0322

38-9

THE

SECURITY

OF

Englishmen's Lives:

OR,

The TRUST, POWER and DUTY of

Grand Juries of England

Explained according to the Fundamentals of the *English* Government, and the Declaration of the same made in Parliament by many Statutes.

First printed in the Year 1681.

Written by the Right Honourable

JOHN LORD SOMERS,

Baron of EVESHAM,

And Lord HIGH CHANCELLOR of ENGLAND.

9

LONDON:

Printed for J. ALMON, opposite *Burlington-House*, in *Piccadilly*. 1766.

[Price One Shilling and Sixpence.]

This excellent Tract has for many years been very ſcarce, although ſeveral times ſtrongly recommended by the beſt writers on the Engliſh conſtitution; and in particular by the learned and able author of The Letter upon Libels and Warrants, *&c. As that ingenious work treats ſo fully upon the rights and privileges of Petit and Special Juries, this admired performance, on the ſubject of Grand Juries, is thought to be* its proper companion.

BISHOP Burnet informs us, that this Tract was written on occaſion of the Grand Jury of the city of London returning an *Ignoramus* upon a bill of indictment preſented againſt Lord Shafteſbury in the year 1681. The court declaiming violently againſt this Jury, and affirming that they were actuated by a ſpirit of party, it was urged in their defence (ſays the Biſhop) "that by the expreſs words of their "oath, they were bound to make true preſent-"ments of what ſhould appear true to them; "and therefore if they did not believe the "evidence, they could not find a bill, though "ſworn to. A book was writ to ſupport that, "in which both law and reaſon were brought "to confirm it. It paſt as writ by Lord Eſſex, "though I underſtood afterwards it was writ "by SOMERS, who was much eſteemed and "often viſited by Lord Eſſex, and who truſted "himſelf to him, and writ the beſt papers "that came out in that time. It is true, by "the practice that had generally prevailed, "Grand Juries were eaſy in finding bills upon "a ſlight and probable evidence. But it was "made out, that the words of their oath, "and the reaſon of the law, ſeemed to oblige "them to make no preſentments, but ſuch "as they believed to be true." *Vol.* I. *p.* 509. *fol. Edit.*

A 2 *A cer-*

A certain living writer ſpeaks thus : " Since
" the foundation of the Engliſh government,
" many have been the attempts to break in
" upon its conſtitution; and with various
" ſucceſs. More than once it has, ſeemingly,
" been quite overturned and deſtroyed, either
" by the open attacks of violence, or by the
" more ſure ways of undermining, ſapping
" and corrupting; and ſometimes by all to-
" gether: but ſuch has been our happineſs,
" that providence has, hitherto, been ſo be-
" nign, as, upon all ſuch occaſions, to
" ſtretch forth the almighty arm in our de-
" fence, never failing to animate ſome great
" and good men to undertake the recovery of
" our civil and religious rights; and enlight-
" ening the minds of the people, to a noble
" imitation of their virtue and courage.

" One of which was the great author of
" *The Security of Engliſhmen's Lives*; who, at
" a time when deſpotiſm had taken long
" ſtrides towards, and very near had broke
" down all the fences of liberty, ſent forth
" this ſmall Treatiſe into the world; which,
" together with ſome other excellent things
" publiſhed about the ſame time, convinced
" the generality of the people of the ineſti-
" mable value of thoſe birth-rights, which
" were then going to be taken from them;
" and raiſed that ſpirit throughout the king-
" dom, which was at laſt productive of the
" great and happy REVOLUTION; which re-
" ſtored our antient rights and privileges, and
" confirmed them to us ſo ſtrongly, that no-
" thing

" thing leſs than a general luxury and depra-
" vity of manners, and their natural and in-
" ſeparable concomitant, an univerſal cor-
" ruption, can ever deprive us of them.

" One of the great outworks of liberty is
" a *Grand Jury*; which, by our old conſtitu-
" tion, was the principal guard of every man's
" life, liberty and eſtate; for by our known
" laws no ſubject of this realm could be
" brought to the bar of juſtice, without
" having his caſe firſt inquired into by a
" Grand Jury; who are in the firſt place to
" examine whether the charge be in its own
" nature criminal or indictable; and ſecondly,
" whether the perſon ſo charged be guilty of
" the fact for which he ſtands accuſed. If
" in the firſt inſtance they don't find the
" charge to be in its own nature criminal or
" indictable, then they have nothing more to
" do than to diſcharge the bill as inſufficient;
" and in the ſecond inſtance, if the accuſa-
" tion be not properly ſupported by evidence,
" they muſt by their oaths throw out the in-
" dictment, to the great relief of the unhap-
" py perſon ſo accuſed: and that this is a
" principal part of a Grand Jury's office,
" appears not only from legal reaſon, but by
" expreſs ſtatutes, *viz.* 25 *Edw.* 3. 4, and 42
" *Edw.* 3. 3, which ſay, " that for prevent-
" ing miſchiefs done by FALSE ACCU-
" SERS, none ſhall be put to anſwer, un-
" leſs it be by indictment, or preſentment of
" good and lawful men of the ſame neigh-
" bourhood where ſuch deeds be done;"
" which

0325

" which can be meant of no other than a
" Grand Jury.

" But, alas! how often has this well-con-
" trived barrier of liberty been broke in upon
" by the unconſtitutional method of bringing
" or filing informations in the court of
" King's Bench, and obliging many of the
" beſt ſubjects of this realm, to anſwer at
" that or ſome other awful tribunal, for no
" crimes but bravely endeavouring to ſupport
" the rights and privileges of *Engliſhmen*,
" without ſo much as ſuffering a *Grand Jury*
" to inquire whether the caſe be criminal or
" not? This unconſtitutional method of bring-
" ing informations, and charging the ſubjects
" of this realm, by the crafty way of innuendo,
" with the moſt flagitious crimes, deſerves
" the ſtricteſt attention of the legiſlature, and
" calls aloud upon the great council of the
" nation for redreſs." *Rights of Engliſhmen.*

Another modern writer, after very ſtrongly recommending the republication of this Tract, ſays,
" This little book explains the whole duty of
" Grand Juries, the high importance of them
" to every individual in the kingdom, as the
" life and ſafety of all depends upon them.
" It alſo ſhews their independency of judges;
" explains the duty and power of judges, and
" not only of judges but of kings, and is a full
" account of that moſt eſſential part of the
" Engliſh conſtitution, upon which all our
" other liberties depend." *Advice to Poſterity.*

THE SECURITY OF Engliſhmen's Lives.

Written by Lord SOMERS.

THE principal ends of all civil government, and of human ſociety, were the ſecurity of mens lives, liberties and properties, mutual aſſiſtance and help unto each other, and proviſion for their common benefit and advantage; and where the fundamental laws and conſtitution of any government have been wiſely adopted unto thoſe ends, ſuch countries and kingdoms have increaſed in virtue, proweſs, wealth, and happineſs, whilſt others, through the want of ſuch excellent conſtitutions, or neglect of preſerving them, have been a prey to the pride, luſt and cruelty of the moſt potent, and the people have had no aſſurance of their liberties or lives, but from their grace and pleaſure: they have been many times forced to welter in each other's blood, in their maſter's quarrel for dominion, and at beſt they have ſerved like beaſts of burden, and by continual, baſe ſubſerviency to their maſter's vices, have loſt all ſenſe of true religion, virtue and manhood.

0326

Our anceſtors have been famous in their generations for wiſdom, piety, and courage, in forming and preſerving a body of laws to ſecure themſelves and their poſterities from ſlavery and oppreſſion, and to maintain their native freedoms; to be ſubject only to the laws made by their own conſent in their general aſſemblies, and to be put in execution chiefly by themſelves, their officers and aſſiſtants; to be guarded and defended from all violence and force, by their own arms, kept in their own hands, and uſed at their own charge under their prince's conduct; entruſting nevertheleſs an ample power to their kings and other magiſtrates, that they may do all the good, and enjoy all the happineſs, that the largeſt ſoul of man can honeſtly wiſh; and carefully providing ſuch means of correcting and puniſhing their miniſters and counſellors, if they tranſgreſs the laws, that they might not dare to abuſe or oppreſs the people, or deſign againſt their freedom or welfare.

This body of laws our anceſtors always eſteemed the beſt inheritance they could leave to their poſterities, well knowing that theſe were the ſacred fence of their lives, liberties, and eſtates, and an unqueſtionable title whereby they might call what they had their own, or ſay they were their own men: the ineſtimable value of this inheritance moved our projenitors with great reſolution bravely from age to age to defend it; and it now falls to our lot to preſerve it againſt the dark contrivances of a popiſh faction, who would by frauds,

frauds, ſham-plots, and infamous perjuries, deprive us of our birth-rights, and turn the points of our ſwords (our laws) into our own bowels; they have impudently ſcandalized our parliaments, with deſigns to over-turn the monarchy, becauſe they would have excluded a popiſh ſucceſſor, and provided for the ſecurity of the religion and lives of all proteſtants: they have cauſed lords and commoners to be for a long time kept in priſons, and ſuborned witneſſes to ſwear matters of treaſon againſt them; endeavouring thereby, not only to cut off ſome who had eminently appeared in parliament for our antient laws, but through them to blaſt the repute of parliaments themſelves, and to leſſen the people's confidence in thoſe great bulwarks of their religion and government.

The preſent purpoſe is to ſhew how well our worthy forefathers have provided in our law for the ſafety of our lives, not only againſt all attempts of open violence, by the ſevere puniſhment of robbers, murderers, and the like, but the ſecret poiſonous arrows that fly in the dark, to deſtroy the innocent by falſe accuſation and perjuries. Our law-makers foreſaw both their dangers from malice and paſſion, that might cauſe ſome of private condition to accuſe others falſly in the courts of juſtice, and the great hazards of worthy and eminent men's lives, from the malice, emulation, and ill deſigns of corrupt miniſters of ſtate, or otherwiſe potent, who might commit the moſt odious of murders in the form

0327

and courſe of juſtice; either by corrupting of judges, as dependent upon them for their honour and great revenue, or by bribing and hiring men of depraved principles, and deſperate fortunes, to ſwear falſly againſt them; doubtleſs they had heard the ſcriptures, and obſerved that the great men of the Jews ſought out many to ſwear treaſon and blaſphemy againſt Jeſus Chriſt: they had heard of *Ahab*'s courtiers and judges, who in the courſe and form of juſtice, by falſe witneſſes, murdered *Naboth, becauſe he would not ſubmit his property to an arbitrary power*. Neither were they ignorant of the antient *Roman* hiſtories, and the peſtilent falſe accuſers that abounded in the reign of ſome of thoſe emperors, under whom the greateſt of crimes was to be virtuous: therefore, as became good legiſlatures, they made as prudent proviſion as perhaps any country in the world enjoys, for equal and impartial adminiſtration of juſtice in all the concerns of the people's lives; that every man, whether lord or commoner, might be in ſafety, whilſt they lived in due obedience to the laws.

