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THE
 English-mans
RIGHT.
 A
 DIALOGUE
 BETWEEN
 A BARRISTER at LAW,
 AND A
JURY-MAN:

Plainly setting forth,

- I. The Antiquity
 - II. The excellent designed use
 - III. The Office and just Priviledges
- } of JURIES,

By the Law of England.

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The *Englishmans* RIGHT, &c.

Barrister.

MY old *Client*! a good morning to you, whither so fast? The Introduction.
you seem intent upon some important affair?

Juryman. Worthy Sir! I am glad to see you thus *opportu-*
unately, there being scarce any person that I could at this time
rather have wisht to meet with.

Barr. I shall esteem my self happy, if in any thing I can
serve you.— The *business* I pray?

Jurym. I am summon'd to appear *upon a Jury*, and was just
going to try if I could get off. Now I doubt not but you can
put me into the best way to obtain that favour.

Barr. 'Tis probable I could: But first let me know the
reasons why you desire to *decline that service*.

Jurym. You know, Sir, there is something of *trouble* and The Reasons
loss of time in it; and mens *Lives, Liberties, and Estates* why fit men
(which depend upon a Jury's *Guilty, or Not guilty*, for the endeavour
Plaintiff, or for the Defendant) are *weighty things*. I would sometimes to
not wrong my *Conscience* for a world, nor be accessary to avoid serving
any mans ruin. There are others *better skill'd* in such matters. on Juries.
I have ever so loved *peace*, that I have forborn going to *Law*,
(as you well know many times) though it hath been much
to my loss.

Barr. I commend your *tenderness* and *modesty*; yet must Not sufficient.
tell you, these are but general and *weak* excuses. As for your
time and trouble, 'tis not *much*; and however, can it be bet-
ter spent than in doing *justice*, and serving your *Country*?
To withdraw your self in such cases, is a kind of *sacriledg*, a
robbing of the publick of those duties which you justly owe
it; the more *peaceable* man you have been, the *more fit* you
are. For the office of a *Jury-man* is, *conscientiously to judg his*
neighbour; and needs no more *Law* than is easily learnt to di-
rect him therein. I look upon you therefore as a man well-

qualified with *estate, discretion, and integrity*; and if all such as you, should use private means to avoid it, how would the King and Country be honestly served? At that rate we should have none but *Fools or Knaves* intrusted in this grand concern, on which (as you well observe) the Lives, Liberties, and Estates of all *Englishmen* depend.

Your *Tenderness* not to be accessary to any mans being wrong'd or ruin'd, is (as I said) much to be commended. But may you not incur it unawares, by seeking thus to *avoid* it? *Pilate* was not innocent because he wash't his hands, and said, *He would have nothing to do with the blood of that just one*. There are faults of *Omission* as well as *Commission*. When you are *legally call'd* to try such a cause, if you shall *shuffe* out your self, and thereby persons perhaps *less conscientious* happen to be made use of, and so a *Villain* escapes justice, or an *innocent* man is ruined by a *prepossest* or *negligent* Verdict; can you think your self in such a case wholly blameless? *Qui non prohibet cum potest, jubet: He abets evil, that prevents it not when he may. Nec caret scrupulo societatis occulta qui evidenter facinori desinit obviare: He deserves not to be free from the suspicion of a close society, or underhand conspiracy in the mischief of subverting the fundamental Laws and Liberties of the Nation, who ceases to obviate and oppose it.*

Jurym. Truly I think a man is bound to *do all the good* he can, especially when he is lawfully call'd to it. But there sometimes happen *nice cases*, wherein it may be difficult to discharge ones conscience without incurring the *displeasure* of the Court, and thence *trouble* and *damage* may arise.

Barr. That is but a *vain* and *needless* fear. For as the *Jurors priviledges* (and every *Englishmans* in and by them) are very considerable; So the Laws have no less providently *guarded* them against *Invasion* or *Uurpation*. So that there needs no more than first *understanding* to know your duty, and in the next place *courage* and *resolution* to practise it with impartiality and integrity, free from accursed *bribery* and *malice*, or (what is full out as bad in the end) base and servile *fear*.

Jur.

Jurym. I am satisfied, that as 'tis for the *advantage* and *honour* of the publick, that men of *understanding, substance, and honesty* should be employ'd to serve on *Juries*, that *justice* and *right* may fairly be administred; So 'tis *their own* interest when called thereunto, readily to bestow their attendance and service, to prevent *ill presidents* from men otherwise qualified; which may by degrees *fatally*, though insensibly, undermine our just Birth rights, and perhaps *fall heavy* one day upon us, or our posterity. But for my own part, I am fearful lest I should suffer through my *ignorance* of the duty and office of a *Jurymen*, and therefore on that account principally it is, that I desire to be excused in my appearance, which if I understood but so well as I hope many others do, I would with all my heart attend the service.

Barr. You speak honestly, and like an *Englishman*. But if that be all your cause of scruple, it may soon be removed, if you will but give your self a very *little trouble* of inquiry into the necessary provisions of the Law of *Engl.* relating to this matter.

J. There is nothing (of a *temporal* concern) that I would more gladly be inform'd in, because I am satisfied, 'tis very *expedient* to be generally known. And first I would learn *how long* trials by *Juries* have been used in this Nation?

The Antiquity of Trials by Juries.

B. Even *time out of mind*; so long, that our best *Historians* cannot date the Original of the Institution, being indeed *cotemporary* with the Nation it self, or in use as soon as the people were reduced to any form of *Civil Government*, and administration of Justice. Nor have the several *Conquests* or *Revolutions*, the mixtures of *Foreigners*, or the mutual feuds of the *Natives*, at any time been able to suppress or overthrow it. For,

1. That *Juries* (the *thing* in effect and *substance*, though perhaps not just the number of *Twelve men*) were in use amongst the *Britains* the first Inhabitants of this Island, appears by the Ancient Monuments and Writings of that Nation, attesting that their *Free holders* had always a *share* in all *Tryals* and determinations of differences.

Amongst the Britains.

2. Most certain it is, that they were practised by the *Saxons*.

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Amongst the Saxons. Lamb. p. 218. Cook 1. par. Institutes, fol. 155.

Continued by the Normans. See Spelmans Glossar. in the word Furata.

Confirmed by Magna Charta.

ons, and were then the *only Courts*, or at least an essential, and the greater part of all Courts of Judicature: For so (to omit a multitude of other Instances) we find in King Ethelreds Laws, *In singulis Centuriis, &c. In every Hundred let there be a Court, and let Twelve ancient Free-men, together with the Lord, or rather according to the Saxon, the Greve, i. e. the chief Officer amongst them, be sworn, That they will not condemn any person that is Innocent, nor acquit any one that is guilty.*

3. When the Normans came in, *William*, though commonly called the *Conquerour*, was so far from abrogating this Priviledg of Juries, That in the 4th year of his Reign, *he confirmed all King Edward the Confessors Laws, and the ancient Customs of the Kingdom* (whereof this was an essential and most material part). Nay, he made use of a *Jury chosen in every County, to report and certifie on their Oaths what those Laws and Customs were*; as appears in the *Proem* of such his Confirmation.

4. Afterwards when the *Great Charter*, commonly called *Magna Charta*, (which is nothing else than a recital, confirmation and corroboration of our Ancient English Liberties) was made and put under the Great Seal of *England* in the 9th year of King *Henry the 3d* (which was *Anno Domini 1225*.) Then was this Priviledg of Tryals by Juries in an especial manner confirmed and establisht, as in the 14th Chapter, *That no Amercements shall be assessed, but by the Oath of good and honest men of the Vicinage.* And more fully in that Golden Nine and twentieth Chapter—*No Freeman shall be taken, or imprisoned, nor be disseized of his Freehold or Liberties, or free customs, or be out-law'd, or exil'd, or any other way destroyed, nor shall we pass upon him, or condemn him, but by the lawful judgment of his Piers, &c.* Which Grand Charter having been confirmed by above thirty Acts of Parliament, the said right of Juries thereby, and by constant usage, and common custom of *England*, which is the *common Law*, is brought down to us as our undoubted Birth-right, and the best inheritance of every *English* man. For as that famous Lawyer Chief Justice

Justice *Cook* in the words of *Cicero*, excellently avers, *Major Hereditas venit unicuique nostrum a jure & legibus quam a parentibus*: 'Tis a greater inheritance, and more to be valued, which we derive from the fundamental constitution and Laws of our Country, than that which comes to us from our respective Parents. For without the former, we have no claim to the latter.

