove a terror or disturbance to the people; certainly, if any such thing should be in the time of our meetings, it is brought with the cruelty and barbarous actions of your own soldiers: they never learned by our example to beat, hale before magistrates, fine, and imprison for matters relating to God's worship; neither can they say, we are their precedents: for all those adulterous, prodigal, lascivious, drunken, swearing, and profane acts, they daily commit, and esteem rather occasion of brag and boast, than sorrow and repentance; No, they need not go so far, they have too many, God Almighty knows, of their own superiors for their example.

Sec. 4. But we can never pass over with silence, nor enough observe the detestable juggle of such indictments, which we require all English and conscientious men to mind, as they value themselves in the like occasions. How little a grain of fact was proved, yet how spacious an indictment was made? had it related to the evidence, the bulk had been excusable but when it only swelled with malicious scaring phrases, to suggest to the people, that they were the merest villains, the most dangerous persons, and designing mutually the subversion of the laws, and breach of the peace, to the terrifying of the people, &c.

Who can choose but tell them of their romance-indictment, that is so forged; as it truly merits another against itself. This they childishly call form; but had an Italian or other stranger been in court, he would have judged it matter of fact, as thinking it unworthy of a king's court, to accuse men in terms, not legally, truly, or probably due

to the fact, they really had committed; as well as that no court would practise it, but that which loved to deprive men of their liberties, and lives, rather than to save them; *Nolens Volens*.

Sec. 5. Had their cruelty and juggle ended here itself, they would have spared us the pains of any further observation. But that which we have to add, on the prisoners behalf, renders their actions so abominable, in the sight of justice, that all honest and ingenious hearts must needs abhor their base snares.

They tell the jury, That being but judges of fact only, they were to bring the prisoners in Guilty (that is of the fact) at their peril; and it was the part of the bench, to judge what was law; So that if the jury had brought them in Guilty, without any further additional explanation (though intentionally they meant only of the fact proved by evidence) yet the bench would have extended it to every part of the indictment, and by this impious delusion, to have perjured a well meaning jury, and have had their barbarous ends upon the innocent prisoners. But the jury better understanding themselves brought in William Penn. Guilty of the fact proved, namely, That he was speaking to some people met in Gracious Church-Street, but not of an unlawful assembly, so circumstantiated (the mention of which stabbed their design of moulding the general answer of Guilty, to their own ends, to the heart) nor indeed could they do otherwise; for as well the jury as prisoners, were denied to have any law produced, by which they might measure the truth of the indictment, and guilt of the fact. But because the Recorder would or could not, perhaps it is so long since he read law that he may have forgotten it, we shall perform his part, in shewing what is that common law of the land, which in general, he said, they were indicted for the breach of, and which indeed if rightly understood, is the undoubted birthright of every Englishman; yea, the inheritance of inheritances, 'Major Hæreditas venit unicuique nostrum a jure, et Legibus, quam a parentibus.' Coke Instit. 2. 56.

Sec. 6. All the various kinds or models of government, that are in the world, stand either upon will and power, or condition and contract, the first, rule by men, the second, by laws; it is our happiness to be born under such a constitution, as is most abhorrent in itself, of all arbitrary government, and which is, and ever has been, most choice and careful of her laws, by which all right is preserved.

Sec. 7. All laws are either fundamental, and so immutable; or superficial and so alterable. By the first we understand such laws, as enjoin men to be just, honest, virtuous; to do no wrong, to kill, rob, deceive, prejudice none; but to do, as one would be done unto; to cherish good, and to terrify wicked men; in short, universal reason, which are not subject to any revolutions, because no emergency, time, or occasion can ever justify a suspension of their execution, much less their utter abrogation.

Sec. 8. By superficial laws we understand, such acts, laws, or statutes, as are suited to present occurrences; and which may as well be abrogated, for the good of the kingdom, as they were first made for it. For instance, those statutes, that relate to victuals, cloaths, and places of trade, &c. which have ever stood whilst the reason of them was in force, but when that benefit, which once redounded, fell by cross occurrences, they ended according to that old maxim, 'cessante ratione legis, cessat lex ;' but this cannot be said of fundamental laws, till houses stand without their foundation, and English mankind wholly cease to be, which brings close upon the point.

Sec. 9. There is not any country, that has more constantly expressed her care and deep solicitude to the preservation of her fundamental laws, than the English nation: and though the evil of some particular times and persons have endeavoured an utter abolition of those excellent fundamentals, which we have before defined and defended from any just reason of revolution; yet God Almighty, who is always concerned to avenge the cause of justice, and those excellent good laws, by which it is upheld, has by his providence befooled their contrivances, and baffled their attempts, by bringing their designs to naught, and their persons frequently to condign punishment

and disgrace, their age no antiquary living can assure us, unless they say, as old as reason itself but our own authors are not lacking to inform us, that the liberties, properties and privileges of the English nation are very ancient.

Sec. 10. For Hern in his Mirror of Justice (writ in Edward the first's time) fol. 1. tells us, "That after God had abated the nobility of the Britons, he did deliver the realm to men more humble and simple, of the countries adjoining, to wit, the Saxons, which came from the parts of Almain to conquer this land, of which men there were forty sovereigns, which did rule as companions; and those princes did call this realm England, which before was named the greater Britain: these, after great wars, tribulations and pains, by long time suffered, did chuse a king to reign over them to govern the people of God, and to maintain and defend their persons, and their good in quiet, by the rules of right, and at the beginning they did cause him to swear to maintain the holy Christian faith, and to guide his people by right, with all his power, without respect of persons, and to observe the laws: and after when the kingdom was turned into an heritage, king Alfred, that governed this kingdom about 171 years before the conquest, did cause the great men of the kingdom to assemble at London, and there did ordain for a perpetual usage, that twice in the year, or oftner, if need should be, in tune of peace, they should assemble at London in parliament; for the government of God's people, that men might live in quiet and receive right by certain usages and holy judgments."

"In which parliament (saith our author) the rights and prerogatives of the kings and of the subjects are distinguished and set apart; and particularly by him expressed, too tedious here to insert; amongst which ordinances we find, "That no man should be imprisoned, but for a capital offence. And if a man should detain another in prison, by colour of right, where there was none, till the party imprisoned died; he that kept him in prison should be held guilty of murder" as you may read p. 33, and p. 36. "He is declared Guilty of Homicide, by whom a man shall die in prison, whether it be the judges, that shall too long delay to do a man right, or by cruelty of gaolers, or suffering him to die of famine; or when a man is adjudged to do penance, and shall be surcharged by his gaoler with irons, or other pain whereof he is deprived his life." And p. 149. "That by the ancient law of England, it was felony to detain a man in prison, after sufficient bail offered; where the party was plevisable; every person was plevisable, but he that was appealed of treason, murder, robbery or burglary," p, 35. "None ought to be put in common prisons, but only such as were attainted, or principally appealed or indicted of some capital offence, or attainted of false or wrongful imprisonment; so tender have the ancient laws and constitution of this realm been of the liberty of their subjects persons, that no man ought to be imprisoned, but for a capital offence, as, treason, murder, robbery, or burglary."

Sec. 11. Nor is Lambard short in his excellent translation of the Saxon laws, from king Ina's time, 712, to Hen. 3, 1100. In describing to us the great obligation, and strong condition, the people were wont to put upon their kings, To observe the ancient fundamental laws, and free customs of this land, which were handed down from one age to another. And in the 17th chap. of Edward the Confessor's laws, the mention there made of a king's duty is very remarkable. That if he break his oath, or performed not his obligation 'Nec nomen regis in eo constabit.' The same Lambard farther tells us, that however any may affirm William of Normandy to be a conquerer; he was received by the people as Edward's successor, and by solemn oath taken, to maintain unto them the same laws that his kinsman Edward the Confessor did; this doctrine remained in the general, unquestioned, to the reign of king John, who imperiously thought that *voluntas regis*, and not *salus populi*, was *suprema lex*, or the king's will was the supreme law, and not the people's preservation; till the incensed barons of that time, betook themselves to a vigorous defence of their ancient rights and liberties, and learnt him to keep those laws by a due restraint and timely compulsion, which his former invasion of them evidenced to the world he would never have done willingly.

Sec. 12. The Proposals and Articles of agreement, with the pledges given to the barons, on the behalf of the people by the king, were confirmed in Hen. 3d's time, his son and successor; when the abused, slighted, and disregarded laws, by his father, were thought fit to be reduced to record, that the people of England might not for ever after be to seek for a written recorded law, to their defence and security; for, 'misera servitus est ubi jus est vagum aut incognitum;' and so we enter upon that grand charter of liberty and privilege, in the cause, reason, and end of it.

Sect. 1. We shall first rehearse it, so far as we are concerned (with the formalities of Grant and Curse) and shall then say something as to the Cause, Reason and End of it.