For this purpoſe it is made a fundamental in our government, that unleſs it be by parliament, no man's life ſhall be touched for any crime whatſoever, ſave by the judgment of at leaſt twenty-four men *; that is, twelve or more, to find the bill of indictment, whether he be peer of the realm, or commoner, and twelve peers, or above, if a lord, if not,

* See Lord *Coke's Inſtit.* 3d part, p. 40.

twelve commoners, to give the judgment upon the general iſſue joined *; of theſe twenty-four the firſt twelve are called the grand inqueſt, or the grand jury, for the extent of their power, and in regard that their number muſt be more than twelve, ſometimes twenty-three, or twenty-five, never were leſs than thirteen, twelve whereof at leaſt muſt agree to every indictment, or elſe it is no legal verdict; if eleven of twenty-one, or of thirteen, ſhould agree to find a bill of indictment, it were no verdict. The other twelve, in commoners caſes, are called the petit jury, and their number is ever twelve; but the jury for a peer of the realm may be more in number, though of like authority. The office and power of theſe juries is *judicial*, they only are the judges from whoſe ſentence the indicted are to expect life or death; upon their integrity and underſtanding, the lives of all that are brought into judgment do ultimately depend; from their verdict there lies no appeal; by finding guilty or not guilty, they do complicately reſolve both law and fact.

As it hath been the law, ſo it hath always been the cuſtom, and practice of theſe juries, upon all general iſſues, pleaded in caſes civil as well as criminal, to judge both of the law and fact. So it is ſaid in the report of the Lord Chief Juſtice Vaughan †, in Buſhel's caſe, that theſe juries determine the law in all matters where iſſue is joined and tried, in the prin-

* See *Mag. Chart. Coke's* 2d part of *Inſtit.* p. 50, 51.
† See the Reports of the Lord Chief Juſtice *Vaughan*, p. 150, 151.

0328

cipal caſe, whether the iſſue be about a treſpaſs or a debt, or diſſeizin in aſſizes, or a tort, or any ſuch like, unleſs they ſhould pleaſe to give a ſpecial verdict with an implicit faith in the judgment of the court, to which none can oblige them againſt their wills.

Theſe laſt twelve muſt be men of equal condition with the party indicted, and are called his peers; therefore if it be a peer of the realm, they muſt be all ſuch, when indicted at the ſuit of the king; and in the caſe of commoners, every man of the twelve muſt agree to the verdict freely, without compulſion, fear, or menace, elſe it is no verdict. Whether the caſe of a peer be harder, I will not determine. Our anceſtors were careful that all men of the like condition and quality, preſumed to be ſenſible of each other's infirmity, ſhould mutually be judges of each other's lives, and alternately taſte of ſubjection and rule; every man being equally liable to be accuſed, or indicted, and perhaps to be ſuddenly judged by the party, of whom he is at preſent judge, if he be found innocent. Whether it be lord or commoner that is indicted, the law intends (as near as may be) that his equals that judge him, ſhould be his companions, known to him, and he to them, or at leaſt his neighbours or dwellers near about the place where the crime is ſuppoſed to have been committed, to whom ſomething of the fact muſt probably be known; and though the lords are not appointed to be of the neighbourhood to the indicted lord, yet the law ſuppoſes them to be companions,

companions, and perſonally well known each unto the other, being preſumed to be of a ſmall number (as they have antiently been) and to have met yearly or oftener in parliament, as by law they ought, beſides their other meetings, as the hereditary counſellors of the kings of England. If time hath altered the caſe of the lords, as to the number, indifferency and impartiality of the peers, it hath been, and may be worthy of the parliament's conſideration, and the greater duty is incumbent upon grand juries, to examine with the utmoſt diligence the evidence againſt peers, before they find a bill of indictment againſt any of them, if in truth it may put their lives in greater danger.

It is not deſigned at this time to undertake a diſcourſe of petit juries, but to conſider the nature and power of grand inqueſts, and to ſhew how much the reputation, the fortunes, and the lives of Engliſhmen, depend upon the conſcientious performance of their duty.

It was abſolutely neceſſary for the ſupport of the government, and the ſafety of every man's life and intereſt, that ſome ſhould be truſted to inquire after all ſuch as by treaſons, felonies, or leſſer crimes, diſturbed the peace, that they might be proſecuted, and brought to condign puniſhment; and it was no leſs needful for every man's quiet and ſafety, that the truſt of ſuch inquiſitions ſhould be put into the hands of perſons of underſtanding and integrity, indifferent, and impartial, that might ſuffer no man to be falſly accuſed, or defamed,

nor

0329

nor the lives of any to be put in jeopardy, by the malicious conſpiracies of great or ſmall, or the perjuries of any profligate wretches: for theſe neceſſary, honeſt ends was the inſtitution of grand juries.

Our anceſtors thought it not beſt to truſt this great concern of their lives and intereſts in the hands of any officer of the king's, or in any judges named by him, nor in any certain number of men during life, leſt they ſhould be awed or influenced by great men, corrupted by bribes, flatteries, or love of power, or become negligent, or partial to friends and relations, or purſue their own quarrels or private revenges, or connive at the conſpiracies of others, and indict thereupon. But this truſt of inquiring out, and indicting all the criminals in a county, is placed in men of the ſame county, more at leaſt than twelve of the moſt honeſt, and moſt ſufficient for knowledge, and ability of mind and eſtate, to be from time to time at the ſeſſions and aſſizes, and all other commiſſions of oyer and terminer, named and returned by the chief ſworn officer of the county, the ſheriff, (who was alſo by expreſs law antiently choſen annually by the people of every county) and truſted with the execution of all writs and proceſſes of the law, and with the power of the county to ſuppreſs all violences, unlawful routs, riots, and rebellions. Yet our laws left not the election of theſe grand inqueſts abſolutely to the will of the ſheriffs, but have deſcribed in general their qualifications, who ſhall

ſhall inquire and indict either lord or commoner; they ought, by the old common law, to be lawful liege people, of ripe age; not over-aged or infirm, and of good fame amongſt their neighbours, free from all reaſonable ſuſpicion of any deſign for himſelf or others, upon the eſtates or lives of any ſuſpected criminals, or quarrel, or controverſy with any of them: they ought to be indifferent and impartial, even before they are admitted to be ſworn, and of ſufficient underſtanding and eſtate for ſo great a truſt. The antient law-book, called *Briton* *, of great authority, ſays, The ſheriff's bailiffs ought to be ſworn to return ſuch as know beſt how to inquire, and diſcover all breaches of the peace; and leſt any ſhould intrude themſelves, or be obtruded by others, they ought to be returned by the ſheriff, without the denomination of any, except the ſheriff's officers. And agreeable hereunto was the ſtatute of eleven Henry IV. in theſe words †: "*Item*, "Becauſe of late inqueſts were taken at *Weſtminſter* of perſons named to the juſtices, "without due return of the ſheriff, of which "perſons ſome were outlawed, *&c.* and ſome "fled to ſanctuary for treaſon and felony, *&c.* "by whom, as well many offenders were in-"dicted, as other lawful liege people of the "king not guilty, by conſpiracy, abetment, "and falſe imagination of others, *&c.* againſt "the courſe of the common law, *&c.* it is "therefore granted for the eaſe and quietneſs

* See *Briton*, p. 9. and 10. † See eleven *Henry* IV.

"of

0330

" of the people, that the same indictment, " with all its dependencies, be void, and " holden for none for ever; and that from " henceforth, no indictment be made by any " such persons, but by inquest of the king's " liege people, in the manner as was used, " &c. returned by the sheriffs, &c. without " any denomination to the sheriffs, &c. ac- " cording to the law of England; and if any " indictment be made hereafter, in any point " to the contrary, the same be also void, and " holden for none for ever." See also the Statute of West. 2d cap. 38. and *Articul. super Cortas**, ch. 9.

So careful have our parliaments been that the power of grand inquests might be placed in the hands of good and worthy men, that if one man of a grand inquest, though they be twenty-three or more, should not be *liber & legalis homo*, or such as the law requires, and duly returned without denomination to the sheriff, all the indictments found by such a grand jury, and the proceedings upon them, are void and null. So it was adjudged in Scarlet's case.

I know too well, that the wisdom and care of our ancestors, in this institution of grand juries, hath not been of late considered as it ought; nor the laws concerning them duly observed; nor have the gentlemen and other men of estates, in the several counties, discerned how insensibly their legal power and jurisdiction in their grand and petit juries is decayed,

* See *Coke's Instit.* 3d part, fol. 33.

decayed, and much of the means to preserve their own lives and interests, taken out of their hands. It is a wonder that they were not more awakened with the attempt of the late lord chief justice Keyling, who would have usurped a lordly, dictatorian power over the grand jury of Somersetshire, and commanded them to find a bill of indictment for murder, for which they saw no evidence, and upon their refusal, he not only threatened the jury, but assumed to himself an arbitrary power to fine them.

Here was a bold battery made upon the antient fence of our reputations, and lives: if that justice's will had passed for law, all the gentlemen of the grand juries must have been the basest vassals to the judges, and have been penally obliged, *jurare in verba magistri*, to have sworn to the directions or dictates of the judges: but thanks be to GOD, the late long parliament (though filled with pensioners) could not bear such a bold invasion of the English liberty; but upon the complaint of one Sir Hugh Windham, foreman of the said jury, and a member of that parliament, the commons brought the then chief justice to their bar, to acknowledge his fault, whereupon the prosecution ceased.

The trust and power of grand juries, is, and ought to be, accounted amongst the greatest and of most concern, next to the legislative. The justice of the whole kingdom, in criminal cases, almost wholly depending upon

0331

upon their ability and integrity, in the due execution of their office: beſides, the concernments of all commoners, the honour, reputation, eſtates, and lives of all the nobility of England, are ſo far ſubmitted to their cenſure, that they may bring them into queſtion for treaſon, or felony, at their diſcretion: their verdict muſt be entered upon record, againſt the greateſt Lords, and proceſs muſt legally go out againſt them thereupon, to impriſon them if they can be taken, or to outlaw them, as the ſtatutes direct; and if any peer of the realm, though innocent, ſhould juſtly fear a conſpiracy againſt his life, and think fit to withdraw, the direction of the ſtatutes, in proceeding to the outlawry, being rightly purſued, he could never reverſe the outlawry, as the law now ſtands, ſave by pardon, or act of parliament. Hence it appears, that in caſe a grand jury ſhould be drawn to indict a noble peer unjuſtly, either by means of their own weakneſs, or partiality, or a blind ſubmiſſion to the direction or opinion of judges; one ſuch failure of a jury, may occaſion the ruin of many of the beſt or greateſt families in England: I mention this extent of the grand juries power over all the nobility, only to ſhew their joint intereſt and concern with the commons of England in this antient inſtitution.

The grand juries are truſted to be the principal means of preſerving the peace of the whole kingdom, by the terror of executing the

the penal laws againſt offenders, by their wiſdom, diligence, and faithfulneſs in making due inquiries after all breaches of the peace, and bringing every one to anſwer for his crime, at the peril of his life, limb, and eſtate; that every man, who lives within the law, may ſleep ſecurely in his own houſe.

It is committed to their charge and truſt, to take care of bringing capital offenders to pay their lives to juſtice, and leſſer criminals to other puniſhments, according to their ſeveral demerits. The courts, or judges, or commiſſioners of oyer and terminer, and of gaol delivery, are to receive only from the grand inqueſt, all capital matters whatſoever, to be put in iſſue, tried and judged before them by the petit juries. The whole ſtream of juſtice, in ſuch caſes, either runs freely, or is ſtopped and diſturbed, as the grand inqueſts do their duties, either faithfully and prudently, or neglect or omit them.

And as one part of their duty is to indict offenders, ſo another part is to protect the innocent, in their reputations, lives and intereſts, from falſe accuſers, and malicious conſpirators: they are to ſearch out the truth of ſuch informations as come before them, and to reject the indictment if it be not ſufficiently proved; and farther, if they have reaſonable ſuſpicion of malice, or wicked deſigns againſt any man's life or eſtate, by ſuch as offer a bill of indictment; the laws of God and of the kingdom, bind them to uſe all poſſible means to diſcover the villany; and if it appear to

0332

to them (whereof they are the legal judges) to be a conſpiracy, or malicious combination againſt the accuſed, they are bound by the higheſt obligations upon men and chriſtians, not only to reject ſuch a bill of indictment, but to indict forthwith all the conſpirators with their abettors and aſſociates.