7. But has this method of Trial never been attempted to be invaded or justled out of practice?

B. 'Tis but rarely that any have arrived to so great a confidence: For 'tis a most dangerous thing to shake or alter any of the rules or fundamental points of the common Law, which in truth are the main pillars and supporters of the fabrick of the Commonwealth. These are *Judge Cooks* words*. Yet sometimes it has been endeavoured. But so sacred and valuable was the Institution in the eyes of our Ancestors, and so tenacious were they of their Priviledges, and zealous to maintain and preserve such a vital part of their Birth-right and Freedom, that no such attempts could ever prove effectual, but always ended with the shame and severe punishment of the rash undertakers. For example,

1. *Andrew Horn* an eminent Lawyer, in his Book Entituled, *The Mirrour of Justices*, (written in the Reign of *K. Edm. 1*. now near 400 years ago) in the fifth Chapter, and first Section, records, That the renowned *Saxon King Alfred* caused four and forty Justices to be hang'd in one year as *murderers*, for their false Judgments. And there recites their particular Crimes, most of them being in one kind or other Infringements, Violations and Encroachments of and upon the Rights and Priviledges of Juries; amongst the rest, that worthy Author tells us, *he hanged one Justice Cadwine, because he judged one Hackwy to death without the consent of all the Jurors; for whereas he stood upon his Jury of twelve men, because three of them would have saved him, this Cadwine removed those three, and put others in their room, on the Jury, against the said Hackwys consent.* Where we may observe, that though at last twelve men did give a Verdict against him, yet those so put

2. Institutes, fol. 56.

Essays made to overthrow Trials by Juries, always unsuccessful, and severely punisht. * 2. Institutes, pag. 74.

put upon him, were not accounted his Jurors; by reason all, or any of them, who were first sworn to try him, could not (by Law) be removed, and others put in their stead. And that such illegal alteration was then adjudged a Capital Crime, and forthwith the said Cadwine was Hang'd.

Cook 2. part of Institutes, fol. 51.

2. A second instance I shall give you in the words of the Lord Chief Justice Cook. "Against this ancient and fundamental Law (and in the face thereof) there was in the 11. year of King Henry 7. cap. 3. an Act of Parliament obtained (on fair pretences, and a specious preamble, as to avoid divers mischiefs, &c.) whereby it was Ordain'd, That from thenceforth, as well Justices of Assize, as Justices of the Peace, upon a bare Information for the King before them made, without any finding or presentment by the Verdict of Twelve men, should have full power and authority by their discretions, to hear and determine all offences and contempts committed or done by any person or persons against the Form, Ordinance, or effect of any statute made and not repealed, &c. "By colour of which Act (saith Cook) shaking this Fundamental Law (he means, touching all Trials to be by Juries) it is not credible what HORRIBLE OPPRESSIONS and EXACTIONS, to the undoing of MULTITUDES of people, were committed by Sir Richard Empson Knight, and Edmund Dudley Esq; (being Justices of the Peace) throughout England; and upon this unjust and injurious Act (as commonly in like cases it falleth out) a new Office was erected, and they made Masters of the Kings Forfeitures.

See Sir Rich. Bakers Chron. p. 273. 4. part Instit. fol. 41.

But not only this Statute was justly soon after the decease of Hen. 7. repealed by the Statute of the 1 Hen. 8. cap. 6. but also the said Empson and Dudley (notwithstanding they had such an Act to back them, yet it being against Magna Charta, and consequently void) were fairly executed for their pains; and several of their under agents, as Promoters, Informers, and the like, severely punished, for a warning to all others that shall dare (on any pretence whatsoever) infringe our English Liberties. For so the Lord * Cook having (elsewhere) with de-

detestation mentioned their story, pathetically concludes, Qui eorum vestigiis instant, exitus perhorrescant: Let all those who shall presume to tread their steps, tremble at their dreadful end. Other Instances of a latter date might be given, but I suppose these may suffice.

7. Yes surely; and by what you have discoursed of the long continued use of Juries, and the zealous regards our Ancestors had, not to part with them; I perceive that they were esteemed a special priviledg. Be pleased therefore to acquaint me wherein the excellency and advantages to the people by that method of trial above others, may consist?

The benefits of being tried by Juries.

B. This question shews you have not been much conversant abroad, to observe the miserable condition of the poor people in most other Nations, where they are either wholly subject to the despotick arbitrary lusts of their Rulers; or at best under such Laws as render their Lives, Liberties, and Estates, liable to be disposed of at the discretion of strangers appointed their Judges, most times mercenary, and Creatures of Privilege; sometimes malicious and oppressive, and often partial and corrupt. Or suppose them never so just and upright, yet still has the Subject no security against the attacks of unconscionable Witnesses; yea, when there is no sufficient Evidence, upon bare suspicions they are obnoxious to the Tortures of the Rack, which often make an innocent man confess himself guilty, merely to get out of present pain. Is it not then an inestimable happiness to be born and live under such a mild and righteous Constitution wherein all these mischiefs (as far as humane prudence can provide) are prevented; where none can be condemn'd, either by the power of superior enemies, or the rashness or ill-will of any Judg, nor by the bold Affirmations of any profligate evidence; But no less than Twelve, honest, substantial, impartial men, his neighbours (who consequently cannot be presumed to be unacquainted either with the matters charged, the Prisoner's course of life, or the credit of the Evidence) must first be fully satisfied in their Consciences, that he is guilty, and so all unanimously pro-

See all this excellently made out, and more at large by the L.C. J. Fortescue, afterwards Chancellor to K. Hen. 6. in his Book, De laudibus Legum Angliae. cap. 26, 27, 28, & 29.

pronounce him upon their *Oaths*. Are not these, think you very *material priviledges*?

J. Yes certainly, though I never so well consider'd them before. But now I plainly see our forefathers had, and we still have *all the reason in the world* to be zealous for the maintenance and preservation thereof from subversion or encroachments, and to transmit them *intire* to posterity. For if once this *bank* be broken down or neglected, an *ocean* of oppression, and the ruins of infinite numbers of people, (as in *Empson* and *Dudley's* days) may easily follow, when on any pretence they may be made *Criminals*, and then fined in vast sums, with pretext to enrich the Kings Coffers; but indeed to feed those insatiate *Vultures* that promote such unreasonable Prosecutions. But since you have taught me so much of the *antiquity* and *excellency* of Juries, I cannot but crave the continuance of your favour to acquaint me somewhat more particularly of their *office* and *power* by Law.

The Office and power of Juries.

See Cook, 4th. part of Instit. fol. 84.

B. I shall gladly comply with so reasonable and just a request. *A Jury of twelve men are by our Laws the only proper Judges of the matter in issue before them.* As for instance,

1. That Testimony which is delivered to induce a Jury to believe, or not to believe the matter of Fact in issue, is called in Law EVIDENCE, because thereby the Jury may out of many matters of Fact, *Evidere veritatem*, that is, *see clearly the truth*, of which they are proper Judges.

2. When any matter is sworn, Deed read, or offered whether it shall be believed or not, or whether it be *true or false* in point of Fact, the Jurors are proper Judges.

3. Whether such an act was done in such or such a manner, or to such or such an *intent*, the Jurors are Judges. For the Court is not Judg of these matters, which are evidence to prove or disprove the thing in issue. And therefore the Witnesses are always ordered to *direct their speech to the Jury*, they being the proper Judges of their Testimony. And in all Pleas of the Crown (or matters Criminal) the Prisoner is said, *to put himself for trial upon his Country*, which is explained

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ed and referred by the Clerk of the Court, to be meant of the Jury, saying to them, *Which Country you are.*

J. Well then, what is the part of the Kings *Justices*, or the Court? what are they to take cognizance of, or do, in the Trials of mens Lives, Liberties, and Properties? The office of the Court in Trials.

B. Their office in general is to do *equal justice* and right: particularly,

1. To see that the Jury be regularly *return'd* and duly *sworn*.

2. To see that the Prisoner (in cases where 'tis permittable) be allowed his lawful *challenges*.

3. To advise by Law, whether such matter may be given in evidence or not, such a writing read or not, or such a man admitted to be a witness, &c.

4. Because by their *learning* and experience they are presumed to be best qualified to ask pertinent questions, and in the most perspicuous manner soonest to sift out truth from amongst tedious impertinent Circumstances and Tautologies; they therefore commonly *examine the Witnesses in the Court*, yet not *excluding the Jury*, who of right *may* and where they see cause, *ought* to ask them any necessary questions, which undoubtedly they may lawfully do with modesty and discretion, without *begging any leave*. For if asking leave be necessary, it implies in the Court a right when they list to *deny* it; and how then shall the Jury know the truth? And since we see that Council, who too often (*— fudet hæc opprobria nobis*) for their *fees* strive only to baffle Witnesses, and stifle Truth, take upon them daily to *interrogate* the evidence, 'tis absurd to think that the Jurors should not have the *same priviledg*, who are upon their *Oaths*, and *proper Judges* of the matter.

5. As a discreet and *lawful Assistant* to the Jury, they do often recapitulate and sum up the heads of the Evidence; but the Jurors are still to consider whether it be done *truly, fully and impartially*, (for one mans *memory* may sooner fail than *Twelve's*.) He may likewise state the Law to them, that

Vaughan's Reports in Bushell's Case, fol. 144.

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is, deliver his *opinion* where the case is difficult, or they *desire* it. But since *Ex facto jus oritur*, all matter of Law arises out of matter of Fact, so that till the Fact is *settled* there is no room for Law, therefore all such *discourses* of a Judg to a Jury are or ought to be *Hypothetical*, not *coercive*; conditional, and not *positive*; viz. *If you find the fact thus or thus*, (still leaving the Jury at liberty to find as they see cause) *then you are to find for the Plaintiff*. But *if you find the Fact thus or thus*, then you are to find for the Defendant, or the like, *Guilty*, or *not guilty*, in cases Criminal.