A rehearsal of the material parts of the great charter of England.

"Henry, by the grace of God, king of England, &c. To all archbishops, or earls, barons, sheriffs, provosts, officers, and to all bailiffs, and our faithful subjects, who shall see this present charter, greeting. Know ye that we unto the honour of Almighty God, and for the salvation of the souls of our progenitors, and our successors, kings of England, to the advancement of holy church, and amendment of our realm, of our mere and free win have given and granted to all archbishops, &c. and to all freemen of this our realm, these liberties under written, to be holden and kept in this our realm of England for evermore. [9 H. 3. confirmed 28 Ed. 3.]

"We have granted and given to all freemen of our realm, for us, and our heirs for evermore these liberties under written, to have and to hold to them, and to to their heirs, of us and our heirs fore-named. [Chap. 1. the form of ancient acts, &c. Co. 2. Inst. fol. 2.]

"A freeman shall not be amerced for a small fault, but after the quantity of the fault. And for a great fault, after the manner thereof, saving to him his contenements or free-hold. And a merchant likewise shall be amerced, saving to him his merchandize; and none of the said ameracements shall be assessed, but by the oath of good and honest men of the vicinage. [Chap. 14.]

"No freeman shall be taken, or imprisoned, nor be disseized of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other ways destroyed; nor we shall not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land; we shall sell to no man, we shall deny nor defer to no man either justice or right. [Chap. 29.]

"And to all these customs, liberties aforesaid, which we have granted to be holden within this our realm, as much as appertained to us and our heirs we shall observe; and all men of this our realm, as well spiritual as temporal, (as much as in them is) shall observe the same against all persons in like wise. And for this our gift, and grant of these liberties, and for other contained in our charter of liberties of our Forest, the archbishops, bishops, abbots, priors, earls, barons, knights, freeholders, and other our subjects, have given unto us the fifteenth part of all their moveables; and we have granted unto them on the other part, that neither we, nor our heirs, shall procure or do any thing whereby the liberties in this charter contained shall be infringed or broken; and if any thing be procured by any person contrary to the premises, shall be had of no force nor effect. These being witnesses, Boniface archbishop of Canterbury, &c. We ratifying and approving those gifts and grants aforesaid, confirm and make strong all the same, for us and our heirs perpetually, and by the tenor of these presents do renew the same willingly; and granting for us and our heirs, that this charter, in all and singular his articles for evermore shall be stedfastly, firmly, and inviolably observed. And if any article in the same charter contained, yet hitherto peradventure hath not been observed, nor kept, we will, and by our authority royal command, from henceforth firmly they be observed. Witness, &c."

The SENTENCE of curse given by the Bishops, with the King's Consent, against the Breakers of the great charter.

In the year of our Lord 1253, the third day of May, in the great hall of the king at Westminster, in the presence, and by the consent of the lord Henry, by the grace of God, king of England, and the lord Richard, earl of Cornwall, his brother; Roger Bigot, earl of Norfolk marshall of England; Humphry, earl of Hereford; Henry earl of Oxford; John, earl Warren; and other estates of the realm of England: We Boniface, by the mercy of God, archbishop of Canterbury, primate of England, F. of London, H. of Ely, S. of Worcester, E. of Lincoln, W. of Norwich, P. of Hereford, W. of Salisbury, W. of Durham, R. of Exeter, M. of Carlisle, W. of Bath, E. of Rochester, T. of St. Davids, bishops, apparelled in pontificals, with tapers burning, against the breakers of the churches liberties, and of the liberties and other customs of this realm of England; and namely these which are contained in the Charter of the common Liberties of England, and Charter of the Forest, have denounced Sentence of Excommunication in this form, by the authority of Almighty God, the Father, the Son, and the Holy Ghost, &c. of the blessed apostles Peter and Paul, and of all apostles, and of all martyrs, of blessed Edward king of England, and of all the saints of heaven, we excommunicate and accurse, and from the benefits of our holy mother the church we sequester all those that hereafter willingly and maliciously deprive or spoil the church of her right; and all those that by any craft, or willingness, do violate, break, diminish, or change the churches liberties, and free customs contained in the Charters of the common Liberties, and of the Forest, granted by our lord the king to archbishops, bishops, and other prelates of England, and likewise to the earls, barons, knights, and other freeholders, of the realm; and all that secretly and openly, by deed, word or counsel do make statutes, or observe them being made, and that bring in customs to keep them, when they be brought in, against the said liberties, or any of them, and all those that shall presume to judge against them; and all and every such person, before mentioned, that wittingly shall commit any thing of the premises, let them well know that they incur the aforesaid Sentence *ipso facto*."

A confirmation of the charters and liberties of england, and of the forest, made the 25th Year of edward the first.

"Edward, by the grace of God, king of England, lord of Ireland, duke of Guyan, To all those that these present letters shall hear or see, greeting. Know ye that we to the honour of God and to the profit of our realm, have granted for us, and our heirs, and the Charter of Liberties, and the Charter of Forest, which were made by common assent of all the realm, in the time of king Henry our father, shall be kept in every point, without breach; and we will that the same Charters shall be sent under our seal, as well to our justices of the Forest, as to others, and to all sheriffs of shires, and to all our other officers, and to all our cities throughout the realm, together with our writs, in the which it shall be contained, that they cause the aforesaid Charters to be published, and to declare to the people, that we have confirmed them in all points; and that our justices, sheriffs, mayors, and other ministers, which under us have the laws of our land to guide, shall allow the same Charters pleaded before them in judgment, in all their points; that is, to wit, the Great Charter, as the common law, and the Charter of our Forest, for the Welch of our realm.

"And we will, that if any judgment be given from henceforth, contrary to the points of the Charter aforesaid, by the justices, or by any other of our ministers that hold plea before them, against the points of the Charters, it shall be undone, and holden for naught.

"And we will that the same Charters shall be sent under our seal to cathedral churches throughout our realm, there to remain, and shall be read before the people two times by the year.

"And that all archbishops and bishops shall pronounce the sentence of excommunication against all those that by word, deed, or counsel, do contrary to the foresaid Charters, or that in any point do break or undo them; And

that the said curses be twice a year denounced and published by the prelates aforesaid; and it the same prelates, or any of them, be remiss in the denunciation of the said sentences, the archbishops of Canterbury and York, for the time being, shall compel and distrain them to the execution of their duties in form aforesaid."

The sentence of the Clergy against the Breakers of the Articles above-mentioned.

"In the name of the Father, the Son, and the Holy Ghost; Amen : Whereas our sovereign lord the king, to the honour of God, and of holy church, and for the common profit of the realm, hath granted for him, and his heirs for ever, these Articles above-written; Robert archbishop of Canterbury, primate of all England, admonished all his province once twice and thrice, because that shortness will not suffer so much delay, as to give knowledge to all the people of England of these presents in writing; we therefore enjoin all persons, of what estate soever they be, that they, and every of them, as much as in them is, shall uphold and maintain these Articles granted by our sovereign lord the king, in all points: And all those that in any point do resist, or break, or in any manner hereafter procure, counsel, or in any wise assent to testify or break those ordinances, or go about it; by word or deed, openly or privily, by any manner of pretence or colour; we, the aforesaid archbishop, by our authority in this writing expressed, do excommunicate and accurse, and from the body of our Lord Jesus Christ, and from all the company of heaven, and from all the sacraments of holy church do sequester and exclude."

We may here see, that in the obscurest times of sottish popery, they were not left without a sense of justice, and the necessity of Liberty and Property, to be inviolably enjoyed, which brings us to the cause of it.

1. The Cause of this famous Charter, was, as we have already said, the encroachments that were made by several ministers of precedent kings, that almost became customary, and which had never extinguished the free customs due to Englishmen: How great care it cost our ancestors, it unbecomes us to *ignore*, or by our silence to neglect; It was that Yoke and Muzzle, which failed not to disable many raging bears, from entering the pleasant vineyard of English freedoms, that otherwise would not have left a fruitful vine in being. Anon we may give the reader an account of some, with their wages as well as works.

2. The Reason of it, is so great, that it seems to be its own. It is the very image and expression of justice, liberty, and property; points of such eminent importance, as without which no government can be said to be reasonable, but arbitrary and tyrannical. It allows every man that liberty God and nature have given him, and the secure possession of his property, from the inroad or invasion of his neighbour, or any else of that constitution. It justifies no man in a fault, only it provides equal and just ways to have the offender tried; considering the malice of many prosecutors, and the great value of liberty and life.

3. The End of it was the most noble of any earthly projection, to wit, The refixing of those shaken laws, held for many hundred years, by constant claim, that they living might be reinstated in their primitive liberty, and their posterity secured in the possession of so great a happiness.