Doubtleſs there hath been pride and covetouſneſs, malice and deſire of revenge in all ages, from whence have ſprung falſe accuſations and conſpiracies; but no age before us ever hatched ſuch villanies, as the popiſh faction have contrived againſt our religion, lives, and liberties. No hiſtory affords an example of ſuch forgeries, perjuries, ſubornations, and combinations of infamous wretches, as have been lately diſcovered amongſt them, to defame loyal, innocent proteſtants, and to ſhed their guiltleſs blood in the form and courſe of juſtice, and to make the king's moſt faithful ſubjects appear to be the vileſt traitors unto him. In this our miſerable ſtate, grand juries are our only ſecurity, inaſmuch as our lives cannot be drawn into jeopardy by all the malicious crafts of the devil, unleſs ſuch a number of our honeſt countrymen ſhall be ſatisfied in the truth of the accuſations. For prevention of ſuch plotters of wickedneſs as now abound, was that ſtatute made in the forty-ſecond of Edward 3. 3. in theſe words: "To eſchew "the miſchiefs and damage done to divers of "the commons by falſe accuſers, which oftentimes have made the accuſations more "for revenge and ſingular benefit, than for the "profit

"profit of the king, or of his people; which "accuſed perſons, ſome have been taken, and "ſometimes cauſed to come before the king's "council by writ, and otherwiſe, upon "grievous pain, againſt the law; it is aſſented and accorded for the good government "of the commons, that no man be put to anſwer without preſentment before juſtices, "or matter of record, &c. according to the "old law of the land, and if any thing be "done to the contrary, it ſhall be void in law, "&c." And (ſaith the ſtatute of the twenty-fifth of Edward 3. 4.) "None ſhall be taken "by petition, or ſuggeſtion made to the king "or to his council, unleſs it be by indictment, "or preſentment of good and lawful people "of the ſame neighbourood where ſuch deeds "be done, &c." That is to ſay, by a grand jury.

All our lives are thus by law truſted to the care of our grand inqueſts, that none may be put to anſwer for their lives, unleſs they indict them. If a cauſleſs indictment of any man ſhould careleſly paſs from them, his guiltleſs blood, or what prejudice ſoever the accuſed ſhould thereby ſuffer, muſt reſt upon them, who by breach of their truſt were the occaſions of it; their fault cannot be excuſed by the proſecution of an attorney, or ſolicitor general, or any other accuſer, if it were in their power to be more truly informed in the caſe. Whatſoever prevents not an evil when he may, conſents to it.

Now to oblige theſe juries to the more conſcientious

0333

ſcientious care, to indict all that ſhall appear to them criminal, and to ſave every innocent, if it may be, from unjuſt vexation and danger, by malice and conſpiracy, our anceſtors appointed an oath to be impoſed upon them, which cannot be altered, except by act of parliament: therefore every grand-jury man is ſworn, as the foreman, in the words following, *viz.*

"You ſhall diligently inquire, and true "preſentment make of all ſuch articles, mat- "ters and things as ſhall be given you in "charge. And of all other matters and things "as ſhall come to your own knowledge, "touching this preſent ſervice. The king's "counſel, your fellows, and your own, you "ſhall keep ſecret: you ſhall preſent no per- "ſon for hatred or malice; neither ſhall you "leave any one unpreſented for favour, or "affection, for love, or gain, or any hopes "thereof; but in all things you ſhall preſent "the truth, the whole truth, and nothing "but the truth, to the beſt of your knowledge; "ſo help you God." The tenor of the oath is plain, ſaving in theſe words, "All ſuch "matters and things as ſhall be given you "in charge:" But whenſoever a general commiſſion of oyer and terminer is iſſued, all capital offences are always the principal matters given in charge to the grand jury, which is enough for the preſent diſcourſe of their duty. Hence then it evidently appears, that every grand jury is bound to enquire diligently after the truth of every thing, for which they

they ſhall indict or preſent any man: they are not only bound, by the eternal law of loving their neighbour, to be as tender of the life and good name of every man, as of their own, and therefore to take heed to the truth in accuſing or indicting any man; but their expreſs oath binds them to be diligent in their inquiries, that is, to receive no ſuggeſtion of any crime for truth, without examining all the circumſtances about it, that fall within their knowledge; they ought to conſider the firſt informers, and enquire as far as they can into their aims and pretences in their proſecutions: if revenge or gain ſhould appear to be their ends, there ought to be the greater ſuſpicion of the truth of their accuſations; the law intending all indictments to be for the benefit of the king and of his people, as appears by the ſtatute of forty-ſecond Edward 3. 3. Next, the jury are bound to inquire into the matters themſelves, whereof any man is accuſed, as to the time, place, and all other circumſtances of the fact alledged. There have been falſe informers, that have ſuggeſted things impoſſible; for inſtance, that thirty thouſand men in arms were kept in readineſs for an exploit, in a ſecret place, as if they could have been hid in a chamber or a cabinet. The jury ought alſo to inquire after the witneſſes, their condition and quality, their fame and reputation, their means of ſubſiſtence, and the occaſion whereby the facts whereof they bear witneſs came to their knowledge. Sometimes perſons of debauched lives, and low condition, have depoſed

0334

posed discourses, and treasonable counsels, against persons of honour and virtue, so unlikely to come to their knowledge, (if such things had been) that their pretence of being privy to them, was a strong evidence that their whole story was false and feigned. It is also agreeable unto our antient law and practice, and of great consequence in cases of treason or felony, that the jury inquire after the time, when first the matters deposed came to the witnesses knowledge, and whether they pursued the directions of the law in the immediate discovery and pursuit of the traitor or felon, by hue and cry, or otherwise, or how long they concealed the same; their testimony being of little or no value, if they have made themselves partakers of a crime by their voluntary concealment.

Neither may the jury lawfully omit to inquire concerning the parties accused, of their quality, reputation, and the manner of their conversation, with many other circumstances; from whence they may be greatly helped to make right inferences of the falshood, or truth of the crimes whereof any man shall be accused. The jury ought to be ignorant of nothing whereof they can inquire, or be informed, that may in their understandings enable them to make a true presentment or indictment of the matters before them.

When a grand jury is sworn to inquire diligently after all treasons, *&c.* it is natural and necessary to their business, to think of whom they should inquire; and it is plainly and

and easily resolved, that they ought to inquire of every man that can or will inform them; and if any kind of treason be suggested to them, to have been done by any man, or number of men, their duty is the same in that particular, as it was in the general; that is, to seek diligently to find the truth. It is certainly inconsistent with their oaths, to shut their ears against any lawful man, that can tell them any thing relating unto a crime in question before them: no man will believe, nor can they themselves think that they desire to find and present the truth of a fact, if they shall refuse to hear any man, who shall pretend such knowledge of it, or such material circumstances, as may be useful to discover it; whether that which shall be said by the pretenders, will answer the juries expectations, must rest in their judgments, when they have heard them. It seems therefore from the words of the oath, that there is no bound or limit set (save their own understanding or conscience) to restrain them to any number or sort of persons of whom they are bound to inquire; they ought first and principally to inquire of one another mutually, what knowledge each of them hath of any matters in question before them; the law presumes, that some at least of so many sufficient men of a county, must know or have heard of all notable things done there against the public peace; for that end, the juries are by the law to be of the neighbourhood to the place where the crimes are committed.

0335

mitted. If the parties, and the facts whereof they are accused, be known to the jury, or any of them, their own knowledge will supply the room of many witnesses. Next they ought to inquire of all such witnesses as the prosecutors will produce against the accused, they are bound to examine all fully and prudently to the best of their skill; every juryman ought to ask such questions (by the foreman at least) as he thinks necessary to resolve any doubt that may arise in him, either about the fact, or the witnesses, or otherwise; if the jury be then doubtful, they ought to receive all such further testimony as shall be offered them, and to send for such as any of them do think able to give testimony in the case depending.

If it be asked how, or in what manner, the juries shall inquire; the answer is ready, According to the best of their understandings. They only, not the judges, are sworn to search diligently to find out all treasons, *&c.* within their charge, and they must and ought to use their own discretion in the way and manner of their inquiry: no directions can legally be imposed upon them by any court, or judges; an honest jury will thankfully accept good advice from judges, as they are assistants; but they are bound by their oaths to present the truth, the whole truth, and nothing but the truth, to the best of their own, not the judges, knowledge: neither can they, without breach of that oath, resign their consciences, or blindly submit to the dictates of others; and therefore

therefore ought to receive, or reject such advices, as they judge them good or bad.

If the jury suspect a combination of witnesses against any man's life, (which perhaps the judges do not discern) and think it needful to examine them privately and separately, the discretion of the juries in such a case, is their only, best, and lawful guide; though the example of all ages and countries, in examining suspected witnesses privately and separately, may be a good direction to them.

Nothing can be more plain and express, than the words of the oath are to this purpose. The jurors need not search the law books, nor tumble over heaps of old records, for the explanation of them. Our greatest lawyers may from hence learn more certainly our antient law in this case, than from all the books in their studies. The language wherein the oath is penned is known and understood by every man, and the words in it have the same signification, as they have wheresoever else they are used. The judges (without assuming to themselves a legislative power) cannot put a new sense upon them, other than according to their genuine, common meaning. They cannot magisterially impose their opinions upon the jury, and make them forsake the direct words of their oath, to pursue their glosses. The grand inquest are bound to observe alike strictly every part of their oath; and to use all just and proper ways which may enable them fully to perform it; otherwise it were to say, that after men had sworn to in-

 quire

quire diligently after the truth, according to the beſt of their knowledge, they were bound to forſake all the natural and proper means which their underſtandings ſuggeſt for the diſcovery of it, if it be commanded by the judges.

And therefore, if they are jealous of a combination of the witneſſes, or that corruption and ſubornation hath been made uſe of, they cannot be reſtrained from aſking all ſuch queſtions, as may conduce to the ſifting out of the truth, nor from examining the witneſſes privately and ſeparately; leſt (as Forteſcue ſays) the ſaying of one ſhould provoke or inſtruct others to ſay the like*.

Nor are the jury tied up to inquire only of ſuch crimes as the judges ſhall think fit to give them directly in charge, much leſs of ſuch bills only as ſhall be offered to them; but their inquiry ought to extend to all other matters and things which ſhall come to their knowledge, touching the preſent ſervice. If they have ground to ſuſpect that any accuſation before them proceeds from a conſpiracy, they are obliged by their oaths to turn the inquiry that way, and if they find cauſe, not only to reject the bills offered upon ſuch teſtimony, but to indict ſuch witneſſes, and all the abettors of their villany.

They are carefully to examine what ſort of men the witneſſes are; for it is a rule in all laws, that *Turpes à tribunalibus arcentur*, vile perſons ought to be rejected by courts of juſ-

* *Forteſque de Laud. Leg. Ang.* cap. 26.

tice.

tice. Such witneſſes would deſtroy juſtice, inſtead of promoting it. And the grand jury are to take care of admitting ſuch: they may and ought (if they have no certain knowledge of them) to aſk the witneſſes themſelves of their condition, and way of living, and all other queſtions, which may beſt inform them what ſort of men they are. It is true, it may be lawful for the witneſſes, in many caſes, to refuſe to give anſwer to ſome demands which the jury may make; as where it would be to accuſe themſelves of crimes: but yet that very refuſal, or avoiding to give direct anſwers, may be of great uſe to the jury, whoſe only buſineſs is to find out the truth; and who will be in a good meaſure enabled to judge of the credit of ſuch witneſſes, as dare not clear themſelves of crimes, which common fame or the knowledge of ſome of the grand inqueſt has charged them with.