Lastly, They are to *take the Verdict* of the Jury, and thereupon to give *judgment* according to Law. For the office of a Judg (as *Cook* well observes) is *ius dicere*, not *ius dare*; not to make any Laws by strains of wit, or forced Interpretations; but plainly and impartially to declare the Law already established. Nor can they refuse to accept the Juries Verdict when agreed: For if they should, and force the Jury to return, and any of them should miscarry for want of accommodation, it would undoubtedly be murder; and in such case the Jury may without crime force their liberty, because they are illegally confined having given in their Verdict, and thereby honestly discharged their office, and are not to be starv'd for any mans pleasure.

How Jurors are Judges of Law as well as Fact.

J. But I have been told, That a Jury is only Judg of naked *matter of fact*, and are not at all to take upon them to meddle with, or regard *matter of Law*, but leave it wholly to the Court.

B. 'Tis most true, Jurors are *Judges* of matters of Fact, that is their *proper Province*, their chief business; but yet not *excluding* the consideration of matter of Law, as it *arises* out of, or is *complicated* with, and *influences* the Fact. For to say, they are not at all to meddle with, or have respect to Law in giving their Verdicts, is not only a *false* position, and contradicted by every days *experience*; but also a very *dangerous and pernicious* one, tending to defeat the principal end

end of the Institution of Juries, and so subtilly to *undermine* that which was *too strong* to be *batter'd down*.

1. *It is false*: for though the direction as to matter of Law separately may belong to the Judg, and the finding the matter of Fact does peculiarly belong to the Jury, yet must your Jury also *apply matter of Fact and Law together*; and from their consideration of, and a right judgment upon both, bring forth their Verdict: For do we not see in most General issues, as upon *not guilty*, pleaded in *trespass*, breach of the peace, or *Felony*, though it be matter *in Law* whether the party be a *trespasser*, a breaker of the Peace, or a *Felon*; yet the Jury do not find the *Fact* of the case by it self, leaving the Law to the Court; but find the party *guilty*, or not *guilty*, generally. So as though they answer not to the question singly, *what is Law*; yet they determine the Law in all matters where Issue is join'd. So likewise is it not every days practise, that when persons are Indicted for *murder*, the Jury does not only find them *guilty* or not *guilty*, but many times upon hearing and weighing of circumstances, brings them in, either *guilty* of *Murder*, *Manslaughter*, *per Infortunitus*, or *se-defendendo*, as they see cause. Now do they not herein *complicatedly resolve* both Law and Fact? And to what end is it that when any person is prosecuted upon any *Statute*, the Statute it self is usually read to the Jurors, but only that they *may judg*. Whether or no the matter be within that Statute? But to put the business out of doubt, we have the *suffrage* of that Oracle of Law *Littleton*, who in his *Tenures*, sect. 368. declares, *That if a Jury will take upon them the knowledg of the law upon the matter, they may*. Which is agreed to, likewise by *Cook* in his Comment thereupon. And therefore tis *false* to say, That the Jury hath not power, or doth not use frequently to apply the Fact to the Law; and thence taking their *measures*, judg of, and determine the *crime* or *issue* by their Verdict.

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2. As Juries have ever been vested with such power by Law, so to exclude them from, or disseize them of the same, were utterly to defeat the end of their institution: For then if a person should be Indicted for doing any common innocent act. if it be but clothed and disguised in the Indictment with the name of Treason, or some other high crime, and prov'd by Witnesses to have been done by him; the Jury though satisfied in Conscience, that the Fact is not any such offence as 'tis called, yet because (according to this fond opinion) they have no power to judg of Law, and the fact charged is fully prov'd, they should at this rate be bound to find him guilty. And being so found, the Judg may pronounce sentence against him, for he finds him a convicted Traytor, &c. by his Peers. And thus as a certain Physician boasted, That he had kill'd one of his Patients with the best method in the world; So here should we have an innocent man hang'd, drawn, and quarter'd, and all according to law.

J. God forbid that any such thing should be practised; and indeed I do not very fully understand you.

B. I do not say it ever hath been, and I hope it never will be practised: But this I will say, that according to this Doctrine, it may be; and consequently Juries may thereby be rendred rather a snare or engine of oppression, than any advantage or Guardian of our Legal Liberties against Arbitrary Injustice, and made meer properties to do the drudgery, and bear the blame of unreasonable Prosecutions. And since you seem so dull as not to perceive it, let us put an Imaginary case, not in the least to abet any irreverence towards his Majesty, but only to explain the thing, and shew the absurdness of this opinion. — Suppose then a man should be Indicted, For that he as a false Traytor not having the fear of God before his eyes, &c. did

did trayterously, presumptuously against his Allegiance, and with an intent to affront his Majesties Person and Government, pass by such or such a Royal Statue or Effigies with his hat on his head, to the great contempt of His Majesty and his Authority, the evil example of others, against the Peace, and his Majesties Crown and Dignity. Being hereupon arraigned, and having pleaded Not guilty, suppose that sufficient evidence should swear the matter of Fact laid in the Indictment, viz. That he did pass by the Statue or Picture with his hat on; now imagine your self one of the Jury that were sworn to try him, What would you do in the matter?

J. Do? Why I should be satisfied in my Conscience, That the man had not herein committed any crime, and so I would bring him in not Guilty.

B. You speak as any honest man would do: But I hope you have not forgot the point we were upon; suppose therefore when you thought to do thus, the Court, or one of your Brethren, should take you up and tell you, That it was out of your power so to do; For look ye (saith he) my Masters! we Jury-men are only to find matter of Fact, which being fully prov'd as in this case before us it is, we must find the party Guilty; whether the thing be Treason or not, does not belong to us to inquire; 'tis said so here, you see in the Indictment; and let the Court look to that, they know best, we are not Judges of Law: Shall we meddle with niceties and punctilio's, and go contrary to the directions of the Court? or perhaps we shall bring our selves into a premunire (as they say) and perhaps never be suffered to be Jury men again. No, no. The matter of Fact you see is proved, and that's our business, we must go according to our Evidence, we cannot do less: truly 'tis something hard, and I pity the poor man, but we cannot help it, &c. After these notable documents, what would you do now?

An ordinary Jury-man's wife Speech.

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J. I should not tell what to say to it; for I have heard several *Ancient* Jury-men speak to the very same effect, and thought they talk'd very wisely.

B. Well then, would you consent to bring in the man *Guilty*?

J. Truly I should be somewhat *unwilling* to do it; but I do not see which way it can be *avoided*, but that he *must be found guilty* of the Fact.

B. God keep every honest body from such *Jury-men*; have you no more regard to your *Oath*? to your *Conscience*? to *Justice*? to the *Life* of a man?

J. Hold! hold! perhaps we would not bring him in *Guilty* generally, but only *Guilty* of the Fact, Finding no more but *Guilty of passing by the Statue with his Hat on*.

B. This but poorly mends the matter, and signifies little or nothing; For such a finding hath generally been *refused* by the Court, as being *no Verdict*, though 'tis said it was lately allowed somewhere in a *Case that required favour*. But suppose it were accepted, what do you intend shall become of the Prisoner? must not he be kept in Prison till all the Judges are at leisure and willing to meet and *argue* the business? Ought you not, and what Reason can you give why you should not absolutely acquit and discharge him? Nay, I do aver, you are bound by your Oaths to do it, by saying with your *mouths* to the Court, what your *Consciences* cannot but dictate to your selves, *Not Guilty*: For pray consider, Are you not sworn, *That you will well and truly Try, and true deliverance make*? There's none of this Story of *matter of Fact*, distinguish'd from Law in your Oath. But you are, *Well*, that is, *Fully* and *Truly*, that is, *Impartially*,

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tially, to try the Prisoner. So that if upon the *Consciences*, and the best of the *Understanding* by what is proved against him, you find he is guilty of that *Crime* wherewith he stands charged, that is, deserving *Death*, or such *other Punishment* as the Law inflicts upon an Offence so *denominated*; then you are to say, he is *Guilty*. But if you are not satisfied, that either the *Act* he has committed was *Treason*, or other *Crime*, (though it be never so often *called so*) or that the *Act* it self, if it were so criminal, was not *done*, then what remains but that you are to acquit him? For the end of *Juries* is to preserve Men from *oppression*, which may happen as well by *imposing* or ruining them for that *as a Crime*, which indeed is *none*, or at least not such or so *great* as is pretended, as by charging them with the Commission of that which in truth was *not committed*. And how do you *well and truly Try, and true Deliverance make*, when indeed you do but deliver him up to others to be *Condemned*, for that which your selves do not believe to be any *Crime*?

Jury-m. Well; but the *supposed Case* is a *Case un-supposable*. It is not to be imagined, that any such thing should happen, nor to be thought, that the Judges will condemn any Man, though brought in *Guilty* by the Jury, if the Matter in it self be not so *Criminal* by Law.