Amongst those many rich advantages, that accrue to the free people of England, from this Great Charter; and those many confirmatory statutes of the same, we shall present the Reader with the sight of some few, that may most properly fall under the consideration and inquiry of these present times, as found in our Common Law books.

1. "That every Englishman is born free."

2. "That no such freeman shall be taken, attached, assessed, or imprisoned, by any petition or suggestion to the

king or his council, unless by the indictment or presentment of good and lawful men where such deeds be done;" 5 Edw. 3. c. 9. 25 Edw. 3. c. 4. 17 R. 2. c. 6. Rot. Parl. 42 Edw. 3. Coke 2 Inst.46.

3. "That no freeman shall be disseized of his freehold or liberties, or free customs, &c." Hereby is intended, saith Coke, 'That lands, tenements, goods, and chattels,' shall not be seized into the king's hands contrary to this Great Charter, &c. 43. Ass. p. 12. 43 Edw. 3. Coke 2 Inst. 32. Neither shall any such freeman be put from his lively hood without answer. Coke 2 Inst. 47.

4. "That no freeman shall be out-lawed, unless he shroud and hide himself voluntarily from the justice of the law," 2 and 3 Phil. and Mar.Dier. 114.145.

5. "No freeman shall be exiled." Coke says there are but two grounds, upon which any man may be exiled. One by act of parliament (supposing it not contrary to the Great Charter.) The other in case of abjuration, for felony by the common law, &c. Coke 2 Inst. 47.

6. "No freeman shall be destroyed," that is, he shall not be "fore-judged, of life, limb, dis-herited, or put to torture, or death," every oppression against law, by colour of any usurped authority, is a kind of destruction, and it is the worst oppression that is done by colour of justice. Coke Inst. p. 43.

7. "That no freeman shall be thus taken, or imprisoned, disseized, out-lawed, exiled, or destroyed of his liberties, freeholds, and free customs, but by the lawful judgment of his Peers" (vulgarly called jury). So that the judgment of any fact or person, is by this fundamental law, referred to the breasts, and consciences of the jury; it is rendered in Latin 'per legale iudicium,' that is lawful judgment; from whence it is to be observed, that the judgment must have law in it, and be according to law, which cannot be where they are not judges, how far the fact is legal, or the contrary; 'Iudicium quasi Juris Dictum,' the voice of Law and Right, and therefore is their verdict not to be rejected, because it is supposed to be the truth, according to their consciences : For 'Ver dictis' from 'vere dictum,' is 'quasi dictum veritatis' or a true saying or judgment, 9 Hen. 3. 29. Coke Inst. 1. 39. Inst. 4. 207. Coke says, that by the word Legale three things are implied. 1st. That this was by law, before the Statute, and therefore this statute but declaratory of the ancient law. 2d. That their verdict must be legally given; wherein is to be observed. 1st. The jury ought to hear no evidence, but in the hearing and presence of the prisoner. 2d. That they cannot send to ask any question in law of the judges, but in the presence of the prisoner, for, 'de facto jus oritur.' 3d. The evidence produced by the king's counsel, being given, the judges cannot collect the evidence, nor urge it by way of charge to the jury, nor yet confer with the jury about the evidence, but in the presence of the prisoner. Coke Inst. 2. 49.

8th "Or by the law of the land" It is a synonymous expression, importing no more than by a trial of peers or a jury; for it is sometimes rendered not (or) disjunctively, but (and) which is connectively; however, it can never signify any thing contrary to the old way of trying by Peers; for then it would be connected to a contradiction.

Besides Coke well observes, that in the 4th Chap. of the 25th Edw, 3, 'Per legem terræ,' imports no more, than a trial by due process, and writ original at common law, which cannot be without a jury; therefore, 'Per iudicium parum et per legem terræ,' signify the same privilege unto the people. Coke Inst, 2. page 50.

Thus have we presented you with some of those maxims of law, dearer to our ancestors, than life; because they are the defence of the lives and liberties of the people of England: if is from this 29th chap. of the Great Charter; Great, not for its bulk, but the privileges in it; as from a spacious root, that so many fruitful branches of the law of England springs, if Coke may be credited. But how sacred soever they have been esteemed, and still are by

noble and just minds, yet so degenerate are some, in their proceedings, that conscious to themselves of their baseness, they will not dare stand the touch of this Great Charter, and those just laws grounded upon it, of which number we may truly rank the mayor, and recorder of London, with the rest of their wise companions, in their late sessions, at the Old Bailey, upon the occasion of the prisoners.

1. The prisoners were taken, and imprisoned without presentment of good and lawful men of the vicinage, or the neighbourhood, but after a military and tumultuous manner, contrary to the Grand Charter.
2. They refused to produce the law upon which they proceeded; leaving thereby the prisoners, jury and whole assembly in the dark.
3. They refused the prisoners to plead, and directly withstood that great privilege, mentioned in the first chap. 25 Edw. 1. "Where all justices, mayors, sheriffs, and other ministers, that have the laws of the land, to guide them, are required to allow the said Charter to be pleaded in all its points, and in all causes that shall come before them in judgment." For no sooner did William Penn, or his fellow prisoner, urge upon them the Great Charter, and other good laws, hut the Recorder cried, Take him away; take him away, put him into the Bale-Dock or hole; from which the recorder can never deliver himself, unless it be by avowing; the laws are not his guide, and therefore does not suffer them to be pleaded before him in judgment.
4. They gave the Jury their charge, in the prisoner's absence, endeavouring highly to incence the Jury against them.
5. The verdict being given, which is in law, "Dictum Veritatis," The voice of Truth herself, (because not suitable to their humour) they did five times reject it, with many abusive, imperious, and menacing expressions to the jury, such as no precedent can afford us) as if they were not the only constituted judges by the fundamental laws of the land, but mere cyphers only to signify something behind their figures.
6. Though the prisoners were cleared by their Jury, yet were they continued for the non-payment of their fines, laid upon them, for not pulling off their hats, in which the law is notoriously broken. (1st) In that no man shall be amerced, but according to the offence, and they have fined each forty marks. (2d) They were not merced by any Jury, but at the will of an incensed bench. — Besides there is no law against the hat, and where there is no law there can be no transgression, and consequently no legal amercement or fine, 9 H. 3, chap. 14. But how the prisoners were trepanned into it, is most ridiculous on the side of the contrivers, that finding their hats off, would have them put on again by their officers, to fool the prisoners, with a trial of putting them off again, which childish conceit not being gratified, they fined them the forty marks a piece.
7. Instead, of accepting their verdict as good in law, and for the true decision of the matter, according to the Great Charter (that constitutes them proper judges, and which bears them out with many other good laws, in what they agreed to, as a verdict, the court did most illegally and tyrannically fine and imprison them, as in the trial was expressed. And that notwithstanding the late just resentment of the House of Commons, in judge Keeling's Case, where they resolved, "That the precedent and practice of fining, and imprisoning of juries, for their verdicts, were illegal." And here we must needs observe two things.

1st. That the fundamental laws of England cannot be more slighted, and contradicted in any thing (next Englishmens being quiet destroyed) than in not suffering them to have that equal *medium*, or just way of trial, that the same law has provided, which is by a jury.

2d. That the late proceeding of the court, at the Old Bailey, is an evident demonstration, that juries are now but mere formality, and that the partial charge of the Bench must be the verdict of the jury; for if ever a rape were attempted on the consciences of any jury, it was there. And indeed the ignorance of jurors of their authority by law, is the only reason of their unhappy cringing to the court, and being scared into an Anti-Conscience Verdict, by their lawless threats.

But we have lived to an age, so debauched from all humanity and reason, as well as faith and religion, that some stick not to turn butchers to their own privileges, and conspirators against their own liberties. For however Magna Charta had once the reputation of a sacred unalterable law, and few hardened enough, to incur and bear the long curse, that attends the violators of it, yet it is frequently objected now, that the benefits there designed are but temporary, and therefore liable to alteration, as other statutes are. What game such persons play at, may be lively read, in the attempts of Dionisius, Palaris, &c. which would have will and power be the people's law.

But that the privileges due to Englishmen, by the Great Charter of England, have their foundation in reason and law: and that those new Cassandrian ways, to introduce will and power, deserve to be detested by all persons professing sense and honesty, and the least allegiance to our English government; we shall make appear from a sober consideration of the nature of those privileges contained in that Charter.

1. The ground of alteration of any law in government (where there is no invasion) should arise from the universal discommodity of its continuance, but there can be no disprofit in the discontinuance of liberty and property, therefore there can be no just ground of alteration.

3. No one Englishman is born slave to another, neither has the one a right to inherit the sweat and benefit of the others labour, without consent, therefore the liberty and property of an Englishman, cannot reasonably be at the will and beck of another, let his quality and rank be never so great.