If the witneſſes which come before the grand jury upon an indictment for treaſon, ſhould diſcover upon their examination, that they concealed it a long time without juſt impediment; the preſumption of law will be ſtrong againſt them, that no ſenſe of honeſty or of their duty brought them at laſt to reveal it.

It appears by Bracton*, that antient writer of our laws, that in caſes of treaſon the juries were in his days adviſed (as now they ought)

* Bracton, l. 3. c. 3. *Non morari debet,* &c. *nec debet ad aliqua negotia, quamvis urgentiſſima, ſe convertere, quia vix permittitur ei quòd retro aſpiciat,* &c. *Si poſt intervallum accuſare velit, non erit de jure audiendus.*

to

to be so severe in their inquiry within what time the witnesses discovered the treason after it came to their knowledge; that if it were not evident that they revealed it with as much expedition as was well possible for them, they were not by law to be heard as witnesses: it was scarce permitted them (saith he) to look back in their going; such ought to be their speed to make known the treason. Or if in any case they be otherwise openly flagitious, though they be not legally infamous, or if they are men of desperate fortunes, so that the temptation of want is manifestly strong upon them, and the restraint of conscience can be supposed to be little or none at all; whatever they say is, at least, to be heard with extraordinary caution, if not totally rejected. In Scotland *, such a degree of poverty, that a witness cannot swear himself to be worth ten pounds, is sufficient to lay him aside wholly in these high concernments of criminal cases: and in some other kingdoms, to be a loose liver, is an objection of the same force, against any produced for witnesses.

And for the better discovery of the truth of any fact in question, the credit of the witnesses, and the value of the testimonies; it is the duty of the grand inquest to be well informed concerning the parties indicted; of their usual residence, their estates and manner of living, their companions and friends, with whom they are accustomed to converse, such knowledge being necessary to make a

* Sir G. *Mackenzie, Crim. Law*, lib. 26. cap. 3.

good

good judgment upon most accusations; but most of all in suspicions, or indictments of secret treasons, or treasonable words, where the accusers can be of no credit, if it be altogether incredible that such things as they testify should come to their knowledge.

Sometimes the quality of the accused person may set him at such a distance from the witnesses, that he cannot be supposed to have conversed with them familiarly, if his wisdom and conduct has been always such, that it is not credible he would trust men so inconsiderable, or meer strangers to him, and such as are wholly uncapable to assist in the design which they pretend to discover.

Can the grand inquest believe such testimony to be of any value? Or can they avoid suspecting malice, combination, and subornation in such a case? Or can they shew themselves to be just, and conscientious in their duty, if they do not suspend their verdict until further inquiry, and write *ignoramus* on the bill?

It is undoubtedly law which we find reported in *Stiles* *, that *though there be witnesses who prove the bill, yet the grand inquest is not bound to find it, if they see cause to the contrary.*

Now to make their inquiry more instrumental and advantageous to the execution of justice, they are enjoined by their oath to keep secret *the king's counsel, their fellows, and their own.* Perhaps it is not sufficiently

* *Stiles*, Repor. 11.

under-

0338

underſtood or conſidered, what duty is enjoined to every man of a grand inqueſt by this clauſe of their oath, being ſeldom (if ever) explained to them in the general charge of the judges at ſeſſions or aſſizes: but it is neceſſary that they ſhould apprehend what counſel of the king is truſted with them. Certainly there is or ought to be much more of it communicated to them, than is commonly thought, and in things of the greateſt conſequence. To them ought to be committed in the ſeveral counties where any proſecutions are begun, the firſt informations and ſuſpicions of all treaſons, murders, felonies, conſpiracies, and other crimes, which may ſubvert the government, endanger or hurt the king, or deſtroy the lives or eſtates of the innocent people, or any way diſquiet or diſturb the common peace. Our law intends the counſels of the king to be continually upon the protection and ſecurity of the people, and prevention of all their miſchiefs and dangers by wicked, lawleſs, and injurious men. And in order thereunto, to be adviſing how to right his wronged ſubjects in general, if the public ſafety be hazarded by treaſons of any kind; or their relations ſnatcht from them by murderers, or any way deſtroyed by malicious conſpirators in form of law; or their eſtates taken away by robbery and thieves, or the peace broken. And for theſe ends to bring to exemplary juſtice all offenders, to deter others from the like wickedneſs. And until theſe counſels of the king come to the

the grand jury, he can bring no ſuch criminals to judgment, or to anſwer to the accuſations and ſuggeſtions againſt them. Hence it becomes unavoidably neceſſary to reveal to the grand juries all that hath been diſcovered to the king, or any of his miniſters, judges, or juſtices, concerning any treaſons, or other offences, whereof any man is accuſed. And where ſuſpicion hath cauſed any to be impriſoned, all the grounds of their ſuſpicions ought to be opened, concerning the principals and the acceſſories, as well before as after the fact, all the circumſtances and preſumptions that may induce a belief of their guilt, and all notices whatſoever, which may enable the jury to make a more exact and effectual inquiry, and to preſent the whole truth. They themſelves will not only be offenders againſt God by reaſon of their oath, but ſubject to legal puniſhments, if they knowingly conceal any criminals, and leave them unpreſented; and none can be innocent, who ſhall conceal from them any thing that may help and aſſiſt them in their duty.

The firſt notices of crimes or ſuſpicions of the criminals, by whomſoever brought in, and the intentions of ſearching them out, and proſecuting them legally, are called the king's counſel; becauſe the principal care of executing juſtice is entruſted to him, and they are to be proſecuted at his ſuit, and in his name; and ſuch proceedings are called Pleas of the Crown. From hence may be eaſily concluded, that the king's counſel, which,

0339

by the oath of the grand inqueſt, is to be kept ſecret, includeth all the perſons offered to them to be indicted, and all the matters brought in evidence before them, all circumſtances whatſoever whereof they are informed, which may any way conduce to the diſcovery of offences; all intimations given them of abettors and encouragers of treaſons, felonies, or perjuries and conſpiracies, or of the receivers, harbourers, nouriſhers, and concealers of ſuch criminals.

Likewiſe the oath, which enjoins the counſel of their fellows, and their own to be kept, implies, that they ſhall not reveal any of their perſonal knowledge concerning offences or offenders; nor their intentions to indict any man thereupon; nor any of the propoſals and advices amongſt them of ways to inquire into the truth of any matter before them, either about the crimes themſelves, or the accuſers and witneſſes, or the party accuſed, nor the debates thereupon amongſt themſelves, nor the diverſity of opinions in any caſe before them.

Certainly this duty of ſecrecy concerning the King's counſel was impoſed upon the grand inqueſt with great reaſon, in order to the public good. It was intended that they ſhould have all the advantages which the ſeveral caſes will afford, to make effectual inquiries after criminals, to offer them to juſtice. If packs of thieves, private murderers, ſecret traitors, or conſpirators and ſuborners, can get intelligence of all that is known of their villanies,

villanies, all the parties concerned may conſult together, how to hide their crimes, and prevent ſuch further inquiries as can be made after them; they may form ſham ſtories by agreement, that may have appearance of truth to miſlead and delude the jury in their examination, and avoid contradicting each other; they may remove or conceal all ſuch things as might occaſion a fuller diſcovery of their crimes, or become circumſtantial evidences againſt any of their aſſociates, if one or more of them be known or taken, or is to be indicted. There hath been confederates in high crimes, who have ſecured themſelves from the juſtice done upon ſome of their companions, by their confident appearance and denial of the fact, having been emboldened therein from their knowledge of all the grounds of ſuſpicion, and all the witneſſes examined about them, and the matter of their teſtimonies. It is too well known what helps of diſcovering the whole Popiſh plot were loſt, through the want of keeping ſecret the king's counſel therein, before the matter was brought either to the parliament, or to any grand inqueſt; and thereby they were diſabled for the effectual execution of their offices, and could never ſearch into the bowels of that dangerous treaſon in any county. But our law having placed this great truſt of inquiry in the prudence and faithfulneſs of the grand inqueſt, was careful that they might not diſable themſelves for their own truſt, by the indiſcretion or worſer fault of any of their

own

0340

own number, in revealing the king's counſel or their own.

And as it was intended hereby to preſerve unto them all reaſonable helps for their bringing to light the hidden miſchiefs that might diſturb the common peace, ſo it was neceſſary to prevent the flight of criminals; if the evidence againſt one that is accuſed ſhould be publickly known, whether it ſhould be ſufficient for an indictment of him, and how far it extends to others; his confederates and accomplices might eaſily have notice of their danger, and take opportunity to eſcape from juſtice.

Yet the reaſon will be ſtill more manifeſt for keeping ſecret the accuſations and the evidence by the grand inqueſt, if it be well conſidered, how uſeful and neceſſary it is for diſcovering truth in the examinations of witneſſes in many, if not in moſt caſes that may come before them; when if by this privacy witneſſes may be examined in ſuch manner and order, as prudence and occaſion direct; and no one of them be ſuffered to know who hath been examined before him, nor what queſtions have been aſked him, nor what anſwers he hath given, it may probably be found out whether a witneſs hath been biaſſed in his teſtimony by malice or revenge, or the fear or favour of men in power, or the love or hopes of lucre and gain, in preſent or future, or promiſes of impunity for ſome enormous crime.

The ſimplicity of truth in a witneſs may appear by the natural plainneſs, eaſineſs, and directneſs of his anſwers to whatſoever is propounded to him, by the equality of his temper, and ſuitableneſs of his anſwers to queſtions of ſeveral kinds, and perhaps to ſome that may be aſked for trial-ſake only of his uprightneſs in other matters. And the falſeneſs, malice, or ill deſign of another, may be juſtly ſuſpected from his ſtudiouſneſs and difficulty in anſwering, his artifice and cunning in what he relates, not agreeable to his way of breeding and parts; his reſerved, indirect, and evaſive replies to eaſy queſtions; his pretences of doubtfulneſs and want of remembering things of ſuch ſhort dates, or ſuch notoriety, that it is not credible he could be ignorant or forgetful of them. In this manner the truth may be evidenced to the ſatisfaction of the jurors conſciences, by the very demeanor of the witneſſes in their private examinations, inaſmuch as the greateſt certainty doth often ariſe from the careful obſervation and comparing of ſuch minute matters; of which a diſtinct account is not poſſible to be given to a court: and for that reaſon (among others) the juries are made the only abſolute judges of their evidence.

Yet further, their private examinations may diſcover truth out of ſome diſagreement of the witneſſes, when ſeparately interrogated, and every of the grand inqueſt aſks them queſtions for his own ſatisfaction about the matters which have come to his particular knowledge, and this freely, without awe or control of judges, or diſtruſt of his own parts,

0341

parts, or fear to be checked for aſking impertinent queſtions.

Conſpiracies againſt the lives of the innocent, in a form of juſtice, have been frequently detected by ſuch ſecret and ſeparate examination of witneſſes. The ſtory of Suſanna is famous; that two of their elders, and judges of great credit and authority, teſtified in the open aſſembly a malicious invention againſt her, with all the ſolemnity uſed in capital caſes, and ſentence of death paſſed upon her, and was ready to be executed, had not wiſe Daniel cried out in her behalf*: "Are ye ſuch fools, O Iſraelites, that without examination, or knowledge of the truth, ye have condemned a daughter of Iſrael? Return (ſaid he) again to judgment, and put theſe two one far from another, and I will examine them:" And being aſked ſeparately (though in public, the teſtimony having been ſo given before) concerning the place of the fact then in queſtion, they had not agreed upon that circumſtance, as they had upon their ſtory; and ſo their falſhood became manifeſt, one ſaying the adultery was committed under a *lentiſk* tree, the other, it was under a *prime* tree: and upon that conviction of the falſe witneſſes, the whole aſſembly cried with a loud voice, and praiſed God. Theſe falſe witneſſes were put to death, as their law required.