Barr. 'Tis most true, I do not believe that ever *that Case* will happen. I put it in a thing of apparent *Absurdity*, that you might the more clearly observe the unreasonableness of this *Doctrine*; but withal I must tell you, That 'tis not impossible that some *other Cases* may really happen, of the same or the *like nature*, though more *fine* and plausible. And though we apprehend not, that during the Reign of His Majesty that now is, (*whose Life God long preserve*) any Judges will be made that would *so wrest the Law*; Yet what Security is there, but that some *Successors* may not be so cautious in their Choice? And though our *Benches* of Judicature be at present furnish'd with Gentlemen of great Integrity, yet there may one day happen some *Tresilian*, or Kinsman of *Empsons*, to get in, (for what *has been*, may be.) who *Empson*-like too, shall pretend it to be for his Masters Service,

Service, to encrease the number of Criminals, that his Coffers may be fill'd with *Fines* and *Forfeitures*. And then such mischiefs may arise. And Juries having upon confidence parted with their just Priviledges, shall *then, too late*, strive to reassume them, when the number of Ill-presidents shall be vouch'd to inforce that as of *Right*, which in truth was at first a *Wrong* grounded on *Easiness* and *Ignorance*. Had our *wise and wary* Ancestors thought fit to depend so far upon the *Contingent Honesty* of Judges, they needed not to have been so *zealous* to continue the usage of *Juries*.

Jury. Yet still I have heard, that in every Indictment, or Information, there is always something of *Form* or *Law*, and something else of *Fact*; and it seems reasonable, that the Jury should not be bound up *nicely* to find *every Formality* therein expressed, or else to acquit (perhaps) a notorious Criminal. But if they find the *Essential Matter* of the Crime, then they ought to find him Guilty.

Barr. You say *true*, and therefore must note, that there is a *wide difference* to be made between *Words of Course*, rais'd by Implication of Law, and *Essential Words*, that either *make*, or really *aggravate* the Crime charged. The Law does suppose and imply every *Trespass*, *Breach of the Peace*, every *Felony*, *Murder*, or *Treason* to be done *Uti & Armis*, with Force and Arms, &c. Now if a Person be Indicted for Murder by *Poison*, and the Matter proved, God forbid the Jury should scruple the finding him *Guilty* upon the Indictment, meerly because they do not find that part of it, as to *Force and Arms*, proved. For that is implied as a necessary or allowable *Fiction* of Law.

But on the other side, when the Matter in Issue in it self, and taken as a naked Proposition, is of such a Nature, as no Action, Indictment, or *Information* will lie for it *singly*, but it is *work'd up* by special Aggravations into Matter of *Damage* or *Crime*; as that it was done to *scandalize the Government*, to *raise Sedition*, to *affront Authority*, or the like, or with such or such an *evil intent*. If these Aggravations, or some *overs Act* to manifest such ill Design or Intention be not made

How far aggravating words, or those of course in Indictments or Informations, are to be regarded.

out by *Evidence*, then ought the Jury to find the Party *Not Guilty*; for example.

Bishop *Latimer*, (afterwards a *Murtyr* in bloody *Queen Maries* days, for the *Protestant Religion*) in a Sermon preach'd before the most excellent King *Edward* the sixth delivered these words. ' I must desire your Grace to hear Poor Mens Suits your self; the Saying is now, That Money is heard e-
' very where; if he be Rich, he shall soon have an end of his
' Matter, others are fain to go home with weeping Tears for
' any help they can obtain at any Judges Hand. Hear Mens
' Suits your self, I require you in Gods behalf, and put them
' not to the Hearing of these Velvet-Coats, these Up-skips.
' Amongst all others, one especially moved at this time to speak;
' This it is, Sir! A Gentlewoman came and told me, that a
' Great Man keepeth certain Lands of hers from her, and will
' be her Tenant in spite of her Teeth. And that in a whole
' Twelve-month she could not get but one day for the Hearing
' of her Matter, and the same day, when it should be heard,
' the Great Man brought on his side a great sight of Lawyers
' for his Counsel, the Gentlewoman had but one Man of Law;
' and the Great Man shakes him so, that he cannot tell what to
' do; so that when the Matter came to the Point, the Judge
' was a means to the Gentlewoman, that she should let the
' Great Man have a quietness in her Land: I beseech your
' Grace, that ye would look to these Matters. And you proud
' Judges! Harken what God saith in his Holy Book; *Audite*
' *illos ita parvum ut magnum*, Hear them (saith he) the
' Small as well as the Great, the Poor as well as the Rich,
' regard no Person, fear no Man. And why? *Quia Domini*
' *Judicium est*, The Judgment is Gods. Mark this Saying,
' thou Proud Judge; The Devil will bring this Sentence
' against thee at the Day of Doom. Hell will be full of these
' Judges, if they repent not, and amend, they are worse than
' the wicked Judge that Christ speaketh of *Luke* the 19th; that
' neither feared God nor the World. Our Judges are worse
' than this Judge was; for they will neither hear Men for God's

See Latimers Sermons fo- 41. the second Sermon before King Edward the sixth.

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Prison.

'fake, nor fear of the World, nor Importunateness, nor any
'thing else; yea some of them will command them to * ward
'if they be importunate. I heard say, That when a Suiter
'came to one of them, he said, What fellow is it that giveth
'these folks counsel to be so importunate? he deserves to be
'Punished and Committed to ward. Marry sir! punish me then,
'It is even I that gave them Counsel, I would gladly be punish-
'ed in such a Cause, and if you amend not, I will cause them to
'cry out upon you still, even as long as I live. — These are
'the very words of that good Bishop and Martyr Father
'*Latimer*.

Jurym. Truly they are somewhat *Bold*, but I think very
Honest ones. But what signify they to our discourse?

Barr. Only this, suppose the Judges of those times, think-
ing themselves agrieved by such his *Freedom*, should have
brought an *Indictment* against him, setting forth, *that falsly*
and maliciously intending to scandalize the Government and
the Administration of Justice in this Realm, and to bring the
same into Contempt, he did speak, publish and declare the false
and scandalous words before recited.

Jurym. I conceive the Judges had more *Wit* than to trouble
themselves about such a Business.

Barr. That's nothing to the purpose, but suppose I say by
them or any body else, it had been *done*, and his *speaking*
the *words had been proved*, and you had then been Living
and one of the Jury.

Jurym. I would have pronounced him *not Guilty*, and been
starv'd to Death before I would have consented to a contrary
Verdict, Because the words in themselves are not *Criminal*, nor
reflecting upon any particulars, and as for what is supposed to be
laid in the *Indictment* or *Information*, that they were published
or spoken to *scandalize the Government and the Administration*
of Justice, or to bring the same into Contempt, nothing of that
appears.

Barr. You resolve as every *Honest, Understanding, Consci-*
entious man would do in the like Case, for when a man is *Pro-*
secuted

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secuted for that which in it self is *no Crime*, how dreadfully so-
ever it may be set out, as the Inquisitors in *Spain* use to Cloath
Innocent Protestants, whom they Censure to the flames, with
Sambenito's (Garments all over bepainted with *Devils*) that
the people beholding them in so Hellish a dress, may be so
far from pitying them, that they may rather Condemn them
in their thoughts as *Miscreants* not worthy to Live, though
in truth they know nothing of their Cause, yet I say notwith-
standing any such *Bugg-bear Artifice*, an Innocent man ought
to be Acquitted, and not he and all his Family ruined and
perhaps utterly undone, for *words* or *matters* harmless in them-
selves, and possibly very well intended, but only rendred *Cri-*
iminal by being thus hideously dressed up, and wrested with
some far-fetch'd, forced and odious Construction.

Jurym. This is a matter well worthy the Consideration of
all Juries, for indeed I have often wondred to observe the
Adverbs in Declarations, *Indictments* and *Informations* in some
Cases to be harmless *Vinegar and Pepper*, and in others *Hen-*
bane steep'd in Aqua fortis.

Barr. That may easily happen, where the Jury does not *di-*
stinguish Legal Implications, from such as *Constitute*, or ma-
terially *Aggravate* the Crime, for if the Jury shall honestly re-
fuse to find the *latter* in Cases where there is not direct proof
of them, *viz.* That such an Act was done *Falsly, Scandalously,*
Maliciously, with an intent to *raise Sedition, defame the Go-*
vernment, or the like, their mouths are not to be stopt, nor
their Consciences satisfied with the Courts telling them — *you*
have nothing to do with that, its only matter of Form or matter
of Law, you are only to examine the Fact, whether he spoke
such words, writ or sold such a Book or the like; For, now
if they should ignorantly take this for an Answer and bring in
the Prisoner *Guilty*, though they mean and intend of the *naked*
Fact or bare Act only, yet the Clerk Recording it, demands a
further Confirmation, saying to them, thus, *well then you say*
A. B. is Guilty of the Trespass or Misdemeanour in manner and
form as he stands Indicted and so you say all, to which the
Foreman

Foreman Answers for himself and his fellows *Yes*. Whereupon the Verdict is drawn up—*Juratores super Sacramentum suum dicunt, &c.* The Jurors do say upon their Oaths, that A. B. maliciously, in Contempt of the King and the Government, with an intent to scandalize the Administration of Justice, and to bring the same into Contempt, or to raise Sedition &c. (As the words before were laid) spake such Words, publisht such a Book, or did such an Act, against the Peace of our Lord the King his Crown and Dignity.