3. There can be nothing more unreasonable than that which is partial, but to take away the liberty and property of any, which are natural rights, without breaking the law of nature (and not of will and power) is manifestly partial, and therefore unreasonable.

4. If it be just and reasonable for men to do as they would be done by, then no sort of men should invade the liberties and properties of other men, because they would not be served so themselves.

5. Where liberty and property are destroyed, there must always be a state of force and war, which however pleasing it may be unto the invaders, it will be esteemed intolerable by the invaded, who will no longer remain subject in all human probability, than while they want as much power to free themselves, as their adversaries had to enslave them; The troubles, hazards, ill-consequences, and illegality of such attempts, as they have declined by the most prudent in all ages, so have they proved most uneasy to the most savage of all nations, who first or last have by a mighty torrent freed themselves, to the due punishment and great infamy of their oppressors; such being the advantage, such the disadvantage which necessarily do attend the fixation, and removal of liberty and property.

We shall proceed to make it appear that Magna Charta (as recited by us) imports nothing less than their preservation.

"No freeman shall be taken, or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be out-lawed, or exiled, or any other ways destroyed; nor we will not pass upon him nor condemn him, but by

lawful judgment of his peers, &c.

"A freeman shall not be amerced for a small fault, but after the manner of the fault, and for a great fault after the greatness thereof, and none of the said amercement shall be assessed, but by the oath of good and lawful men of the vicinage."

1. It asserts Englishmen to be free; that's liberty.
2. That they have free-holds, that's property.
3. That amercement, or penalties, should be proportioned to the faults committed, which is equity.
4. That they shall lose neither, but when they are adjudged to have forfeited them, in the judgment of their honest neighbours, according to the law of the land; which is lawful judgment.

It is easy to discern to what pass the enemies of the Great Chapter would bring the people.

1. They are now free-men; but they would have them slaves.
2. They have now right unto their wives, children, and estates, as their undoubted property; but such would rob them of all.
3. Now no man is to be amerced, or punished but suitably to his fault; whilst they would make it suitable to their revengeful minds.
4. Whereas the power of judgment lies in the breasts and consciences of twelve honest neighbours; they would have it at the discretion of mercenary judges: to which, we cannot chuse but add, That such discourses manifestly strike at this present constitution of government; for it being founded upon the Great Charter, which is the ancient common law of the Land, as upon its best foundation; none can design the cancelling of the Charter, but they must necessarily intend the extirpation of the English government; For where the cause is taken away the effect must consequently cease. And as the restoration of our ancient English laws, by the Great Charter, was the sovereign balsam which cured our former breaches, so doubtless will the continuation of it, prove an excellent prevention to any future disturbances.

But some are ready to object, "That the Great Charter consisting as well of religious as civil rights, the former having received an alteration, there is the same reason, why the latter may have the like."

To which we answer, That the reason of alteration cannot be the same, therefore the consequence is false. The one being matter of opinion, about faith and religious worship, which is as various as the unconstant apprehensions of men; but the other is matter of so immutable right, and justice, that all generations, however differing in their religious opinion, have centered, and agreed to the certainty, equity, and indispensable necessity of preserving these fundamental laws; so that Magna Charta hath not risen and fallen with the differing religious opinions, that have been in this land, but have ever remained, as the stable right, of every individual Englishman, purely as an Englishman. Otherwise, if the civil privileges of the people had fallen with the pretended religious privileges, of the popish tyranny, at the first reformation, as must needs be suggested by this objection, our case had ended here, that we had obtained a spiritual freedom, at the cost of a civil bondage; which certainly was far from the intention of the first reformers, and probably an unseen consequence, by the objectors to their idle opinion.

In short, there is no time, in which any man may plead the necessity of such an action, as is unjust in its own nature, which he must unavoidably be guilty of, that doth deface or cancel that law by which the justice of liberty and property is confirmed and maintained to the people. And consequently, no person may legally attempt the subversion, or extenuation of the force of the Great Charter. We shall proceed to prove from instances out of both.

1. Any judgment given contrary to the said Charter, is to be undone, and holden for nought. 25 Edw. 1, Chap. 2.

2. Any that by word, deed, or counsel, go contrary to the said Charter, are to be excommunicated by the bishops; And the archbishops of Canterbury and York, are bound to compel the other bishops to denounce sentence accordingly, in case of their remissness, or neglect; which certainly hath relation to the state, rather than the church; since there was never any necessity of compelling the bishops to denounce sentence in their own case, though frequently in the peoples. 25 Edw. 1, chap. 4.

3. That the Great Charter, and Charter of Forest, be holden and kept in all points, and if any statute be made to the contrary, that it shall be holden for nought. 42 Edw. 3, 1. Upon which Coke, that famous English lawyer, said, "That albeit judgments in the king's courts, are of high regard in law, and *judicia* are accounted as *juris dicta*; yet it is provided by act of parliament, that if any judgment be given contrary to any of the points of the Great Charter, it should be holden for nought."

He further saith, "That upon the Statute of the 25th of Ed. 1, chap. 1. That this Great Charter, and the Charter of Forest, are properly the common law of this land, or the law is common to all the people thereof."

4. Another statute runs thus, "If any force come to disturb the execution of the common law, ye shall cause their bodies to be arrested, and put in prison; Ye shall deny no man right by the king's letters, nor counsel the king any thing, that may turn to his damage, or disherison. 18 Ed. 3, chap. 7. Neither to delay right by the great and little seal." This is the judges charge and oath. 2 Ed. 3, chap. 8, 14 Ed. 3, 14, 11 R. 2, chap. 10.

5. Such care hath been taken, for the preservation of this Great Charter, that in the 25th of Ed. 1. It was enacted, "That commissioners should issue forth, that there should be chosen in every shire-court, by the commonalty of the same shire, three substantial men, knights, or other lawful, wise, and well disposed persons, to be justices, which shall be assigned by the kings letters patents, under the great seal, to hear and determine, without any other writ, but only their commission, such complaints as shall be made upon all those, that commit or offend against any point, contained in the aforesaid Charters." 28 Ed. 1, chap. 1.

6. The necessity of preserving these Charters, hath appeared in nothing more, than in the care they have taken to confirm them; which as Coke observes, "hath been by 32 parliaments confirmed, established, and commanded to be put in execution," with the condign punishment they had inflicted upon the offenders. Coke's. Proem to the second book of his Inst.

7. That in the notable Petition of Right, many of these great privileges, and free customs, contained in the aforesaid Charters, and other good laws, are recited and confirmed, 3 Car. 1. ^[3]

8. The late king, in his Declaration, at Newmarket, 1641, acknowledged, 'The law to be the rule of his power. ^[4] By which he doubtless intended fundamental laws, since it may be the great advantage of countries, sometimes to suspend the execution of temporary laws.

Having so manifestly evidenced that venerable esteem, our ancestors had of that golden rule, the Great Charter, with their deep solicitude, to preserve it, from the defacing of usurpation and faction. We shall proceed to give an account of their just resentment and earnest prosecution against some of those, who in any age have adventured, to undermine that ancient foundation, by introducing an arbitrary way of government.

1. As judicious Lambard reports in his Saxon translation; "That the kings in those days, were by their coronation oaths obliged to keep, the ancient fundamental laws, and customs of this land" (of which this Great Charter is but declaratory) "so did king Alfred (reputed the most famous compiler of laws amongst them) give this discovery of his indignation against his own judges for actions contrary to those fundamental laws, that he commanded the execution of 40 of them," which may be a seasonable caveat to judges of our times.

2. Hubert de Burgo, once chief justice of England (having advised Ed, I in the 11th year of his reign, (in his council holden at Oxford) "To cancel this Great Charter, and that of the Forest) was justly sentenced according to law, by his peers, in open parliament. When the statute called Confirmationis Cartarum was made; in the 1st chapter whereof, Magna Charta is peculiarly called the common law, 25 Ed. 1, chap. 2.

3. The Spencers, both father and son, for their arbitrary domination, and rash, and evil counsel to Ed. 2, (by which he was seduced to break the Great Charter) were banished for their pains, as Coke relates.^[5]

4. The same fate attended Tresilian and Belknap, for their illegal proceedings.^[6]

5. The breach of this Great Charter, was the ground of that exemplary justice done upon Empson and Dudley,^[7] whose case is very memorable in this point; for though they gratified Hen. 7. in what they did, and had an Act of parliament for their warrant, made the 11th of his reign; yet met they with their due reward from the hands of justice, that Act being against equity and common reason, and so no justifiable ground or apology, for those frequent abuses, and oppressions of the people, they were found guilty of. Here what the Lord Coke further saith, concerning the matter, "There was an Act of parliament, made in the 11th year of king Hen. 7. which had a fair flattering preamble, pretending to avoid divers mischiefs, which were (1st) The high displeasure of Almighty God. 2d. The great let of the common law. And (3d) The great let of the wealth of this land. And the purview of that act, tended in the execution contrary, *ex diametro*, viz. To the high displeasure of Almighty God, and the great let, nay the utter subversion of the common Law, and the great let of the wealth of this land, as hereafter shall appear; the substance of which Act follows in these words.