* Note, that the teſtimony given in the aſſembly without ſeparating the witneſſes, and trying the truth by circumſtances, was eſteemed no examination or knowledge of the truth.

We

We have alſo a late inſtance of the uſefulneſs of private and ſeparate examinations, in the caſe of the Lord Howard, againſt whom the attorney general proſecuted an accuſation of treaſon the laſt Midſummer term, before the grand inqueſt for Middleſex. Mrs. Fitz-Harris, and Tereſa Peacock her maid, ſwore words of treaſon againſt him poſitively, and agreed in every point whilſt they were together: but by the prudence of the inqueſt, being put aſunder, and the miſtreſs aſked how her maid came to be admitted to the knowledge of ſuch matters; ſhe had an evaſion ready, pretending her maid had craftily hearkened behind a wainſcot door, and ſo heard the treaſon. But the maid not ſuſpecting what her miſtreſs had ſaid, continued in her firſt ſtory, that ſhe heard the treaſon from the Lord Howard himſelf, and was as much entruſted by him as her miſtreſs: by this circumſtance the falſhood and perjury (which Mrs. Fitz-Harris hath ſince acknowledged) was diſcovered; and the ſnare for the life of the injured Lord was broken, as is manifeſt by his liberty now obtained by law.

Witneſſes may come prepared, and tell plauſible ſtories in open court, if they know from the proſecutor to what they muſt anſwer; and have agreed and acquainted each other with the tales they will tell, and have reſolved to be careful, that all their anſwers to croſs interrogatories, may be conformable to their firſt ſtories: and if theſe relate only to words ſpoken at ſeveral times in private to diſtinct

witneſſes,

0342

witnesses, in such a case, evidence, if given in open court, may seem to be very strong against the person accused, though there be nothing of truth in it. But if such witnesses were privately and separately examined by the grand inquest, as the law requires, and were to answer only such questions as they thought fit, and in such order as was best in their judgments, and most natural to find out the truth of the accusation, so that the witnesses could not guess what they should be asked first, or last, nor one conjecture what the other had said, (which they are certain of when they know beforehand what the prosecutor will ask in court of every one of them, and what they have resolved to answer) if the inquest should put them out of their road, and then compare all their several answers together, they might possibly discern marks enough of falshood, to shew that their testimonies ought not to be depended upon, where life is in question.

By what is now said, the reasonableness of this institution of secrecy may be discerned in respect to the discovery of truth, and the protection of the innocent from malicious combinations and perjuries. Yet the same secrecy of the king's counsel is no less necessary to reserve the guilty for punishment; when the evidence against any party accused is not manifest and full, it may be kept without prejudice under secrecy until further inquiry; and if sufficient proof can afterwards be made of the offence, an indictment may be found

found by a grand inquest, and the party brought to answer it: but when the examinations are in open court, or the king's counsels any other way divulged, and the evidence is weak, and less than the law requires, it is not probable that it will be more or stronger; and should an indictment be found, and the party tried by a petit jury, whilst the evidence is not full, they must and ought to acquit him, and then the further prosecution for the same offence is for ever barred, though his guilt should afterward be manifest, and confessed by himself.

From hence may certainly be concluded, that secrecy in the examinations and inquiries of grand juries is in all respects for the interest and advantage of the king. If he be concerned to have secret treasons, felonies, and all other enormities brought to light, and that none of the offenders should escape justice; if the gain of their forfeitures be thought his interest (which God forbid) then the first notices of all dangerous crimes, and wicked confederacies, ought to be secretly and prudently pursued and searched into by the grand inquest: the accusers and witnesses ought not to publish in a court, before a multitude, what they pretend to know in such cases, until the discretion of so many honest men of the neighbourhood, hath first determined whether their testimony will amount to so good and full evidence, that it may be made public with safety to the king and people in order to justice. Else they are obliged by oath

 to

to lock up in their own breaſts all the circumſtances and preſumptions of crimes, until they, or ſuch as ſhall ſucceed in the ſame truſt, ſhall have diſcovered (as they believe) evidence enough to convict the accuſed, and then, and not before, they are to accuſe the party upon record, by finding the bills, as it is uſually called. But when bills are offered without ſatisfactory evidence, and they neither know nor can learn any more, they ought, for the king's ſake, to indorſe *ignoramus* upon them, leſt his honour and juſtice be ſtained, by cauſing or permitting ſuch proſecution of his people in his own name, and at his ſuit, as ſhall appear upon their trial and acquittal to have been frivolous, or elſe malicious deſigns upon their lives and fortunes.

If it ſhould be ſaid, that whatſoever reaſons there are for this oath of ſecrecy; yet it cannot deprive the king of the benefit of having the evidence made public, if he deſires it, and that the grand jury do not break their oaths when the king, or the proſecutor for him, will have it ſo: it is not hard to ſhew that ſuch notions have no foundation in law or reaſon, and ſeem to come from men who have not well ſtudied the firſt principles of the Engliſh government, or of true religion.

Whoſoever hath learnt, that the kings of England were ordained for the good government of the kingdom in the execution of the laws, muſt needs know, that the king cannot lawfully ſeek any other benefit in judicial proceedings, than that common right and juſtice

juſtice be done to the people according to their laws and cuſtoms. Their ſafety and proſperity are to be the objects of his continual care and ſtudy, that being their higheſt concern. The greatneſs and honour of a prince conſiſts in the virtue, multitude, wealth and proweſs of his people; and his greateſt glory is, by the excellence of his government ſo to have encouraged virtue and piety, that few or no criminals are to be found in his dominions. Thoſe who have made this their principal aim, have in ſome places ſo well ſucceeded, as to introduce ſuch a diſcipline and rectitude of manners, as rendered every man a law unto himſelf. As it is reported in the hiſtory of Peru *, that though the laws were ſo ſevere as to make very ſmall crimes capital, yet it often fell out, that not one man was put to death in a year, within the whole compaſs of that vaſt empire.

The king's only benefits in finding out and puniſhing offenders by courts of juſtice, are the preſervation and ſupport of the government, the protection of the innocent, revenging their wrongs, and preventing further miſchiefs by the terrors of exemplary puniſhments.

The king is the head of juſtice in the eſteem of our laws, and the whole kingdom is to expect right to be done them in his ſeveral courts inſtituted by law for that purpoſe. Therefore writs iſſue out in his name in all caſes where relief is ſought by the ſubjects: and the wrongs

* *Gar. de la Vega. Hiſt. de los Incas.*

done

done to the lives or limbs of the people, are ſaid to be done againſt the peace of the king, his crown and dignity, reckoning it a diſhonour to him and his government, that ſubjects ſhould not, whilſt they live within the law, enjoy peace and ſecurity. It ought to be taken for a ſcandal upon the king, when he is repreſented in a court of juſtice as if he were partially concerned, or rather inclined to deſire, that a party accuſed ſhould be found guilty, than that he ſhould be declared innocent, if he be ſo in truth. Doubtleſs the king ought to wiſh in all inquiries made after treaſons, felonies, &c. that there were none to be found in his kingdom; and that whoſoever is accuſed, might be able to anſwer ſo well and truly for himſelf, as to ſhew the accuſation to be erroneous or falſe, and to be acquitted of it. Something of this appears in the common cuſtom of England, that the clerks of the king's courts of juſtice, when any man hath pleaded not guilty to an indictment, pray forthwith that God would ſend him a good deliverance.

The deſtruction of every criminal is a loſs to a prince, and ought to be grievous to him; in the common regard of humanity, and the more particular relation of his office, and the name of father. The king's intereſt and honour is more concerned in the protection of the innocent, than in the puniſhment of the guilty. This maxim can never run them into exceſſes; for it hath ever been looked upon as a mark of great wiſdom and virtue in ſome princes

princes and ſtates, upon ſeveral occaſions, to deſtroy all evidences againſt delinquents; and nothing is more uſual than to compoſe the moſt dangerous diſtempers of nations by acts of general amneſty, which were utterly unjuſt, if it were as great a crime to ſuffer the guilty to eſcape, as to deſtroy the innocent. We do not only find thoſe princes repreſented in hiſtory under odious characters, who have baſely murdered the innocent; but ſuch as by their ſpies and informers were too inquiſitive after the guilty: whereas none was ever blamed for clemency, or for being too gentle interpreters of the laws. Though Trajan was an excellent prince, endowed with all heroical virtues, yet the moſt eloquent writers, and his beſt friends, found nothing more to be praiſed in his government, than that in his time, all men might think what they pleaſed, and every man ſpeak what he thought; and he had no better way of diſtinguiſhing himſelf from his wicked predeceſſors, than by hanging up the ſpies and informers, whom they had employed for the diſcovery of crimes *. But if the puniſhment of offenders were as univerſally neceſſary as the protection of the innocent, he were as much to be abhorred as Nero; and that clemency which is ſo highly praiſed, were to be looked upon as the worſt of vices, and thoſe who have hitherto been taken for the beſt of princes, were altogether as deteſtable as the worſt.

Moreover, all human laws were ordained for

* *Tacit. lib.* 1. *Hiſt.*

the

the preſervation of the innocent, and for their ſakes only are puniſhments inflicted. That thoſe of our own country do ſolely regard this, was well underſtood by Forteſcue*, who ſaith, "Indeed I could rather wiſh twenty evil-doers "to eſcape death through pity, than one man "to be unjuſtly condemned." Such blood hath cried to heaven for vengeance againſt families and kingdoms, and their utter deſtruction hath enſued. If a criminal ſhould be acquitted by too great lenity, caution, or otherwiſe, he may be reſerved for future juſtice from man or God, if he doth not repent; but it is impoſſible that ſatisfaction or reparation ſhould be made for innocent blood, ſhed in the forms of juſtice.