Dictum. Thus a Verdict, so called in Law, *quasi veritatis*, because it ought to be the Voice or Saying of Truth it self, may become compos'd in its material part of Falshood. Thus Twelve men ignorantly drop into a Perjury. And will not every conscientious man tremble to pawn his Soul under the sacred and dreadful solemnity of an Oath, to attest and justifie a Lie upon Record to all Posterity; besides the wrong done to the Prisoner, who thereby perhaps comes to be hang'd (and so the Jury *in foro conscientie* are certainly guilty of his Murder) or at least by Fine or Imprisonment) undone with all his Family, whose just Curses will fall heavy on such unjust Jurymen and all their Posterity, that against their Oaths and Duty occasion'd their causeless misery. And is all this think you nothing but a matter of Formality?

Jurym. Yes really, a matter of *Vast Importance* and *sad Consideration*; yet I think you charge the mischiefs done by such Proceedings a little *too heavy* upon the Jurors; Alas good men! They *mean no harm*, they do but follow the *directions* of the Court, if any body ever happen to be to blame in such Cases it must be the Judges.

Barr. Yes, forsooth! That's the Jury-mens *common-plea*, but do you think it will hold good in the Court of Heaven? 'Tis not enough that we *mean no harm*, but we must *do none neither*, especially in things of that moment, nor will *Ignorance* excuse, where 'tis *affected*, and where duty obliges us to *Inform* our selves better, and where the matter is so *plain* and *easy* to be understood.

As

As for the Judges they have a fairer plea than you, and may quickly return the Burthen back upon the Jurors; for *we*, may they say, *did nothing but our duty* according to usual Practice, the Jury his Peers had found the Fellow Guilty upon their Oaths of such an *Odious Crime*, and attended with such vile, presumptions, and dangerous Circumstances. They are Judges, we took him as they presented him to us, and according to our duty pronounced the Sentence, that the Law inflicts in such Cases, or set a Fine, or ordered Corporal punishment upon him, which was very moderate, Considering the Crime laid in the Indictment or Information, and of which they had so sworn him Guilty; if he were innocent or not so bad as Represented, let his Destruction lye upon the Jury &c. At this rate if ever we should have an unconscionable Judge, might he Argue; And thus the Guilt of the Blood or ruin of an Innocent man when tis too late shall be Bandyed to and fro, and shuff'd off from the Jury to the Judge, and from the Judge to the Jury, but really sticks fast to both, but especially on the Jurors; because the very end of their Institution was to prevent all dangers of such oppression, and in every such Case, they do not only wrong their own Souls, and irreparably Injure a particular Person, but also basely betray the Liberties of their Countrey in General, for as without their *ill-compliance* and Act no such mischief can happen; so by it, ill precedents are made, and the Plague is encreas'd, honest Juries are *disheartned* or *seduc'd* by Custome from their Duties; just Priviledges are lost by *disuser*; and perhaps within a while some of themselves may have an *hole pickt* in their Coats, and then they are Tryed by another Jury just as wise and honest; and so deservedly come to smart under the Ruinating Effects and Example of their own Folly and Injustice.

Jurym. You talk of Folly, and blame Jury-men, when indeed they cannot help it, they would sometimes find such a Person Guilty, and such an one Innocent, and are perswaded they ought so to do, but the Court over-rules, and forces them, to do otherwise.

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Barr

Barr. How I pray ?

Jurym. How ? Why, did you never hear a Jury *threatned to be Fined and Imprisoned*, if they did not comply with the Sentiments of the Court ?

Barr. I have *Read* of such doings, but I never heard, or saw it done, and indeed I do not doubt but our *seats* of Justice are furnisht with both *better men*, and *better Lawyers*, than to use any such *Menaces* or *Direfs*, for undoubtedly 'tis a base and very *Illegal* Practise. But however will any man that *fears God*, nay that is but an *honest Heathen* debauch his *Conscience*, and forswear himself, do his Neighbour *Injustice*, betray his Countreys *Liberties*, and consequently *enslave* himself and his *Posterity*, and all this meerly because he is *Herd* and threaten'd a little ?

Jurym. I know it should not sway with any, but alas, a *Prison* is terrible to most men, whatever the *Cause* be; And the *Fine* may be such, if one shall refuse to comply, as may utterly *ruin* ones Family.

Barr. Fright not your self, there is no cause for this *Aguefit*, to shake your Conscience out of Frame; if you are *Threatned* tis but *Brutum Fulmen*, Lightning without a Thunderbolt, nothing but *big words*, for it is well known *That there is never a Judge in England that can Fine or Imprison any Jury-man in such a Case.*

Jurym. Good Sir ! I am half asham'd to hear a *Barrister* talk thus; have not some in our memory been *Fin'd* and *Imprison'd* ? And sure that which has *actually* been done is not altogether *Impossible*.

Barr. Your Servant Sir ! Under favour of your mighty Wisdom and Experience, when I said no Judge *could do it*, I spake the more like a *Barrister*, for tis a Maxim in Law — *Id possumus quod Jure possumus*. A man is said to be *Able* to do only so much, as he may *Lawsfully do*. But such *Fining* or *Imprisoning* cannot *Lawsfully* be done; the Judges have no *Right or Power* by Law to do it, and therefore it may well be said, they *cannot*, or are *not able* to do it.

And

Jurors cannot be Fined or Imprisoned in any case for giving their Verdict according to their Consciences, though contrary to the direction or sense of the Court.

And whereas you say, that some *Juries in our Memory* have been *Fined* and *imprisoned*, you may possibly say true, But tis as true that it hath been only in our Memory, for no such thing was practised in Antient times, for so I find it asserted by a late Learned Judge (d) in these positive words; *No Case can be offered, either before Attaints granted in General, or after, that ever a Jury was punished by Fine and Imprisonment by any Judge, for not finding according to their evidence and his direction, until Pophams time, nor is there clear proof, that he ever Fined them for that Reason, seperated from other Misdemeanours.* And Fol, 152 he Affirms—*That no man can shew, that a Jury was ever punished upon an Information either at Law or in the Star-Chamber, where the Charge was only for finding against their Evidence, or giving an untrue Verdict, unless Imbracery, Subornation, or the like were joyn'd.* So that you see, the Attempt is an *Innovation* as well as *unjust*, a thing unknown to our Fore-fathers and the Antient *Sages* of the Law; and therefore so much the more to be *wacht* against, resisted and suppressed, whilst *young*, left in time this crafty *Cockatrices Egg* hatcht and fosterd by Ignorance, and pusillanimous Compliance, grow up into a *Serpent* too big to be master'd, and so Blast and destroy the *First-Born* of our English Freedoms. And indeed (Blessed be God) it hath *hitherto* been rigorously opposed as often as it durst *Crawl* abroad, being *Condemned* in *Parliament* and knockt o'th head by the Resolutions of the *Judges* upon solemn Argument. As by and by I shall demonstrate.

Jurym. Well, but are Jurors not liable then to *Fine* or *Imprisonment* in *any Case* whatsoever.

Barr. Now you run from the Point; we were talking of giving their Verdict, and you speak of any *Case* whatsoever. Whereas you should herein observe a necessary distinction, which I shall give you in the words of that Learned Iudge last Cited (e) *Much of the Office of Jurors in order to their Verdict is Ministerial; as not withdrawing from their Fellows after they are sworn, not receiving from either side Evidence*

Lord Chief Justice Vaughan in his Reports. fol. 146.

Juries Office partly Ministerial, partly Judicial. Vaughan Rep. fo. 152.

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not given in Court; Not eating and drinking before their Verdict; Refusing to give a Verdict, &c. Wherein if they Transgress they may be finable. But the Verdict it self, when given, is not an Act Ministerial, but Judicial and (supposed to be) according to the best of their Judgment, for which they are not Finable, nor to be punisht but by Attaint; that is, by another Jury, in Cases where an Attaint lies, and where it shall be found that *Wilfully* they gave a Verdict false and Corrupt.

Now that Iuries *otherwise*, are in no Case punishable, nor can (for giving their Verdict according to their Consciences and the best of their Judgment) be Legally Fined or Imprisoned by any Iudge on Colour of not going according to their Evidence, or finding contrary to the directions of the Court, is a truth both founded on unanswerable Reasons and Confirmed by irrefragable Authorities.

Jurym. Those I would gladly hear.

Barr. They are many, but some of the most evident are these that follow.

As for Reasons.

1. A Iury ought not to be Fined or Imprisoned, because they do not follow the Iudges directions, for if they do follow his direction, they may yet be Attainted, and to say they gave their Verdict according to his directions is no Barr, but the Iudgment shall be *revers'd* and they *punisht* for doing that, which if they had not done, they should (by this Opinion) have been Fined and Imprisoned by the Iudge, for not doing it. — Which is *Unreasonable*.

2. If they *do not follow* his direction, and be therefore Fined, yet they may be Attainted, and so they should be doubly punisht by distinct Iudicatures for the same Offence, which the Common Law never admits.