'That from thenceforth, as well justices of Assize, as Justices of the peace, in every countv, upon information for the king, before them made, without any finding or presentment by twelve men, shall have full power and authority, by their discretion; and to hear and determine all offences, as riots, unlawful assemblies, &c. committed and done against any act or statute made, and not repealed, &c.' (a Case that very much resembles this of our own times.)

By pretext of this law, Empson and Dudley did commit upon the subjects, unsufferable pressure, and oppressions; and therefore this statute was justly, soon after the decease of Hen. 7. repealed, at .the next parliament, after his decease by the statute of the 1 H. 8. chap. 6. A good caveat to parliaments, to leave all causes to be measured by the golden and straight metewand of the law, and not to the in-certain and crooked cord of discretion.

"It is almost incredible to foresee, when any maxim, or fundamental, law of this realm is altered (as elsewhere hath been observed) what dangerous inconveniences do follow; which most expressly appeareth by this roost

unjust and strange act of the 11th of H. 7. For hereby, not only Empson and Dudley themselves, but such justices of peace (corrupt men) as they caused to be authorised, committed most grievous, and heavy oppressions and exactions; grinding the faces of the poor subjects by penal laws (be they never so obsolete, or unfit for the time) by information only, without any presentment, or trial by jury, being, the ancient birth-right of the subject; out to near and determine the same, by their discretions; inflicting such penalty, as the Statute not repealed imposed. These and other like oppressions, and exactions by, or by the means of Empson, and Dudley, and their instruments, brought infinite treasure to the king's coffers, whereof the king himself, at the end, with great grief, and compunction, repented as in another place we have observed.

"This statute of the 11th of H. 7. we have recited, and shewed the just inconveniences thereof; to the end, that the like should never hereafter be attempted in any court of parliament; and that others might avoid the fearful end of those two time-servers, Empson and Dudley, 'Qui eorum urstiquiis insistunt, eorum exitus per horrescant.'

"See the Statute of 8 Edw. 4. chap. 2. a Statute of Liveries, an Information, &c. By the discretion of the judges, to stand as an original, &c. This act is deservedly repealed, vide 12 R. 2. c 13. Punishment by discretion, &c. vide, 5th of H. 4. c. 68. See the Commission of Sewers; discretion ought to be thus discribed, 'Discretio est discernere per Legem, 'quid sit justum,' From whence three things seem most remarkable.

1. The great equity and justice of the Great Charter, with the high value our ancestors have most deservedly set upon it.
2. The dreadful maledictions, or curse, they have denounced upon the Breakers of it; with those exemplary punishments they have not spared, to inflict upon such notorious offenders.
3. So heinous a thing was it esteemed of old, to endeavour an enervation, or subversion of these antient rights and privileges, that acts of parliaments themselves (otherwise the most sacred with the people,) have not been of force enough to secure or defend such persons from condign punishment, who in pursuance of them, have acted inconsistent with our Great Charter. Therefore it is, that great lawyer, the lord Coke, doth once more aggravate the example of Empson and Dudley (with persons of the same rank) into a just caution, as well to parliaments as judges, justices and inferior magistrates, to decline making, or executing any act, that may in the least seem to restringe or confirm this so often avowed and confirmed Great Charter of the liberties of England, since parliaments are said to err when they cross it; the obeyers of their acts punished, as time-serving transgressors, and that kings themselves, (though enriched fay those courses) have with great compunction and repentance, left among their dying words their recantations.

Therefore most notable and true it was, with which we shall conclude this present subject, what the king pleased to observe in a Speech to the Parliament, about 1662, (viz.) "The good old rules of law are our best security."^[8]

The manner of the Court's behaviour towards the Prisoners, and Jury, with their many extravagant expressions, must not altogether slip our observation.

1. Their carriage to the Jury outdoes all precedents; they entertained them more like a pack of felons, than a Jury of honest men, as being fitter to be tried themselves, than to acquit others. In short, no Jury, for many ages, received so many instances of displeasure and affront, because they preferred not the humour of the Court, before the quiet of their own consciences, even to be esteemed as perjured, though they had really been so, had they not done what they did.

3. Their treatment of the Prisoners was not more unchristian, than inhuman. History can scarce tell us of one heathen Roman that ever was so ignoble to his captive: what! to accuse, and not hear them; to threaten to bore their tongues, gag and stop their mouths, fetter their legs, merely for defending themselves, and that by the ancient fundamental laws of England too. O barbarous! had they been Turks and infidels, that carriage would have ill become a Christian court, such actions proving much stronger dissuasives, than argument to convince them, how much the Christian religion inclines men to justice and moderation above their dark idolatry. It is truly lamentable that such occasion should be given, for intelligence to foreign parts, where England hath had the reputation of a Christian country, by the ill treating of its sober and religious inhabitants for their conscientious meetings to worship God. But above all, Dissenters had little reason to have expected this boarish fierceness from the mayor of London, when they consider his eager prosecution of the king's party under Cromwell's government, as thinking he could never give too great a testimony of his loyalty to that new instrument, which makes the old saying true, That one renegade is worse than three Turks.

Alderman Blutworth, being conscious to himself of his partial kindness to the Popish Friars, hopes to make amends by his zealous prosecution of the poor, Dissenters; for at the same sessions he moved to have an evidence (of no small quality) against Harrison, the friar, sent to Bridewell and whipped; that he was earnest to have the Jury fined and imprisoned, because they brought not the Prisoners guilty, for only worshipping their God: whence it may be easy to observe, That Popish friars, and prelatical persecutors are mere confederates.

But what others have only adventured to stammer at, the Recorder of London, has been so ingenious as to speak most plainly; or else what means those two fatal expressions, which are become the talk and terror both of city and country?

First, in assuring the Jury, 'That there would be a law next session of parliament, That no man should have the protection of the law, but such as conformed to the church:' which, should it be as true, as we hope it is false, (and a dishonourable prophecy of that great assembly) the papists may live to see their Marian days outdone by professed Protestants. But surely no Englishman can be so sottish, as to conceive that his right to Liberty and Property, came in with his profession of the Protestant religion; or that his natural and human rights, are dependent on certain, religious apprehensions, and consequently he must esteem it a cruelty in the abstract, that persons should be denied the benefit of those laws which relate to civil concerns, who by their deportment in civil affairs, have no ways transgressed them, but merely upon an opinion of faith and matter of conscience. It is well known that Liberty and Property, Trade and Commerce were in the world long before the points in difference betwixt Protestants and Dissenters, as the common privileges of mankind; and therefore not to be measured out by a conformity to this, or the other religious persuasion, but purely as Englishmen.

Secondly, But we should rather choose to esteem this an expression of heat in the Recorder, than that we could believe a London's Recorder should say, an English parliament should impose so much slavery on the present age, and entail it upon their own posterity (who for ought they know may be reckoned among the dissenters of the next age) did he not encourage us to believe, it was both his desire and his judgment, from that deliberate eulogy he made on the Spanish inquisition, expressing himself much to this purpose: viz. "Till now I never understood the reason of the policy and prudence of the Spaniards, in suffering the inquisition amongst them: And certainly it will never be well with us, till some thing like unto the Spanish inquisition be in England." The gross malignity of which saying is almost inexpressible: What does this but justify that hellish design of the papists to have prevented the first reformation; If this be good doctrine, then Hegestrant, the grand inquisitor, was a more venerable person than Luther the reformer. It was an expression that had: better become Cajetan the pope's Legate, than Howel a protestant city's recorder. This is so far from helping to convert the Spaniard, that it

is the way to harden him in his idolatry; when his abominable cruelty shall be esteemed prudence, and his most barbarous and exquisite torturing of truth, an excellent way to prevent faction. If the recorder has spake for no more than for himself it is well; but certainly he little deserves to be thought a protestant, and a lawyer, that put both reformation and law into the inquisition; There being nothing more destructive of the fundamental laws and liberties of England, and that noble design of primitive reformation; than the arbitrary power and terrifying racks of the Spanish inquisition. And doubtless the supreme governors of the land, are highly obliged in honour and conscience (in discharge of their trust to God and the people) to take these things into their serious consideration, as what is expected from them, by those who earnestly wish theirs and the kingdom's safety and prosperity.

The Copy of Judge KEELING'S Case,^[9] takes out of the Parliament Journal.

December 11th, 1667.