Without all queſtion, the king's only juſt intereſt in the evidence given againſt the party accuſed, and in the manner of taking it, is to have the truth made manifeſt, that juſtice may thereupon be done impartially: and if accuſations may be firſt examined in ſecret more ſtrictly and exactly, to prevent fraud and perjury, than is poſſible to be done in open court, (as hath before appeared) then it is for the king's benefit to have it ſo. And nothing done in, or by a court, about the trial of the accuſed, is for the king, (in the ſenſe of our law) unleſs it ſome way conduce to juſtice in the caſe. The witneſſes which the proſecutor brings, are no farther for the king, than they tell the truth and the whole truth, impartially; and by whomſoever any others may

* *Forteſ. de Land. Leg. Ang.* ch. 27.

be

be called upon the inquiry, or the trial to be examined, if they ſincerely deliver the truth of the matter in queſtion, they are therein the king's witneſſes, though the accuſed be acquitted by reaſon of their teſtimonies. If ſuch as are offered by the attorney-general to prove treaſon againſt any man, ſhall be found to ſwear falſly, maliciouſly, or for reward or promiſes, though they depoſe poſitively facts of treaſon againſt the accuſed, yet they are truly and properly witneſſes againſt the king, by endeavouring to pervert juſtice, and deſtroy his ſubjects: their malice and villany being confeſſed or proved, the king's attorney ought *(ex officio)* to proſecute them in the king's name, and at his ſuit, for their offences againſt him in ſuch depoſitions pretended to have been for him: and the legal form of the indictment ought to be for their ſwearing falſly and maliciouſly againſt the peace of the king, his crown and dignity. The proſecutors themſelves, notwithſtanding their big words, and aſſuming to themſelves, to be for the king, if their proſecution ſhall be proved to be malicious, or by conſpiracy againſt the life or fortune of the abuſed, they are therein againſt the king, and ought to be indicted at the king's ſuit, for ſuch proſecutions done againſt his crown and dignity. And if an attorney-general ſhould be found knowingly guilty of abetting ſuch a conſpiracy, his office could not excuſe or legally exempt him from ſuffering the villainous judgement, to the deſtruction of him and his family. It is eſteemed in the law

one

0346

one of the moſt odious offences againſt the king to attempt in his name to deſtroy the innocent for whoſe protection he himſelf was ordained. Queen Elizabeth had the true ſenſe of our law, when the Lord Burleigh, upon Sir Edward Coke her then attorney's coming into her preſence, told her, this is he who proſecutes *pro domina regina*, for our lady the queen; and ſhe ſaid ſhe would have the form of the records altered; for it ſhould be *Attornatus generalis qui pro domina veritate ſequitur**; The attorney-general who proſecutes for our lady the truth. Whoever is truſted in that employment, diſhonours his maſter and office, if he gives occaſion to the ſubjects to believe that his maſter ſeeks other profits or advantages by accuſations, than the common peace and welfare: he ought not to excite a jealouſy in any of their minds, that confiſcations of eſtates are deſigned or deſired by any of the king's miniſters; whoſoever makes ſuch advantages to the crown their principal aim in accuſing, are either robbers and murderers, (in the ſcripture ſenſe) in ſeeking innocent blood for gain, or in the mildeſt conſtruction, (ſuppoſing the accuſation to be on good grounds) they ſhew themſelves to be of corrupt minds and a ſcandal to their maſter and the government. Profit or loſs of that kind ought to have no place in judicial proceedings againſt ſuſpected criminals, but truth is only to be regarded; and for this reaſon the judgments given in courts of human inſtitution,

* Coke, *Inſt.* 3d part, p. 79.

 are

are in ſcripture called, the judgments of GOD, who is the GOD of truth.

Yet further, if any benefit to the king could be imagined by making the evidence to the grand jury public, it could not come in competition with the law expreſſed in their oath; which by conſtant uninterrupted uſage, for ſo many ages, hath obtained the force of law. Bracton and Briton, in their ſeveral generations bear witneſs, that it was then practiſed; and greater proof of it need not be ſought, than the diſputes that appear by the law-books to have been amongſt the antient lawyers, whether it was treaſon or felony for a grand jury to diſcover, either who was indicted, or what evidence was given them. The truſt of the grand juries was thought ſo ſacred in thoſe ages, and their ſecrecy of ſo great concern to the kingdom, that whoſoever ſhould break their oath therein, was by all thought worthy to die; only ſome would have had them ſuffer as traitors, others as felons *. And at this day it is held to be a high miſpriſion, puniſhable by fine and impriſonment. The law then having appointed the evidence to be given to grand juries in ſecret, the king cannot deſire to have it made public. He can do no wrong ſaith the old maxim; that is, he can do nothing againſt the law, nor is any thing to be judged for his benefit that is not warranted by law; his will, commands, and deſires, are therein no otherwiſe to be known: he cannot change the legal method or manner of

* Coke, *Inſtit.* 3d part, p. 107.

 in-

0347

inquiring by juries, nor vary in any particular case from the customary and general forms of judicial proceedings; he can neither abridge nor enlarge the power of juries, no more than he can lessen the legal power of the sheriffs or judges, or by special directions order the one how they shall execute writs, and the other how they shall give judgments, though these made by himself.

It is criminal, no doubt, for any to say, that the king desires a court of justice, or a jury, to vary from the direction of the law, and they ought not to be believed therein: if letters, writs, or other commands should come to the judges for that purpose, they are bound by their oaths not to regard them, but to hold them for null; the statutes of 2 Ed. III. 8. and 20 Ed. III. 1. are express; that if any writs or commandments come to the justices in disturbance of the law, or the execution of the same, or of right to the parties, they shall proceed as if no such letters, writs or commands were come to them: and the substance of these and other statutes, is inserted into the oath taken by every judge; and if they be under the most solemn and sacred tie in the execution of justice, to hold for nothing or none the commands of the king under the great seal; surely the word or desire of an attorney-general in the like case ought to be less than nothing.

Besides, they are strangely mistaken, who think the king can have an interest different from, or contrary unto that of the kingdom, in

in the prosecution of accused persons: his concernments are involved in those of his people; and he can have none distinct from them. He is the head of the body politic, and the legal course of doing justice, is like the orderly circulation of blood in the natural bodies, by which both head and body are equally preserved, and both perish by the interruption of it.

The king is obliged to the utmost of his power to maintain the law, and justice in its due course, by his coronation oath, and the trust thereby reposed in him. In former ages he was conjured not to take the crown, unless he resolved punctually to observe it. Bromton and others speaking of the coronation of Richard I, deliver it thus; that having first taken the oath, *Deinde indutus mantello, ductus est ad altare, & conjuratus ab archiepiscopo, & prohibitus ex parte Dei, ne hunc honorem sibi assumat, nisi in mente habeat tenere sacramenta & vota quæ superius fecit. Et ipse respondit, se per Dei auxilium omnia supradicta observaturum bona fide. Deinde cepit coronam de altari, & tradidit eam archiepiscopo, qui posuit eam super caput regis, & sic coronatus rex, ductus est ad sedem suam* *. Afterward, cloathed with the royal robe, he is led to the altar, and conjured by the Archbishop, and forbid in the name of God, not to assume that honour, unless he intended to keep the oaths and vows he had before made; and he answered, by God's help he would faithfully

* *Bromton, p. 1159. Mat. Paris, p. 153. Hoved. p. 374. Baker, p. 68.*

 observe

0348

observe all the premises: and then he took the crown from off the altar, and delivered it to the archbishop, who put it upon the king's head; and the king thus crowned, is led unto his seat. The violation of which trust cannot but be as well a wound unto their consciences, as bring great prejudice upon their persons and affairs.

The common law that exacts this, doth so far provide for princes, that having their minds free from cares of preserving themselves, they may rest assured that no acts, words or designs, that may bring them into danger, can be concealed from the many hundreds of men, who by the law are appointed in all parts of the kingdom, watchfully to take care of the king; and are so far concerned in his safety, that they can hope no longer to enjoy their own lives and fortunes in peace, than they can preserve him, and the good order which according to the laws he is to uphold.

It is the joint interest of king and people, that the antient rules of doing justice be held sacred and inviolable; and they are equally concerned in causing strict inquiries to be made into all evidences given against suspected or accused persons, that the truth may be discovered; and such as dare to disturb the public peace by breaking the laws, may be brought to punishment. And the whole course of judicial proceedings in criminal causes, shews that the people is therein equally concerned with the king, whose name is used. This is the ground of that distinction which Sir Ed-

Edward Coke makes between the proceedings in pleas of the crown, and actions for wrongs done to the king himself. "In pleas "of the crown, or other common offences, "nusances, *&c.* principally concerning others, "or the public, there the king by law must "be apprised by indictment, presentment, "or other matter of record; but the king "may have an action for such wrong as is "done to himself, and whereof none other "can have an action but the king, without "being apprised by indictment, presentment, "or other matter of record, as a *Quare im-* "*pedit*, *Quare incumbravit*, a Writ of Attaint "of Debt, Detinue of Ward, Escheat, Scire "fac. pur repealer patent *," *&c.* Unto which every man must answer: but no man can be brought to answer for public crimes at the king's suit, otherwise than by indictment of a grand jury.

The whole course of doing justice upon criminals, from the beginning of the process, unto the execution of the sentence, is, and ever was esteemed to be the kingdom's concernment, as is evidenced by the frequent complaints made in parliament, that capital offenders were pardoned to the people's damage and wrong. In the 13 Richard II. it is said, that the king hearing the grievous complaints of his commons in parliament, of the outrageous mischiefs which happened unto the realm, for that treasons, murders, and rapes of women, be commonly done, and commit-

* Coke, 3d *Instit. page* 136.

ted,

0349

ted, and the more, becauſe charters of pardon had been eaſily granted in ſuch caſes; and thereupon it was enacted, that no pardon for ſuch crimes ſhould be granted, unleſs the ſame were particularly ſpecified therein: and that if a pardon were otherwiſe granted for the death of a man, the judges ſhould notwithſtanding inquire by a grand jury of the neighbourhood concerning the death of every ſuch perſon, and if he were found to have been wilfully murdered, ſuch charter of pardon to be diſallowed; and proviſions were made by impoſing grievous fines upon every perſon, according to his degree and quality, or impriſonment, who ſhould preſume to ſue to the king for any pardons of the aforeſaid crimes: and that ſuch perſons might be known to the whole kingdom, their names were to be upon ſeveral records. The like had been done in many ſtatutes made by ſeveral parliaments, as in 6 Ed. I. 9. the 2 Ed. III. 2. the 10 Ed. III. 2. and the 14 Ed. III. 15. wherein it was acknowledged by the king in parliament; "That the oath of the crown "had not been kept, by reaſon of the grant "of pardons contrary to the aforeſaid ſtatutes; "and enacted, that any ſuch charter of par- "don, from thenceforth granted againſt the "oath of his crown and the ſaid ſtatutes, "the ſame ſhould be holden for none." In the 27 Ed. III. 2. It is further provided, for preventing the people's damage by ſuch pardons; "That from thenceforth in every char- "ter of pardon of felony, which ſhall be "granted

"granted at any man's ſuggeſtion, the ſaid "ſuggeſtion, and the name of him that mak- "eth the ſuggeſtion, ſhall be compriſed in "the ſame charter; and if after the ſame "ſuggeſtion be found untrue, the charter "ſhall be diſallowed and holden for none: "and the juſtices before whom ſuch charter "ſhall be alledged, ſhall inquire of the ſame "ſuggeſtion, and that as well of charters "granted before this time, as of charters "which ſhall be granted in time to come, "and if they find them untrue, then they "ſhall diſallow the charter ſo alledged, and "ſhall moreover do as the law demand- "eth."

Thus have parliaments from time to time declared, that the offences againſt the crown are againſt the public welfare, and that kings are obliged by their oath and office to cauſe juſtice to be done upon traitors and felons, for the kingdom's ſake; according to the antient common law declared by *Magna Charta* in theſe words: *Nulli negabimus, nulli vendemus, nulli differemus juſtitiam* *. We will ſell no man, we will not deny or defer to any man either juſtice or right.

And as the public is concerned, that the due and legal methods be obſerved in the proſecution of offenders, ſo likewiſe doth the ſecurity of every ſingle man in the nation depend upon it: no man can aſſure himſelf he ſhall not be accuſed of the higheſt crimes. Let a man's innocence and prudence be what it will, yet his

* 9 *Hen.* 3 29.