3. To what end is the Jury to be return'd out of the *Vicinage* (that is, the neighbourhood) whence the issue ariseth? To what end must *Hundredors* be of the Jury, whom the Law supposeth to have nearer knowledge of the Fact than those of the Vicinage in general? To what end are they *challeng'd* so scrupu-

scrupulously to the *Array* and *Pole*? to what end must they have such a certain *Freehold*, and be *Probi & legales homines*, and not of *Affinity* with the Parties concerned? &c. If after all this they *implicitly* must give a Verdict by the Dictates and Authority of another Man, under pain of *Fines* and *Imprisonment*, when sworn to do it according to the best of their *owne knowledge*; a Man cannot see by anothers Eye, nor hear by anothers Ear, no more can a Man conclude or *infer* the thing to be resolved by *another's* understanding or reasoning, unless all Mens understandings were equally alike; and if meerly in compliance because the Iudge *says thus or thus*, a Iury shall give a Verdict, though such their Verdict should happen to be *right*, true, and just, yet they being not assured *it is so* from their own understanding, are *forsworn*, at least in *Foro Conscientia*.

4. Were Jurors so finable, then every Major and Bailiff of Corporations, all Stewards of Leets, Justices of Peace, &c. whatever Matters are try'd before them, shall have *Verdicts to their minds*, or else Fine and Imprison the Jurors till they *have*; so that such must be either pleased, humored, or gratified, else no Justice or Right to be had in any Court.

5. Whereas a Person by Law may *challenge* the Sheriff or any Jury-man, if of Kin to his Adversary, yet he cannot challenge a Major, Recorder, Justice, &c. who 'tis possible will have a Verdict for their *Kinsman*, or against their *Enemy*, or else Fine and Imprison the Jury till they have obtained it; so that by this means our Lives, Liberties, and Properties shall be solely tryed by, and remain at the Arbitrary dispose of every mercenary or corrupted *Justice*, Major, Bailiff, or Recorder, if any such should at any time get into *Office*.

6. 'Tis unreasonable that a Jury should be Finable on pretence of their going *against their Evidence*; because it can never be *Tryed* whether or no in truth they did find with or against their Evidence, by reason no *Writ of Error* lies in the Case.

7. Were Jury-men liable to such Arbitrary Fines, they should be in a *worse condition* than the Criminals that are tryed by

by them; for in all Civil Actions, Informations, and Indictments, some Appeals, or Writs of false Judgment, or of Error, do lie into *Superior Courts* to try the regular Proceedings of the Inferior. But here can be no After-Trial or Examination, but the Jury-man (if Fining at all were *lawful*) must either pay the Fine, or lie by it, *without remedy*, to decide whether in his particular Case he were legally Fined or not.

8. Without a Fact agreed, it is as impossible for a Judge or any other to *know the Law*, relating to that Fact, or *direct* concerning it, as to know an Accident that hath no Subject; for as where there is *no Law*, there is *no Transgression*, so where there is *no Transgression*, there is *no place for Law*; for *the Law* (saith Divine Authority) *is made for the Transgressor*. And as *Cook* tells us, *Ex facto Jus oritur*, upon stating the Fact or Transgression matter of Law doth arise, or grow out of the Root of the Fact. Now the Jury being the *sole Judges of Fact*, and *Matter in Issue* before them, not finding the Fact on which the Law should arise, cannot be said to find *against Law*, which is no other than a Superstructure on Fact; so that to say they have found against the Law, when *no Fact* is found, is absurd; an expression insignificant and unintelligible; for no *Issue* can be joyned of matter in Law, no *Jury* can be *Charged* with the Trial of matter in Law barely, no *Evidence* ever was, or can be given to a Jury of what is Law, or not. Nor can any such Oath be given to, or taken by a Jury to try matter in Law, nor does an Attaint for such Oath, if false, &c. But if by *finding against the Direction of the Court in matter of Law*, shall be understood, that if the Judge having heard the Evidence given in Court, (for he can regularly know no other, though the Jury may) shall tell the Jury upon this Evidence, *the Law is for the Plaintiff, or the Defendant*, and the Jury are under pain of Fine and Imprisonment to *Find* accordingly; then 'tis plain the Jury ought of *Duty* so to do. Now if this were *true*, who sees not that the Jury is but a troublesome *Delay*, of great *Charge*, much *Formality*, and no real *use* in determining right and wrong, but meer *Ecchos* to sound back the pleasure of the Court;

Court; and consequently that Tryals by them might be better *abolish'd* than continued? which is at once to spit Folly in the Faces of our Venerable Ancestors, and enslave our Posterity.

9. As the Iudge can *never direct what the Law is* in any Matter Controverted, without *first knowing the Fact*, so he cannot possibly know the Fact but from the *Evidence* which the Jury have; but he can never *fully* know what Evidence they have, for besides what is sworn in Court, (which is all that the Judge can know) the Jury being of the *Neighbourhood*, may, and oft-times *do know* something of their own knowledge, as to the Matter it self, the Credit of the Evidence, &c. which may justly *sway* them in delivering their Verdict, and which self knowledge of theirs is so far *countenanced* by Law, that it supposes them capable thereby to *try* the Matter in Issue, (and so they must) though *no Evidence* were given on either side in Court. As when any Man is Indicted, and no Evidence comes against him, the Direction of the Court always is, *You are to acquit him, unless of your own knowledge you know him Guilty*; so that even in that Case they may find him Guilty without any Witnesses. Now, how absurd is it to think, that any Iudge has power to *Fine* a Jury for going against their Evidence, when he that so Fineth knoweth perhaps nothing of their Evidence at all, (as in the last Case) or at least but some part of it? For how is it possible he should lawfully punish them for that which it is impossible for him to know.

Lastly, Is any thing more common, than for two Lawyers or Iudges to deduce *contrary* and opposite Conclusions out of the *same Case* in Law? And why then may not two Men infer distinct Conclusions from the same *Testimony*? And consequently may not the *Judge* and *Jury* honestly differ in their Opinion or Result from the Evidence, as well as two Iudges may, which often happens; and shall the *Jury-men* meerly for this difference of Apprehension merit Fine and Imprisonment, because they do that which they cannot otherwise do, preserving their *Oath* and *Integrity*? especially when by Law they are presum'd to know *better* and much *more* of the Business, than the Judge does as fore said.

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Are not all these gross contradicting Absurdities? and unworthy (by any Man that deserves a *Gown*) to be put upon the *Law of England*, which has ever own'd *Right Reason* for its Parent, and dutifully submitted to be *guided* thereby?

Jurym. If the *Law*, as you say, be *Reason*, then undoubtedly this Practice of *Fining of Juries* is most *Illegal*, since there cannot be any thing more *unreasonable*; But what *Authorities* have you against it?

Barr. You have heard it proved to be a *Modern* up-start encroachment, so you cannot expect any direct or express Condemnation of it in Ancient Times, because the thing was not then *set on Foot*. And by the way, though *Negative Arguments* are not necessarily conclusive, yet that we meet with no *Precedents* of old of *Juries Fined*, for giving their Verdict contrary to Evidence, or the Sense of the Court, is a violent presumption, that it ought not to be done; for it cannot be supposed, that this latter Age did *first of all discover*, that Verdicts were many times not according to the Judges Opinion and *Liking*. Undoubtedly they saw *that* as well as we; but knowing the same not to be any Crime, or *punishable* by Law, were so *Modest* and *Honest* as not to meddle with it. However, what entertainment it hath met with when attempted in *our Times*, I shall shew you in two remarkable Cases.

I. When the late Lord Chief Justice *Keeling* had attempted something of that kind, it was complained of, and highly reſented by the then *Parliament*; as appears by this Copy of their *Proceedings* thereupon taken out of their *Journal*, as follows.

Die Mercurii 11. Decembris 1667.

• The House resumed the Hearing of the rest of the Report touching the matter of *Restraint upon Juries*, and that upon the Examination of divers Witnesses in several Cases of Restraints put upon *Juries* by the Lord Chief Justice *Keeling*, and thereupon Resolved as followeth.

• First, That the Proceedings of the said Lord Chief Justice in the Cases now Reported are *Innovations* in the Tryal of Men for their Lives and Liberties. And that he hath used

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• 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.

• Secondly, That in the Place of Iudicature the Lord Chief Justice hath undervalued, vilified, & contemned *Magna Charta*, the great *Preserver* of our Lives, Freedom, and Property.

• Thirdly, That he be brought to *Tryal* in order to condign *Punishment*, in such manner as the House shall judge most fit and requisite.

Die Veneris 13. Decembris 1667.

• Resolved, &c.

• That the Precedents and Practice of *Fining* or *Imprisoning* of Jurors for giving their Verdicts, is *Illegal*.

Here you see it *Branded* in *Parliament*: Next you shall see it formally condemn'd on a solemn Argument by the *Judges*. The Case thus.

At the Sessions for *London* Sept. 1670. *William Pen*, and *William Mead* (two of the People commonly called *Quakers*) were Indicted, for that they with others, to the number of 300, on the 14th. Aug. 22. *Regis*, in *Gray Church Street*, did with Force and Arms; &c. unlawfully and tumultuously assemble and congregate themselves together to the disturbance of the Peace; and that the said *William Pen* did there Preach and speak to the said *Mead* and other Persons in the open Street; 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 our 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 our said Lord the King, His Crown and Dignity.