'The House resumed the bearing of the rest of the report touching the matter of restraints upon juries; and that upon the examination of divers witnesses, in several clauses of restraints, put upon juries, by the Lord Chief Justice Keeling; whereupon the committee made their resolutions, which are as followeth: '1. That the proceedings of the Lord Chief Justice, in the cases now reported, are innovations, in the trial of men for their lives and liberties; and that he hath used an arbitrary and illegal power, which is of dangerous consequence to the lives and liberties of the people of England, and tends to the introducing of an arbitrary government.

'2. That in the place of judicature, the Lord Chief Justice hath under-valued, vilified, and condemned Magna Charta, the great preserver of our lives, freedom, and property.

'3. That he be brought to trial, in order to condign punishment, in such manner as the House shall judge most fit and requisite.'

December 13th 1667.

'Resolved, &c.

'That the precedents and practice of fining or imprisoning jurors, for verdicts, is illegal.'^[10]

Now whether the justices of this court, in their proceedings (both towards the prisoners, and Jury) have acted according to law, to their oaths and duty, and to do justice without partiality : whereby right might be preserved, the peace of the land secured, and our ancient laws established; or whether such actions tend not to deprive us of our lives and liberties, to rob us of (our birth-right) the fundamental laws of England? and finally to bring in an arbitrary and illegal power to usurp the benches of all our courts of justice, we leave the English reader to judge.

Certainly, there can be no higher affront offered to king and parliament, than the bringing their reputations into suspicion with their people, by the irregular actions of subordinate judges : And no age can parallel the carriage of this recorder, mayor, &c. Nor can we think so ignobly of the parliament, as that they should do less than call these persons to account, who failed not to do it to one less guilty, and of more repute, (to wit) judge Keeling: for if his, behaviour gave just ground of jealousy, that he intended an innovation, and the introducing an arbitrary government, this recorder much more. Did Chief Justice Keeling say, Magna Charta was *Magnafarta*; so did this recorder too: And did justice Keeling fine and imprison Juries, contrary to law; so did this Recorder also. In short there is no difference, unless it be, that the one was questioned, and the other deserves it: But we desire in

this they may be said to differ, that though the former escaped punishment, the latter may not, who having a precedent before, did notwithstanding notoriously transgress.

To conclude, the law supposes the king cannot err, because it is willing to suppose, he always acts by law (and 'voluntas legis, est voluntas Regis,' or the king's will is regulated by the law) but it says no such thing of his judges. And since they are obliged by oath to disregard the king's letters (though under the broad and privy seal) if they any wise oppugn, or contradict the laws of the land; and considering that every singular action of an inferior minister, has an ugly reference to the supreme magistrate, where not rebuked; we cannot but conclude, that both judges are answerable for their irregularities, especially, where they had not a limitation of a king's letter, or command; and that the supreme magistrate is obliged, as in honour and safety to himself, Alfred-like, to bring such to condign punishment, lest every sessions produce the like tragical scenes of usurpation over the consciences of Juries, to the vilifying and contemning of justice, and great detriment, and prejudice of the good and honest men of this famous and free city. Fiat Justitia.

THE severe measures adopted in the early part of the reign of Charles the Second, against Protestant Non-Conformists, (See the Act of Uniformity, Stat. 13 and 14 Car. 2, c. 4, the first Conventicle Act Stat. 16, Car. 2, c. 4, The Five Mile Act Stat. 17 Car. 2, c. 2,) it is probable were occasioned by the sentiments of hatred and revenge which Clarendon felt towards the Presbyterians. The revival of that course of measures, after Clarendon had been removed, was perhaps the result of cool policy in favour of the Papists. It seems to have been supposed that by the enactment and severe enforcement of the second Conventicle Act, Stat. 22, Car. 2, c. 1. the Protestant Dissenters might have been driven to petition for a general Toleration. However this may be, it appears that an active persecution was exercised under the provisions of that statute.

"Many of the bishops," says Neal, "chose to lie behind the curtain, and throw off the odium from themselves to the civil magistrate; but some of the more zealous could not forbear appearing in person, as bishop Ward, already mentioned, and bishop Gunning, who often disturbed the meetings in person; once finding the doors shut, he ordered the constable to break them open with a sledge; another time he sat upon the bench at the quarter sessions, upon which the chairman desired his lordship to give the charge, which he refusing, received a very handsome rebuke; it being hardly consistent with one that is an ambassador of the prince of peace, to sit in judgment upon the consciences of his poor countrymen and neighbours, in order to plunder and tear them to pieces. The bishop was so zealous in the cause, that he sunk his character by giving a public challenge to the Presbyterians, Independants, Anabaptists, and Quakers, and appointed three days for the disputation; on the first of which his lordship went into the pulpit in the church, where was a considerable congregation, and charged the former with sedition and rebellion out of their books, but would hear no reply. When the day came to dispute with the Quakers, they summoned their friends, and when the bishop railed, they paid him in his own coin; and followed him to his very house with repeated cries, "The Hireling flyeth;" The Non-conformist ministers did what they could to keep themselves within the compass of the law; they preached frequently twice a day in large families, with only four strangers, and as many under the age of sixteen as would come; and at other times in places where people might hear in several adjoining houses; but after all, infinite mischiefs ensued, families were impoverished and divided; friendship between neighbours was interrupted; there was a general distrust and jealousy of each other; and sometimes upon little quarrels, servants would betray their masters and ruin all their affairs. Among others that suffered at this time was Dr. Manton, who was apprehended on a Lord's day in the afternoon just as he had done sermon, the door being opened to let a gentleman out, the justice and his attendants rushed in and went up stairs; they stayed till the Doctor had ended his prayer and then writ down the names of the principal persons present, and took the Doctor's promise to come to them at an house in the

Piazzas of Covent Garden, where they tendered him the Oxford oath, upon his refusal of which he was committed prisoner to the Gatehouse, where he continued till he was released by the indulgence. At another time his Meeting-house in White-hart-yard was broken up; the place was fined forty pounds, and the minister twenty, which was paid by Lord Wharton, who was then present: they also took down the names of the hearers for the benefit of the justices of peace and spiritual courts."

These severities seem to have been attended by the usual effects of religious persecution. The same author, by way of introduction to his Account of this Case of Penn and Mead tells us:

"The behaviour of the Quakers was very extraordinary, and had something in it that looked like the spirit of martyrdom. They met at the same place and hour as in times of liberty, and when the officers came to seize them none of them would stir; they went altogether to prison; they stayed there till they were dismissed, for they would not petition to be set at liberty, nor pay the fines set upon them, nor so much as the gaol fees. When they were discharged they went to their Meeting-house again, as before; and when the doors were shut up by order, they assembled in great numbers in the street before the doors, saying, they would not be ashamed, nor afraid to disown their meeting together in a peaceable manner to worship God; but in imitation of the Prophet Daniel, they would do it more publicly because they were forbid. Some called this obstinacy, others firmness; but by it they carried their point, the government being weary of dealing with so much perverseness."

The fanaticism of the Quakers had, indeed, occasionally displayed itself in an offensive manner some years earlier, as may be seen in the Case of James Nayler, *ante*, vol. 5, p. 801, and in the following curious narrative:

"In the year 1659, in the fourth month, the last day of the month being the 5th day of the week,

"The presence of the Lord God was felt within me, and in his light he let me see what his pleasure was with me; it was clearly shewed me that I should go to the Steeplehouse in Alderman-bury the first day of the week then following, and take with me something to work, and do it in the pulpit at their singing time.

"At which sight I found much unwillingness in myself, yet sitting still with trembling, there came upon me a very great weight pressing me to obedience; yea a heavy burthen was felt, till I had consented to obey; I felt the weight to increase, oh how hard my unwilling will was to yield, but the Lord strengthened me, and having consented, I found a little ease, yea I did resolve in the power of the Lord to go on: I purposed to carry with me a pocket to sow.

"So the first day morning being the 3rd day of the 5th month after the 8th hour one of the doors being open, I passed in, thinking to get into the pulpit to hide myself there till their singing time, and then get up and work; the Sexton spying me, took me by the arm, said friend we do not open yet, for it was their Communion day as they call: but the time I was in, I found the galleries were higher than the pulpit, and I should have been discovered before their song began; I see the clerk giving tickets: so about the 9th hour their doors were opened, I passed in as one of their own crowd, the throng came in very fast, I got into one of the galleries to spy if possible to get in the pulpit some way, but I found none at that time, so they began to read, and I came down, and finding no way to get into the pulpit, I came to the table that is prepared for that troop, I thought to get upon the table to work, but the table was set round with young men, and when they began their song, they laid on their hats upon the table, so I standing still waiting on the Lord, having a great mind to do the Lord's work; their song being up, my hat offended them, they took it off, and cast it away, and one of the young men gave it me again, I put it on, and it offended again, insomuch that Piercefall did perceive me, who came violently, and took my hat off to fling it away, but I held it, then he took me by the hair of the head, and dragged me out, and as one of their own

company testified to his face that he struck me, but I cannot say that, but a lusty red-haired man did strike me, I supposed him to be an officer in that hateful place, but Piercefall after he had dragged me out by the hair, said, Sirrah do you not know William Duike, I said nay, for I did not know him; Sirrah, said he, I put him in prison, and fined him ten pound, and you must be served so too, and so charged the constable with me, and went himself in again, and received the Sacrament for all this.