0350

his moſt inoffenſive words and actions are liable to be miſconſtrued, and he may, by ſubornation and conſpiracy, have things laid to his charge, of which he is no ways guilty. Who can ſpeak or carry himſelf with that circumſpection, as not to have his harmleſs words or actions wreſted to another ſenſe than he intended? who can be ſecure from having a paper put into his pockets, or laid in his houſe, of which he ſhall know nothing till his accuſation? Hiſtory affords many examples of the deteſtable practices in this kind of wicked court paraſites, among which one may ſuffice for inſtance, out of Polybius, an approved author *. "Hermes, a powerful favourite under Antiochus the younger, but a man noted to be a favourer of liars, was made uſe of againſt the innocent and brave Epigenes: he had long watched to kill him, for that he found him a man of great eloquence and valour, having alſo favour and authority with the king: he had unjuſtly but unſucceſsfully accuſed him of treaſon, by falſe gloſſes put upon his faithful advice given to the king in open council; this not prevailing, he by artifice got him put out of his command, and to retire from court; which done, he laid a plot againſt him, with the help and counſel of (one of his accomplices) Alexis, and writing letters as if they had been ſent from Molon, (who was then in open rebellion againſt his prince, for fear, amongſt other reaſons, of the cruelty and treachery of Hermes)

* *Polybius*, lib. 5.

"and corrupted one of Alexis's ſervants with great promiſes, who went to Epigenes, to thruſt the letters ſecretly amongſt his other writings, which when he had done, Alexis came ſuddenly to Epigenes, demanding of him, if he had received any letter from Molon: and when he ſaid he had none, the other ſaid, he was confident he ſhould find ſome; wherefore entering the houſe to ſearch, he found the letters, and taking this occaſion, ſlew him, [leſt if the fact had been duly examined, the conſpiracy had been diſcovered.] Theſe things happening thus, the king thought that he was juſtly ſlain; in this manner the worthy Epigenes ended his days: but this great man's deſigns did not reſt here; for within a while, heightened with ſucceſs, he ſo arrogantly abuſed his maſter's authority, as he grew dangerous to the king himſelf, as well as thoſe about him; inſomuch as Antiochus was forced, for that he hated and feared Hermes, to take away his life by ſtratagem, thereby to ſecure himſelf." By theſe, and a thouſand other ways, the moſt unblemiſhed innocence may be brought into the greateſt dangers. Since then every man is thus eaſily ſubject to queſtion, and what is one man's caſe this day, may be another man's to morrow, it is undoubtedly every man's concern, to ſee (as far as in him lies) in every caſe that the accuſed perſon may have the benefit of all ſuch proviſions, as the law hath made for the defence of innocence and reputation.

Now to this end there is nothing ſo neceſſary

0351

ſary as the ſecret and ſeparate examination of witneſſes; for though perhaps, as hath already been obſerved, it may be no very difficult thing for ſeveral perſons, who are permitted to diſcourſe with each other freely, and to hear, or be told what each of their fellows had been aſked, and anſwered, to agree in one ſtory; eſpecially if the jury may not aſk what queſtions they ſhall think fit for the ſatisfaction of their own conſciences; but that they ſhall be ſo far under the correction and cenſure of the judges, as to have the queſtions which they put called by them trifles, impertinent, and unfit for the witneſſes to ſpeak to: yet if they be examined apart, with that due care of ſifting out all the circumſtances which the law requires, where every man of the jury is at full liberty to inquire into any thing for his clearer information, and that with what deliberation they think fit; and all this be done with that ſecrecy which the law commands; it will be almoſt impoſſible for a man to ſuffer under a falſe accuſation.

Nor has the law been leſs careful for the reputation of the ſubjects of England, than for their lives and eſtates; and this ſeems to be one reaſon why, in criminal caſes, a man ſhall not be brought to an open legal trial by a petit jury, till the grand jury have firſt found the bill. The law having intruſted the grand inqueſt in a ſpecial manner with their good names; they are therefore not only to inquire whether the fact that is laid, was done by the party accuſed, but into the circumſtances

ſtances thereof too, whether it were done traiterouſly, feloniouſly, or maliciouſly, *&c.* according to the manner charged: which circumſtances are not barely matter of form, but do conſtitute the very eſſence of the crime: and, laſtly, into the credit of the witneſſes, and that of the party accuſed. And unleſs they find both the fact proved upon him, and ſtrong preſumptions of ſuch aggravating circumſtances attending it, as the law requires in the ſpecification of ſuch crime; and likewiſe are ſatisfied in the credibility of the witneſſes; they ought not to expoſe the ſubject to an open trial in the face of the county, to a certain loſs of his reputation, and hazard of his life and eſtate. Moreover, ſhould this practice of public examination prevail, and the jurors oath of ſecrecy continue, how partial and unequal a thing would it be to declare that to all the world, which will blaſt a man's good name, and religiouſly conceal what they may know tending to his juſtification? to examine witneſſes, perhaps ſuborned, certainly prepared, and have evidence dreſſed up with all the advantages that lawyers wits can give it, of the fouleſt crimes a man can be guilty of, and this given before ſome thouſands againſt him, and yet for the ſame court to ſwear thoſe, whom the law makes judges in the caſe, not to reveal one word of thoſe reaſons, which have ſatisfied their conſciences of his innocence? what is this, but an artifice of ſlandering men, it may be, of the moſt unſpotted converſation, and of abuſing authority, not ſo much to find men

guilty,

0352

guilty, as to make them infamous? after this ignominy is fixed, what judgment can the auditors, and from them the world, make, but of high probability of guilt in the party accused, and perjury in the jury?

This course, if it should be continued, must needs be of most dangerous consequence to all sorts of men: it will both subject every one without relief to be defamed, and fright the best and most conscientious men from serving on grand juries, which is a most necessary part of their duty.

Now since there is in our government, as in every one that is well constituted there ought to be, great liberty of accusation, that no man may be encouraged to do ill through hopes of impunity, if by this means a method be opened for the blasting the most innocent man's honour, and deterring the most honest from being his judges, what remains, but that every man's reputation, which is most dear unto such as are good, is held precariously, and it will be in the power of great men to pervert the laws, and take away whose life and estate they please; or at least to fasten imputations of the most detested crimes upon any, whom for secret reasons they have a mind to defame? the consequences of which scandal, as they are very mischievous to every man, so in a trading country in a more especial manner, to all who live by any vocation of that kind.

The greatest part of trade is driven upon credit; most men of any considerable employment dealing for much more than they are truly

truly worth; and every man's credit depends as well upon his behaviour to the government he lives under, as upon his private honesty in his transactions between man and man; so that the suspicion only of his being obnoxious to the government, is enough to set all his creditors upon his back, and put a stop to all his affairs, perhaps to his utter ruin. What expedition and violence will they all use to recover their debts, when he shall be publickly charged with such crimes, as forfeit life and estate? though there should not be one word of the accusation true, yet they knowing the charge, and the seeming proofs in the court and the consequences of it, and not being acquainted with the truth, as it appears to the jury, self-interest will make his creditors to draw in their effects; which is no more than a new contrivance, under colour of law, of undoing honest men.

If to prevent any of these mischiefs, the jury should discover their fellows and their own counsel, as the court by public examination doth, it would not only be a wilful breach of their oath, but a betraying of the trust which the law has reposed in them, for the security of the subject. For to subject the reasons of their verdicts upon bills to the censure of the judges, were to divest themselves of the power which the law has given them, for most important considerations, without account or control; and to interest in it, whom the law has not in this case trusted, and so by degrees, the course of justice in one of the most

0353

moſt material parts may be changed, and a fundamental ſecurity of our liberty and property inſenſibly loſt. On the other hand, if for fear of being unworthily reproached as *ignoramus* jurymen, obſtinate fellows that obſtruct juſtice, and diſſerve the king, the grand jury ſhall ſuffer the judges, or the king's counſel, to prevail with them to indorſe *Billa vera*, when their conſciences are not ſatisfied in the truth of their accuſation, they act directly againſt their oaths, oppreſs the innocent, whom they ought to protect, and, as far as in them lies, ſubject their country, themſelves and poſterity, to arbitrary powers; pervert the adminiſtration of juſtice, and overthrow the government, which is inſtituted for the obtaining of it, and ſubſiſts by it.

This ſeems to be the greateſt treaſon that can be committed againſt the whole kingdom, and threatens ruin unto every man in private in it. No one can be ſafe againſt authoriſed malice; and, notwithſtanding the care of our anceſtors, rapine, murder, and the worſt of crimes, may be advanced by the formality of verdicts, if grand juries be over-awed, or not ſuffered to inquire into the truth, to the ſatisfaction of their conſciences. Every man, whilſt he lives innocently, doth, under God, place his hopes of ſecurity in the law, which can give no protection, if its due courſe be ſo interrupted, that frauds cannot be diſcovered: witneſſes may as well favour offenders, as give falſe teſtimony againſt the guiltleſs, and if they by hearing what each other ſaith, are put into

to a way of concealing their villainous deſigns, there can be no legal revenge of the crimes already committed. Others by their impunity will be encouraged to do the like: and every quiet-minded perſon will be equally expoſed unto private injuries, and ſuch as may be done unto him, under the colour of law. No man can promiſe unto himſelf any ſecurity for his life or goods: and they who do not ſuffer the utmoſt violences in their own perſons, may do it in their children, friends and neareſt relations, if he be deprived of the remedies that the law ordains, and forced to depend upon the will of a judge, who may be (and perhaps we may ſay are) too often corrupted, or ſwayed by their own paſſions, intereſts, or the impulſe of ſuch as are greater than they. This miſchief is aggravated by a commonly received opinion, that whoſoever ſpeaks againſt an accuſed perſon is the king's witneſs; and the worſt of men, in their worſt deſigns, do uſually ſhelter themſelves under that name; whereas he only is the king's witneſs, who ſpeaks the truth, whether it be for or againſt him that is accuſed. As the power of the king is the power of the law, he can have no other intention than that of the law, which is to have juſtice impartially adminiſtered: and as he is the father of his people, he cannot but incline ever to the gentleſt ſide, unleſs it be poſſible for a father to delight in the deſtruction, or deſire to enrich himſelf by the confiſcation of his children's eſtates. If the moſt wicked princes have had different thoughts, they

0354

they have been obliged to diſſemble them. We know of none worſe than Nero; but he was ſo far from acknowledging, that he deſired any man's condemnation, that he looked upon the neceſſity of ſigning warrants for the execution of malefactors, as a burden, and rather wiſhed he had not learnt to write, than to be obliged to do it *. They who by ſpreading ſuch barbarous errors, would create unto the king an intereſt different from that of his people which he is to preſerve, whilſt they pretend to ſerve him in deſtroying of them, they deprive him of his honour and dignity; juſtice is done in all places, in the name of the chief magiſtrate; it being preſumed that he doth embrace every one of his ſubjects with equal tenderneſs, until the guilty are by legal proofs diſcriminated from the innocent; and amongſt us the king's name may be uſed in civil caſes, as well as criminal: but it is as impoſſible for him rightly to deſire I ſhould be condemned for killing a man whom I have not killed, or for a treaſon that I have not committed, as that my land ſhould be unjuſtly taken from me by a judgment from his bench, or I ſhould be condemned to pay a debt that I do not owe.

In both caſes we ſue unto him for juſtice, and demand it as our right. We are all concerned in it, publickly and privately; and the king as well as all the officers of juſtice, are by their ſeveral oaths, obliged in their reſpective capacities to perform it. They are

* Sen. Vit. Ner. *Utinam neſcirem literas.*

bound

bound to give their aſſiſtance to find out offenders; and the king's attorney is by his oath to proſecute them, if he be required. And he is not only the king's ſervant in ſuch caſes, but the nation's; or rather, cannot otherwiſe ſerve the king, than by ſeeing juſtice done in the nation.