The Prisoners Pleading *Not Guilty*, it was proved, that there was a Meeting at the time in the Indictment mentioned, in *Gray Church Street*, consisting of three or four hundred People, in the open Street, that *William Pen* was Speaking or Preaching

The Sum of the Case of *Bushel*, and the rest of Mr. *Pen* and Mr. *Meads* Jury.

Note, the Quakers have a Meeting-house in that Street, out of which they were then kept by Soldiers, and therefore they met as near to it as they could in the open Street.

to them, but *what* he said the Witnesses (who were Officers and Soldiers sent to disperse them) could not *hear*. — This was the effect of the Evidence; which Sir *John Howel*, the then Recorder, (as I find in the *Print* of that Tryal P. 14) was pleased to sum up to the Jury, in these words.

You have heard what the Indictment is, 'tis for Preaching to the People in the Street, and drawing a Tumultuous Company after them, and Mr. *Pen* was speaking; if they should not be disturb'd, 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.

This Tryal begun on the *Saturday*; the Jury retiring, after some considerable time spent in debate, came in, and gave this Verdict, — *Guilty of Speaking in Gray Church-Street*. At which the Court was offended, and told them, *they had as good say nothing*; Adding, — *Was it not an unlawful Assembly? you mean he was speaking to a Tumult of People there*. But the Foreman saying, what he had delivered was *all* he had in Commission, and others of them affirming, That they allowed of no such word as an *unlawful Assembly* in their Verdict, They were sent back again, and then brought in a Verdict in writing, subscribed with all their Hands, in these words.

We the Jurors hereafter named do find William Pen to be Guilty of Speaking or Preaching to an Assembly met together in Gray Church Street the 14th of Aug. 1670. And William Mead not Guilty of the said Indictment.

* This the Court resented still worse, and therefore sent them back again, and Adjourned till *Sunday morning*, but then too they insisted on the same Verdict, so the Court Adjourned till *Monday morning*; and then the Jury brought in the Prisoners generally *Not Guilty*, which was Recorded, and allowed of. But immediately the Court fined them *Forty Mark* a Man, and to lie in Prison till paid.

*Note, though this Jury for their excellent example of courage and constancy deserve the commendation of every good English-man, yet if they had been better advis'd, they might have brought the Prisoners in *Not Guilty at first*, saved themselves the trouble and inconveniences of these two Nights Restraint.

Being

Being thus in *Custody*, *Edw. Bushel*, one of the said Jurors, on the 9th of *Nov.* following brought his *Habeas Corpus* in the Court of *Common-Pleas*. On which the Sheriffs of *London* made Return, ' That he was detained by vertue of an Order of Sessions, whereby a Fine of forty Marks was set upon him and eleven others particularly named, and every of them being Jurors sworn to try the Issues joyned between the King, and *Pen*, and *Mead*, for certain Trespasses, Contempts, unlawful Assemblies and Tumults, and who then and there did acquit the said *Pen* and *Mead* of the same, against the Law of this Kingdom, and against full and manifest Evidence, and against the direction of the Court in matter of Law of and upon the Premises openly in Court to them given and declared; and that it was ordered they should be imprisoned till they severally paid the said Fine, which the said *Bushel* not having done, the same was the cause of his Caption and Detention.

See Bushel's Case in Vaughans Reports at large

The Court coming to debate the *validity* of this Return, adjudged them same *insufficient*; for 1. The Words, — *Against full and manifest Evidence*, was too general a Cause; the Evidence should have been *fully* and particularly recited, else how shall the Court know it was *so full and evident*; they have now only the Judgment of the *Sessions* for it, that it was so; but, said the Judges, *Our Judgments ought to be Grounded upon our own Inferences and Understandings, and not upon theirs*.

2. It is not said, that they acquitted the Persons Indicted against full and manifest Evidence, *corruptly, and knowing the said Evidence to be full and manifest*, for otherwise it can be no *Crime*; for that may seem *full and manifest* to the Court, which does not appear so to the Jury.

3. The other part of the Return, *viz.* That the Jury had acquitted those Indicted, *against the direction of the Court in matter of Law*, was also adjudged to be *naught*, and unreasonable, and the *Fining of the Juries for giving their Verdict in any Case* concluded to be illegal, for the several Reasons before recited, and other Authorities of Law urged to that purpose; and all the Precedents and Allegations brought to justify the

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Fine and Commitment solidly answered; whereupon the Chief Justice delivered the Opinion of the Court, That the Cause of Commitment was insufficient; and accordingly the said Bushel, and other his Fellow-prisoners, were discharged, and left to the Common Law for Remedy and Reparation of the Damages by that tortious illegal Imprisonment sustained.

Which Case is (amongst others) Reported by that Learned Judge Sir John Vaughan, at that time Lord Chief Justice of the Common-Pleas, setting forth all the Arguments, Reasons, & Authorities on which the Court proceeded therein; from which I have extracted most of the Reasons which before I recited for this Point, & for the greatest part in the very words of that Reverend Author.

Jurym. This Resolution hath, one would think, (as you said) knock'd this Illegal Practice on the Head, beyond any possibility of Revivals, but may it not one day be denied to be Law, and the contrary justified?

Barr. No such thing can be done without apparent violating and subverting all Law, Justice, and Modesty; for though the Precedent it self be valuable, and without further inquiry is wont to be allowed, when given thus deliberately upon solemn debate by the whole Court; yet 'tis not only that, but the sound substantial and everlasting Reasons, whereon they grounded such their Resolves, that will at all times justify Fining of Juries in such Cases to be Illegal; besides, as the Reporter was most considerable, both in his Quality as Lord Chief Justice, and for his Parts, soundness of Judgment, and deep Learning in the Law; so such his Book of Reports is approved and recommended to the World, (as appears by the Page next after the Epistle) by the Right Honourable the present Lord Chancellor of England, Sir William Scroggs, now Lord Chief Justice of England, my Lord North, Chief Justice of the Common-Pleas; and in a word, by all the Judges of England at the time of Publishing thereof; so that it cannot be imagined how any Book can challenge greater Authority, unless we should expect it to be particularly confirm'd by Act of Parliament.

Jurym. You have answered all my Scruples, and since I see the

the Law has made so good Provisions for Jury-mens priviledges and safety, God forbid any Jury-man should be of so base a temper, as to betray that (otherwise) impregnable Fortress wherein the Law hath plac'd him, to preserve and defend the just Rights and Liberties of his Country; by treacherously surrendering the same into the hands of Violence or Oppression, though maskt under never so fair Stratagems and Pretextes; for my own part, I shall not now decline to appear according to my Summons, and therefore (though I fear I have detained you too long already) shall desire a little more of your direction about the Office of a Jury-man, in particular that I may uprightly and honestly discharge the same.

Barrist. Though I think from what we have discours'd being digested and improv'd by your own Reason, you may sufficiently inform your self, yet to gratifie your request, I shall add a few brief Remarques, as well of what you ought cautiously to avoid, as what you must diligently pursue and regard if you would justly and truly do your duty.

First, as to what you must avoid.

1. I am very Confident, that you would not willingly violate the Oath which you take, but 'tis possible that there are such who as frequently break them, as take them, through their careless custome on the one hand, or slavish fear on the other, against which I would fully caution you; that you may defend your self and others, against any Enemies of your Countreys Liberties and happiness, and keep a good Conscience towards God and towards man.

2. 'Tis frequent, that when Juries are withdrawn that they may consult of their Verdict, they soon forget that Solemn Oath they took, and that mighty Charge of the Life and Liberty of men, and their Estates, whereof then they are made Judges, and on their Breath not only the Fortunes of the particular Party, but perhaps the preservation or Ruin of several Numerous Families does Solely depend, now I say without due Consideration of all this, nay sometimes without one serious thought, or Consulted Reason offered for, or Con, presently the Eare-

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man or one or two that call themselves *Antient* Jury-men (though in truth they never *knew* what belongs to the place more than a common *School-Boy*) rashly deliver their *Opinions*, and *all the rest* in respect to their supposed *Gravity* and *Experience*, or because they have the biggest *Estates*, or to avoid the trouble of *disputing* the Point, or to prevent the spoiling of *Dinner* by delay; or some such *weighty* Reason, forthwith agree *blind-fold*, or else go to holding up of hands or telling of *Noses*, and so the *Major Vote* carries away *Captive* both the *Reason* and the *Consciences* of the rest. Thus trifling with *Sacred Oaths*, and putting mens *Lives*, *Liberties* and *Properties* (as it were) to the hap-hazard of *Cross* or *Pile*; This Practise or something of the like kind, is said to be *too Customary* amongst some Jurors, which occasions such their extraordinary *dispatch* of the weightiest or most *Intricate* matters, but there will come a time when they shall be called to a severe Account for their *Hast* and *Negligence*, therefore have a care of such *Fellow-Jurors*.