"The constable told me that I might go away if I would, but in again I must not. So I stood a while and finding in myself no constraint, I passed away towards More-fields finding a little ease from the weight of the burden, being faithful to what might be done at that time: but the 6th day of the week being the 8th day of the month sitting at work in my shop but not on the shop board, the burden of the Lord came upon me, and the light making manifest the same thing that was not yet done, must be done, and the Lord would not discharge me, but laid a necessity upon me. I beholding this with trembling and fear; I did resolve in the power of the Lord not to eat nor drink, till I had performed the Lord's requiring. So having purposed in heart, I greatly desired the Lord's assistance; and it was shewed me how to do it, and the Lord made way for me.

"So the first day of the week being the 10th day of the 5th month, I waited opportunity till the singing time began, which when I heard, I passed in, but being fearful to be taken with the hat again; and so loose my main, business, for the Lord: I slept out again, but staid not, I came in again; I looked towards the pulpit and spied the pew door open, that the priest might pass up the pulpit. So I waited thinking that Edmund Calomy would go up the pulpit, I intended to get in before him; for thought I that boy that sits upon the stairs will open the pulpit door for the priest, and I will get in before, but no priest came, whereupon in the power of the Lord I fixed my eye upon the pulpit, and I spied an iron hook, and I passed through the pew up the stairs, and unbooked the door, and pulled twice and got it open, and I sat myself down upon the cushion, and my feet upon the seat where the priest when he hath told out his lies doth sit down, and having my work ready, I pulled one or two stitches. The people lost their song, and some cried Pull him down, some break his neck down, and a lusty fellow came up and did intend to do me a mischief, and wrung my neck as if he would have wrung it in two. So I let go my hold and he flung me down stairs; but the Lord preserved me, and I felt no hurt; for having done that which the Lord required me to do I was fall of peace; and it had been little to me if they had there taken away or killed the body. For I was full of joy, and they were full of wrath and madness; so they tore my coat off and my hat, and dragged me out, and one took me by the hair and flung me upon the ground, and some that was without said, Why do you use the man so, but I got up again, then they dragged me quite out into the street, and there held me, and while they held me, one came, and gave me a violent kick on the shins, and said he could find in his heart to knock me down, he made my shin bleed, and another kicked me on the other shin, but did not much hurt, another said that I had been some notorious sinner heretofore and now came to do something that might merit, presently the church-warden as they call him, came out, and he and the bell-toller carried me away to the counter, till their Sermon was ended, as they call it, then they carried me away to Paul's Yard to stay for the mayor, but the sergeant said he would carry me away to the mayor's house and there stay me till he came in; and so he did: and all the way through Paternoster-Row as I went, the boys kicked my heels, so then the mayor came in, and they told him that I was at work in the pulpit; then said he to me, Wherefore did you work there? I said in obedience to the Lord's commandment: he said, It was a false spirit, and said he, where are your sureties? I said the Lord was my surety; he said, the Lord would not bear me out in this thing: said he to them, Carry him again to the Counter: so they carried me back again, and there I was till the third day.

"Now let all sober people judge whether I did this thing out of envy against either priest or people.

"Yea farther I say, the Lord God lay it not to their charge, who have said that I did it in malice, devilishness and

envy; it is the desire of my soul that they might be saved.

"And so do write my name being a prisoner for the Testimony of the Lord in the common gaol in Newgate, London: committed the 15th of the 5th month, 1659.

"SOLOMON ECCLES."

[1] Published in the same year under the title of "The People's Ancient and Just Liberties, asserted, in the Trial of William Penn and William Mead, at the Sessions held at the Old-Bailey, in London, the 1st, 3rd, 4th and 5th of Sep. 1670, against the most arbitrary procedure of that Court." — Isaiah, x. 1. 2. "Woe unto them that decree unrighteous decrees, and write grievousness, which they have prescribed; to turn away the needy from judgment, and to take away the right from the poor, &c." Psalm xciv. 20. "Shall the throne of iniquity have fellowship with thee, which frameth mischief by a law."

'Sic volo, sic jubeo, stat pro ratione voluntat.'

With a Prefatory Address as follows:

To the English Reader.

"If ever it were time to speak or write, it is now, so many strange occurrences requiring both. How much thou art concerned in this ensuing Trial, where not only the Prisoners, but the Fundamental Laws of England, have been most arbitrarily arraigned, read, and thou mayest plainly judge.

"Liberty of Conscience is counted a pretence for Rebellion, and religious assemblies, routs, and riots; and the defenders of both, are them, reputed factious and disaffected.

"Magna Charta, is Magna f—— with the Recorder of London; and to demand right an affront to the court.

"Will and Power are their great charter, but to call for England's, is a crime, incurring the penalty of their Bale-dock, and Nasty-hole, nay, the menace of a Gag, and Iron Shackles too.

"The Jury, though proper judges of law and fact, they would have over-ruled in both, as if their Verdict signified no more, than to echo back the illegal Charge Of the Bench; and because their courage and honesty did more than hold pace with the threat and abuse of those, who sat as judges, after two days and two nights restraint for a verdict, in the end were fined and imprisoned, forgiving it.

"O! what monstrous, and illegal proceedings are these? Who reasonably can call his coat his own? When property is made subservient to the will and interest of his judges; or, who can truly esteem himself a free man? When all pleas for liberty are esteemed sedition, and the laws, that give, and maintain them, so many insignificant pieces of formality.

"And what do they less than plainly tell us so, who at will and pleasure break open our locks, rob our houses, raze their foundations, imprison our persons, and finally deny us justice to our relief; as if they then acted most like Christian men, when they were most barbarous, in ruining such, as really are so; and that no sacrifice could be so acceptable to God, as the destruction of those, that most fear him.

"In short, That the conscientious should only be obnoxious, and the just demand of our religious liberty, the reason, why we should be denied our civil freedom, as if to be a Christian and an Englishman were inconsistent, and that so much solicitude and deep contrivance, should be employed only, to ensnare, and ruin, so many ten thousand conscientious families, so eminently industrious, serviceable, and exemplary, whilst murder can so easily obtain pardons, rapes be remitted, public uncleanness pass unpunished, and all manner of levity, prodigality, excess, profaneness, and atheism, universally connived at; if not in some respect manifestly encouraged, cannot but be detestably abhorrent, to every serious and honest mind.

"Yet that this lamentable state is true, and the present project in hand, let the London's Recorder, and Canterbury's Chaplain be heard.

"The first in his public panegyric, upon the Spanish Inquisition, highly admiring the prudence of the Romish Church, in the erection of it, as an excellent way to prevent Schism,' which unhappy expression, at once passeth sentence, both against our fundamental laws, and Protestant Reformation.

"The second, In his printed mercenary Discourse against Toleration, asserting for a main principle, 'That it would be less injurious to the government, to dispense with prophane and loose persons, than to allow a toleration to religious dissenters:' It were to over-do the business, to say any more, where there is so much said already.

"And therefore to conclude, we cannot choose but admonish all, as well persecutors to relinquish their heady, partial, and inhuman prosecutions, as what will certainly issue in disgrace here, and inevitable condign punishment hereafter, as those who yet dare express their moderation, however out of fashion, or made the brand of fanaticism, not to be huffed, or menaced, out of that excellent temper, to make their parts, and persons subservient to the base humours, and sinister designs of the biggest mortal upon earth: But to reverence and obey the eternal just God, before whose great tribunal all must render their accounts, and where he will recompence to every person according to his works."

[2] See Throgmorton's Case, vol. 1, p. 901; and the Case of Lilburne's Jury, Aug. 1653, *ante*, vol. 5, p. 445.

"The practice heretofore in use of fining, imprisoning or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional and illegal; and is treated as such by sir Thomas Smith, 200 years ago; who accounted such doings to be very violent, tyrannical and contrary to the liberty and custom of the realm of England. [Smith's Commonw. 1. 3, c. 1.] For, as sir Matthew Hale well observes [2 Hal. P. C. 313.] it would be a most unhappy case for the judge himself, if the prisoner's fate depended upon his directions: — unhappy also for the prisoner; for if the judge's opinion must rule the verdict, the trial by jury would be useless. Yet in many instances [1 Lev. 9. T. Jones, 163.] where contrary to evidence the jury have found the prisoner Guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of King's-bench; for in such case, as hath been said, it cannot be set right by attain. But there hath yet been no instance of granting a new trial, where the prisoner was acquitted upon the first [2 Hawk. P. C. 442]." Blackst. Comm. b. 4, c. 27, p. 361.

This practice of Fining is well treated by Hale, as follows:

"If a bill be against A. for murder, and the grand inquest upon the evidence before them, or their own knowledge be satisfied that it was but *per infortunium* or *se defendendo*, and accordingly return the bill specially, the court may remand them to consider better of it, or may hear the evidence at the bar, and accordingly direct the grand inquest; but I have known a judge blamed for setting a fine upon the grand inquest for such a return, because in

truth it comes not up to felony.

"But if a bill goes out against B. for murder, and it doth *constare de persona occidentis*, may the grand inquest find the bill for manslaughter and *ignoramus* for the murder? and is the court bound to receive such a return?

"In this case, of all hands it is agreed [upon this Emlyn remarks, "This is far from being agreed of all hands, for such an anticipation of the evidence by the grand jury is what they cannot avoid, they being bound by their oath as much as the petit jury, to present the whole truth and nothing but the truth; nor do they in this case so properly determine matter of law as matter of fact; for whether murder or not depends upon a preconceived malice, which though it is to be presumed, where no provocation appears, is matter of fact, and proper for the consideration of a jury."] that the grand jury is to blame, because they take upon them to anticipate the evidence that is to be given to the petit jury, and so determine matter of law which belongs to the court to determine, and by this means many murders may escape under the disguise of manslaughter, and so escape with their clergy.

"Some therefore have made it a practice to set a fine upon the grand jury in this case, and it hath proceeded so far as to fine petit juries, also in such like cases; whereof hereafter.

"That which I think herein and in other concealments of grand inquests, is as follows:

"1. That the court may receive such a return from the grand inquest, and it is a matter of discretion, especially if upon inquiry from the indictors or witnesses, or upon view of their examinations it doth plainly appear, that the crime amounts to no more.

"2. That barely upon such a return no fine can be set upon the grand inquest, unless the evidence to the grand inquest be given at the bar in the presence of the court; for otherwise the court cannot understand whether the grand inquest doth well or ill in such case.

"3. That if the evidence to the grand inquest be given at the bar upon an indictment in the King's-bench, and the grand inquest will not find a bill according to the direction of that court; as for instance, will find a man Guilty only *se defendendo*, or of manslaughter when it is murder, that court may set, a fine upon the grand inquest, and so it hath been practised; for it is the highest court in England of ordinary justice, especially in criminal causes.

"4. That if the justices of Oyer and Terminer or gaol-delivery, having heard the evidence at the bar, the grand inquest will not find according to their directions, the justices may bind them over by recognizance into the King's-bench, and upon an information against them they may be fined.

"5, That in such a case justices of peace, Oyer and Terminer or gaol-delivery may, according to the statute of 3 H. 7, c. 1, impanel another inquest to enquire of their concealments, and thereupon set fines upon them.

"6. But in my opinion fines set upon grand inquests by justices of the peace, Oyer and Terminer or 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 in points of fact; this was done by a judge of assize [Justice Hyde at Oxford. Vaugh.

145.] in Oxfordshire, and the 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, prescribed a way for their fining, 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 safe-guard, 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." 2 Hale's. P. C. 158.

[3] See 2 Cobb. Parl. Hist. 374.

[4] See 2 Cobb. Parl. Hist. p. 970.

[5] See vol. 1, p. 23 of this Collection.

[6] Ibid, p. 89.

[7] See vol. 1, p. 283.

[8] See 4 Cobb. Parl. Hist. 247.

[9] "On the 16th of October, 1667, the House being informed, 'That there have been some innovations of late in trials of men for their lives and deaths; and in some particular cases, restraints have been put upon juries, in the inquiries,' this matter is referred to a committee. On the 18th of November, this committee are empowered to receive information against the Lord Chief Justice Keeling, for any other misdemeanors, besides those concerning juries. And on the 11th of December, 1667, the committee report several Resolutions [as above] against the Lord Chief Justice Keeling, of illegal and arbitrary proceedings in his office. The Chief Justice desiring to be heard, he is admitted on the 13th of December, and heard in his defence to the matters charged against him, and being withdrawn, the House resolve, That they will proceed no farther in the matter against him." 4 Hatsell.

Mr. Hatsell observes, that "The report of the facts on which these Resolutions are grounded, is not entered in the Journals; but the cases complained of, in which innovations had been had of late, were probably those of Wagstaff and Hood. Wagstaff's case in Trin. term, 17 Ch. 2, is reported in Hardress's Rep. p. 409. 'Wagstaff and others of a jury were fined an hundred marks a piece by Lord Chief Justice Keeling, because, though evidence was given, that persons had assembled at conventicles and had bibles with them, the jury would not find them guilty of keeping a conventicle, upon the late act of 16 Ch. 2. And the jury were committed till they paid their fine: and on application to the court of Exchequer, Lord Chief Baron Hale directed the fines to be estreated.' The other case was in the 18th of Charles 2, Kelyng's Reports, p. 50." 4 Hatsell, 113.

"Memorandum, At Lent circuit at Winchester, 18 Car. 2, one Henry Hood was indicted for the murder of John Newen, and upon the evidence it appeared, that he killed him without any provocation, and thereupon I directed the jury that it was murder: for the law in that case intended malice; and I told them they were judges of the

matter of fact, viz. whether Newen died by the hand of Hood; but whether it was murder or manslaughter, that was matter in law, in which they were to observe the direction of the Court. But notwithstanding they would find it only manslaughter; whereupon I took the verdict and fined the jury, of which John Goldwier was the foreman, 5*l.* a-piece, and committed them to gaol till they found sureties to appear at the next assizes, and in the mean time to be of the good behaviour: but after, upon the petition of the jurors, I took down their fines to 40*s.* a-piece, which they all paid and entered in recognisance, &c." Kelyng, 50.

It is, perhaps, worth observation, that in this case of Hood, Kelyng's direction, (for not following which he fined the jury), seems upon his own shewing to have been wrong. According to his own report of the case, the only question, which he left to the jury, was, whether Newen died by the hand of Hood. Now most undoubtedly the circumstances of intention on the part of Hood, and of provocation (the sufficiency of provocation is altogether distinct) on the part of Newen, were as much matters of fact, and to be collected from the testimony of the witnesses, as the giving the mortal wound. Those matters therefore should have been left to the jury. See the 8th Resolution of the Judges in lord Morley's case *ante*, p. 771, It is not improbable, that in Hood's case there was some provocation, which the jury thought sufficient to excite his sudden resentment, and put him off his guard, and so reduce his offence to man-slaughter, but which the judge did not think sufficient for that purpose.

The following Case is in 2 Keble, 180.

"The King against Sir H. Windham and others, Jurors of Somersetshire.

"The Chief Justice bound them over to appear here in regard they would not find a bill of murder, albeit they were satisfied the man died by the hands of the party indicted, and were told this was but an accusation, and no trial of the issue Guilty or Not Guilty, or whether it were maliciously or *fortuito*, and that whether the fact were murder or *se defendendo* was matter of law; and because they would not find the bill, the Chief Justice fined the eleven who refused to find it, to 20*l.* a-piece at the assizes; and now the Court delivered their opinions severally that this was well assessed, in regard if they should try the malice by the grand jury, they would prevent the judgment of the Court, and the grand jury is only for enquiry not for conviction; also they are not to regard the legal forms of *malitiose*, no more than the saying *vi et armis* in trespass, which is found everyday without scruple; and when the petty jury, contrary to directions of the Court, will find a murder manslaughter, albeit it lie properly before them, yet the Court will fine them, but because they were gentlemen of repute in the country, the Court spared the fine, yet in Parliament the Chief Justice was fain to submit, being by sir H. W. accused."

"This conduct of Chief Justice Kelyng," says Mr. Hatsell, "was grounded on the authority of Wharton's case, Mich. term, 44 Eliz. reported in Yelverton's Rep. p. 23. Wharton and others were indicted of murder; on which indictment all the parties were found Not Guilty; per q Popham, Gaudy and Fenner, fuerunt valde irati, et tous les jurors comit et fine, et oblige a leur bon behaviour.' See the case of Watts v. Brains, in 1 Croke's Rep. p. 778."

A bill was ordered in, which however did not pass the House of Commons, to "declare the fining and imprisoning of jurors to be illegal."

[10] See Mr. Clifford's argument in the Case of Flower, A. D. 1799, and Mr. Clifford's Postscript to that Case, *infra*. See also what Mr. Hargrave says of this matter, in his Preface to lord Hale's Treatise on the Judicature of the Lords' House of Parliament. Some spirited observations on Kelyng's conduct are to be found in the Tract concerning Juries, ascribed to lord Somers. See lord Shaftesbury's Case, a.d. 1681, *infra*.

[Text Version](#) | [Contents](#)