3. Such a *slavish Fear* attends many Jurors, that let the Court but direct to find *Guilty*, or *not Guilty*, though they themselves see no just Reason for it, yea oft-times though their own *Opinions* are contrary, and their *Consciences* tell them it ought to go *otherwise*; yet, right or wrong accordingly they will bring in their *Verdict*; and therefore many of them never regard seriously the *course* and force of the Evidence, what and how it was delivered more or less to prove the *Indictment*, &c. But *as the Court Sums it up*, they find; as if *Juries* were appointed for no other purpose but to *Eccho* back, what the Bench would have done; such a base temper is to be avoided, as you would escape being *Forsworn*, even though your *Verdict* should be right; for since you do not know it so to be by your own *Judgment* or *Understanding*, you have *abused your Oath* and hazarded your own *Soul* as well as your *Neighbours Life* *Liberty* or *Property*, because you *blindly* depend on the opinion or perhaps *passion* of others, when you were Sworn well and truly to try them *your selves*. Such an *implicite*

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implicite Faith is near of Kin to that of *Rome* in Religion, and (at least in the next degree) as *dangerous*.

4. There are some that make a *Trade* of being Jury-men that seek for the Office, use means to be constantly *continued* in it, will not give a *disobliging* *Verdict* lest they should be *discharg'd* and serve no more, these *standing Jurors* have certainly some ill-game to play, there are others that hope to *signalize* themselves to get a better *Trade*, or some *Preferment* by *servng a Turn*; there are others that have particular *Piques* and a humor of *Revenge* against such or such *Parties*, if a man be but *miscalld* by some *Odious* name, or said to be of an exploded *Faction* — streight they cry *hang him*, *Find him Guilty*, no punishment can be too bad for such a *Fellow*, in such a case they think it merit to *stretch* an Evidence on the tenter-hooks, and *strain* a Point of Law because they fancy it makes for the Interest of the Government. As if *Injustice* or *Oppression* could in any case be for the true Interest of Government when in truth nothing more *weakens* or *destroys* it, but this was an *old stratagem*, if thou *suffer this man to escape*, thou shalt not be *Cæsars Friend*. When *Cæsar* was so far from either *needing* or *thanking* them for any such base *Services*, that had he but truly understood them, he would severely have punisht their *Partiality* and *Tyranny*.

All these and the like *pestilent Biases* are to be avoided and abominated by every honest Jury-man.

But now as to the positive *Qualifications* requisite.

1. You that are Jury-men should first of all seriously regard the weight and importance of the Office; your own *Souls* other mens *Lives*, *Liberties*, *Estates*, all that in this World are dear to them, are at Stake, and in your hands; therefore consider things well before-hand, and come substantially furnished and provided with sound and well-grounded *Consciences*, with clear minds, free from malice, fear, hope, or favour; lest instead of *Judging* others, thou shouldest work thy own *Condemnation*, and stand in the fight of God our Creator and Judge of all men, no better than a *Murthurer*, or *Perjur'd* Malefactor.

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2. Observe well the Record, Indictment or Information that is read, and the several parts thereof, both as to the matter, manner, and form.

3. Take due notice and regard to the Evidence offered for Proof of the Indictment, and each part of it, as well to manner and form as matter; and if you suspect any Subornation, foul Practise, or tampering hath been with the witnesses, or that they have any malice or sinister design, have a special regard to the Circumstances or Incoherencies of their Tales, and endeavour by apt Questions to sift out the truth, or discover the Villainy. And for your better satisfaction endeavour to write down the evidence or the Heads thereof that you may the better Recall it to memory.

4. Take notice of the nature of the Crime charged, and what Law the Prosecution is grounded upon, and distinguish the supposed Criminal Fact which is proved, from the aggravating Circumstances which are not proved.

5. Remember that in Juries there is no Plurality of Voices to be allowed; 7 cannot over-rule or by vertue of Majority Conclude 5. no, nor 11, 1. But as the Verdict is given in the name of all the 12, or else it is void: So every one of them must be actually agreeing, and satisfied in his particular Understanding and Conscience, of the truth and Righteousness of such Verdict, or else he is forsworn; and therefore if one man differ in Opinion from his fellows, they must be kept together, till either they by strength of Reason or Argument can satisfy him, or he convince them. For he is not to be Hecktor'd, much less punisht by the Court into a Compliance; for as the L. Ch. Justice *Vaghan* says well, *if a man differ in Judgment from his Fellows whereby they are kept a day and a night, though his dissent may not in truth be as reasonable as the Opinion of the rest that agree, yet if his Judgment be not satisfied, one disagreeing can be no more Criminal than four or five disagreeing with the rest.* Upon which occasion the said Author recites a remarkable Case out of an antient Law-Book a Juror would not agree with his fellows for

Rep. fol. 151.

41 ff. p. 11.

for

for two days, and being demanded by the Judges, if he would agree, said, he would first die in Prison; whereupon he was Committed and the Verdict of the eleven taken, but upon better Advice, the Verdict of the eleven was Quasht, and the Juror discharged without Fine, and the Justices said the way was to carry them in Carts (this is to be understood at Assizes where the Judges cannot stay but must remove in such a time into another County) until they agreed, and not by Fining them. And as the Judges err'd in taking the verdict of Eleven, so they did in Imprisoning the Twelve. And therefore you see on second thoughts Releas'd him.

6. Endeavour as much as your Circumstances will permit at your spare Hours to Read and Understand the Fundamental Laws of the Country; such as *Magna Charta*, the Petition of Right, the late excellent Act for *Habeas Corpus's*, *Horns Mirrour of Justices*, *Sir Edw. Cook* in his 2d 3d and 4th parts of the Institutes of the Law of England, and *Judge Vaughans Reports*, these are Books frequent to be had, and of excellent use to inform any Reader of Competent Apprehension, of the true Liberties and Priviledges which every *English* man is Justly Intituled unto, and Estated in by his Birth-right, as also the nature of Crimes and the punishments severally and respectively Inflicted on them by Law, the Office and duties of Judges, Juries, and all Officers and Ministers of Justice, &c. Which are highly necessary for every Jury-man in some Competent measure to know, for the Law of *England* hath not placed Tryals by Juries to stand between men and Death or Destruction to so little purpose as to Pronounce men *Guilty*, without regard to the nature of the Offence, or to what is to be Inflicted thereupon.

For want of duly understanding and considering these things, Juries many times plunge themselves into lamentable perplexities; as it befel the Jury who were the Tryers of *Mr. Udal* a Minister, who in the 32d year of *Q. Eliz.* was Indicted and Arraigned at *Croydon* in *Surry*, for High-Treason, for defaming the Queen and Her Government in a certain Book Intituled, *A Demonstration of the Discipline*, &c. And though there was no Direct, but a scambling Shadow of Proof, and though the Book duly considered contained no matter of Treason, but certain words which by a forced construction were laid to tend to the defamation of the Government, and so the thing prosecuted under that Name; yet the Jury not thinking that in pronouncing him *Guilty*, they had upon their Oath pronounced him *Guilty* of Treason, and to die as a Traitor; but supposing that they had only declared him *Guilty* of making the Book, hereupon they brought him in *Guilty*, but when after the Judges Sentence of Death against him (which they never in the least intended) they found what they had done, they were contounded in themselves, and would have done any thing

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thing in the world to have Revok'd that unwary pernicious Verdict, when, alas! it was too late. Dr. Fuller has this witty note on this witty Gentlemans Conviction, that it was Conceived rigorous in the greatest, which at best (saith he) is Cruel in the least Degree. And it seems so Queen Elizabeth thought it, for she suspended Execution, and he dyed naturally. But his Story survives to warn all Succeeding Jury-men to endeavour better to understand what it is they do, and what the Consequences thereof will be.

7. As there is nothing I have said intended to encourage you to partiality, or tempt any Jury-man to a Connivance at Sin and Malefactors, whereby those Pests of Society should avoid being brought to condign punishment; and so the Law cease to be a terror to evil-doers; which were in him an horrible Perjury, and indeed a foolish Pitty, or *Crudelis misericordia*, a Cruel Mercy; for he is highly injurious to the Good that absolves the Bad, when real Crimes are proved against them; so that I must take leave to say, That in Cases where the matter is dubious, both Lawyers and Divines prescribe rather favour than rigour; an eminent and learned Judge * of our own has in this Advice and Wish gone before me, *Mallem revera viginti Facinorosos mortem pietate evadere, quam justum unum injuste condemnari.* I verily (saith he) had rather twenty evil-doers should escape death through Tenderness or Pitty, than that one Innocent Man should be unjustly condemned.

* Fortescue, Ca. 27.

* In the Epilogue of his 4th Part of Institutes.

I shall conclude with that excellent Advice of my Lord Cook, * which he generally addresses to all Judges, but may no less properly be applyed to Jurors. —

Fear not to do Right to all, and to deliver your [Verdicts] justly according to the Laws; for Fear is nothing but a betraying of the Succours that Reason should afford; and if you shall sincerely execute Justice, be assured of three Things.

1. Though some may malign you, yet God will give you his Blessing.
2. That though thereby you may offend Great Men and Favourites, yet you shall have the favourable Kindness of the Almighty, and be his Favourites.

And lastly, That in so doing, against all scandalous Complaints and pragmatical Devices, against you, God will defend you as with a Shield.

Psal. 5. 15.

For thou Lord wilt give a Blessing unto the Righteous, and with thy favourable Kindness wilt thou defend him as with a Shield.

F I N I S.