Whenſoever any man receives an injury in his perſon, wife, children, friends or goods, the king is injured; inaſmuch as he is by his office to prevent ſuch miſchief, and ought to be concerned in the welfare of every one of his ſubjects; but the parties to whom the injuries are done, are the immediate ſufferers, and the proſecution is principally made, that they may be repaired or revenged, and other innocent perſons ſecured by the puniſhment of offenders, in which the king can be no otherwiſe concerned than as he is to ſee his office faithfully performed, and his people protected. The king's ſuit therefore is in the behalf of his people; yet the laws leave unto every man a liberty, in caſe of treaſons, murders, rapes, robberies, &c. to ſue in the king's name, and crave his aid; or by way of appeal, in his own. The ſame law looks upon felons, or traitors, as public enemies; and by authorizing every one to purſue and apprehend them, teacheth us, that every man, in his place, ought to do it. The ſame act whereby one, or a few are injured, threatens all; and every man's private intereſt ſo concurs with that of the public, that all depends upon the exact preſervation of

I

the

the method prescribed by the law, for the impartial inquisition after suspected offenders, and most tender care of preserving such as are innocent. As this cannot possibly be effected without secret and separate examinations, the forbidding of them is no less than to change the course which is enjoined by law, confirmed by custom, and grounded upon reason and justice.

If, on the other side, any man believe, that such as in the king's name prosecute suspected delinquents, ought only to try how they may bring them to be condemned, he may be pleased to consider, that all such persons ought, according unto law, to produce no witness whom they do not think to be true; no evidence, which they do not believe good; nor can conceal any thing that may justify the accused. No trick or artifice can be lawfully used to deceive a grand jury, or induce them to find or reject a bill, otherwise than as they are led by their own consciences.

All lawyers were antiently sworn to put no deceit upon the courts for their client's sake; and there are statutes still in force to punish them if they do it. But there is an eternal obligation upon such as are of counsel against persons accused of crimes, not to use such arts as may bring the innocent to be condemned; and thereby pervert that, which is not called the judgment of man, but of GOD: because man renders it in the stead and by the commandment of GOD. Such practices do not exalt the jurisdiction of tribunals; but infect and

and pollute them with that innocent blood, which will be their overthrow. And least of all can it be called a service to the king; since none could ever stand against the cry of it. This is necessarily implied in the attorney-general's oath, to serve the king in his kingly office, wherein the law presumes he can do no wrong. But the greatest of all wrong, and that which hath been most destructive unto thrones, is by fraud to circumvent and destroy the innocent. This is to turn a legal king into a Nimrod, a hunter of men. This is not to act the part of a father or a shepherd, who is ready to lay down his life for his sheep; but such as the psalmist complains of, "who "eat up the people as if they eat bread." Jezebel did perhaps applaud her own wit, and think she had done a great service to the king, by finding out men of Belial, judges and witnesses, to bring Naboth to be stoned: but that unregarded blood was as a canker, or the plague of leprosy, in his throne and family, which could not be cured but by its overthrow and extinction. But if the attorney-general cannot serve the king by abusing juries, and subverting the innocent, he can as little gain an advantage to himself by falsifying his oath; by the true meaning whereof he is to prosecute justice impartially: and the eternal divine law would annul any oath or promise that he should have taken to the contrary, even though his office had obliged him unto it.

The like obligation lies upon jurors not to suffer themselves to be deluded or persuaded,

that

0356

that the judges, king's counſel, or any others can diſpenſe with that oath, or any part of it, which they have taken before God unto the whole nation; nor to think that they can ſwerve from the rules ſet by the law without a damnable breach of it. The power of releaſing or diſſolving conſcientious obligations, acknowledged in the pope, makes a great part of the Roman ſuperſtition; and that grand impoſtor could never corrupt kingdoms and nations to their deſtruction, and the eſtabliſhment of his tyranny, until he had brought them to believe he could diſpenſe with oaths, taken by kings unto their ſubjects, and by ſubjects to their kings; nor impoſe ſo extravagant an error upon either, until he had perſuaded them he was in the place of God. It is hard to ſay, how the judges or king's counſel can have the ſame power, unleſs it be upon the ſame title; but we may be ſure they may as well diſpenſe with the whole oath as any part of it, and can have no pretence unto either, unleſs they have the keys of heaven and hell in their keeping: it is in vain to ſay, the king as any other man may remit the oath taken unto and for himſelf; he is not a party for himſelf, but in the behalf of his people, and cannot diſpoſe of their concernments without their conſent, which is given only in parliament.

The king's counſel ought to remember, they are in criminal caſes of counſel unto every man in the kingdom. It is no ways referred unto the direction of the judges, or unto them, whether

whether that ſecrecy enjoined by law, be profitable unto the king or kingdom; they muſt take the law as it is, and render obedience unto it, until it be altered by the power that made it. To this end the judges, by acts of parliament, *viz.* 18 Ed.III. cap. 8. and 20 Ed. III. cap. 1. are ſworn to ſerve the people, "Ye "ſhall ſerve our lord the king and his people "in the office of juſtice, *&c.* ye ſhall deny to "no man common right by the king's letters, "nor no other man's, nor for no other cauſe; "and in default thereof in any point, they are "to forfeit their bodies, lands and goods." This proves them to be the people's ſervants as well as the king's.

Further, by the expreſs words of the commiſſions of oyer and terminer, they are required to "aſſiſt every man that ſuffers injury, and "make diligent inquiſition after all manner of "falſhoods, deceits, offences and wrongs done "to any man, and thereupon to do juſtice according to the law." So that in the whole proceedings in order unto trial, and in the trials themſelves, the thing principally intended, which ſeveral perſons are ſeverally in their capacities obliged to purſue, is, the diſcovery of truth: the witneſſes are to depoſe "the "truth, the whole truth, and nothing but the "truth:" thereupon the counſel for the king are to proſecute: the grand jury to preſent: and the petit jury to try. Theſe are ſeveral offices, but all to the ſame end. It is not the priſoner, but the crime that is to be purſued; this primarily, the offender but by conſequence; and

0357

and therefore ſuch courſes muſt be taken, as may diſcover that, and not ſuch as may inſnare him. When the offence is found, the impartial letter of the law gives the doom; and the judges have no ſhare in it, but the pronouncing of it: till then the judges are only to preſide, and take care that every man elſe, who is employed in this neceſſary affair, do his duty according to law. So that upon the reſult of the whole tranſaction, impartial juſtice may be done, either to the acquittal, or condemnation of the priſoner.

Hereby it is manifeſt why the judges are obliged by oath, to "ſerve the people as well "as the king:" and by commiſſion, to "ſerve every one that ſuffers injuries." As they are to ſee that right be done to the king, and his injured ſubjects in diſcovering of the delinquent; ſo they are to be of counſel with the priſoner, whom the law ſuppoſeth may be ignorant as well as innocent; and therefore has provided, that the court ſhall be of counſel for him, and as well inform him of what legal advantages the law allows him, as to reſolve any point of law when he ſhall propoſe it to them. And it ſeems to be upon the preſumption of this ſteady impartiality in the judges, (thus obliged by all that is held ſacred before God and man to be unbiaſſed) that the priſoner hath no counſel; for if the court faithfully perform their duty, the accuſed can have no wrong or hardſhip, and therefore needs no adviſer.

Now ſuppoſe a man perfectly innocent, and in ſome meaſure knowing in the law, ſhould be accuſed of treaſon or felony; if the judges ſhall deny unto the grand jury the liberty of examining any witneſſes, except in open court, where nothing ſhall be offered that may help to clear the priſoner, but every thing aggravated, that gives colour for the accuſation; ſuch perſons only produced, as the king's counſel, or the proſecutors ſhall think fit to call, of whoſe credit alſo the jury muſt not inquire, but ſhall be controlled and brow-beaten in aſking queſtions of ſuch unknown witneſſes for their own ſatisfaction, if they have any tendency to diſcover the infamy of theſe witneſſes, or the falſhood of their teſtimony; how can innocence ſecure any man from being arraigned?

And if the oath of the judges ſhould be as much forgotten in the farther proceedings upon the trial, where in caſes of treaſon the priſoner ſhall have all the king's counſel (commonly not the moſt unlearned) prepared with ſtudied ſpeeches, and arguments to make him black and odious, and to ſtrain all his words, and to alledge them for inſtances of his guilt: if then all his private papers, and notes to help his memory in his plea and defence, ſhall be taken from him by the gaoler, or the court, and given to his proſecutors; and all advice and aſſiſtance from counſels or friends, and his neareſt relations, ſhall be denied him, and none ſuffered by word or writing to inform him of the indifferency, or ho-

0358

nesty, or the partiality or malice of the pannels returned (whom the law allows him to challenge or refuse, either peremptorily or for good reasons offered;) should he be thus deprived of all the good provisions of the law for his safety, to what frauds, perjuries, and subornations is not he, and every man exposed, who may be accused? What deceits may there not be put upon juries? And what probability is there of finding security in innocence? What an admirable execution would this be of their commission, to "make diligent inquisition after all manner of falshoods, deceits, wrongs and frauds, and thereupon to do justice according to law;" when at the same time, if so managed, a method would be introduced of ruining and destroying any man in the form of justice? Such practices would be the highest dishonour to the king imaginable, whose name is used, and so far misrepresent the kingly office, as to make that appear to have been erected to vex and destroy the people, which was intended and ordained to help and preserve them.

The law so far abhors such proceedings, that it intends, that every man should be strictly bound to be exactly just, in their several employments, relating to the execution of justice. The serjeant of the king's counsel, Sir George Jeffreys, amongst the rest, who prosecute in the king's name, and are consulted in the forming bills of indictment, and advise about the witnesses, and their testimonies against the accused; these, if they would

would remember it, when they are made serjeants, take an oath, Coke's 2d *Institute*, page 214. "as well and truly to serve the "people," whereof the party accused is one, "as the king himself; and to minister the "king's matters duly and truly after the "course of the law to their cunning;" not to use their cunning and craft to hide the truth, and destroy the accused if they can.

They are also obliged by the Statute of *Westm.* 1. cap. 29. to put no manner of deceit or collusion upon the king's court, nor secretly to consent to any such tricks as may abuse or beguile the court, or the party, be it in causes civil or criminal: and it is ordained, that if any of them be convicted of such practices, he shall be imprisoned for a year, and never be heard to plead again in any court; and if the mischievous consequence of their treacheries be great, they are subject to farther and greater punishments. Our antient law book, called *the Mirror of Justice*, cap. 2. sect. 4. says, "That every serjeant pleader "is chargeable by his oath, not to maintain "or defend any wrong or falshood to his "knowledge, but shall leave his client "when he shall perceive the wrong intended "by him: also that he shall not move or "proffer any false testimony, nor consent to "any lies, deceits or corruptions whatsoever "in his pleadings."

As a farther security unto the people against all attempts upon their laws, exemplary justice hath been done, in several ages, upon

such

ſuch judges, and juſticiaries, as through corruption, ſubmiſſion unto unjuſt commands, or any other ſiniſter conſideration, have dared to ſwerve from them: the puniſhments of theſe wicked men remain upon record, as monuments of their infamy, to be a terror unto all that ſhall ſucceed them. In the reign of the Saxons, the moſt notable example was given by king Alfred, who cauſed above forty judges to be hanged in a ſhort ſpace, for ſeveral wrongs done to the people, as is related in *the Mirror of Juſtice*: ſome of them ſuffered for impoſing upon juries, and forcing them to give verdicts according to their will; and one, as it ſeems, had taken the confidence to examine a jury, that he might find which of them would ſubmit to his will, and ſetting aſide him who would not, condemned a man upon the verdict of eleven.

Since the coming in of the Normans, our parliaments have not been leſs ſevere againſt ſuch judges as have ſuffered the courſe of juſtice to be perverted, or the rights and liberties of the people to be invaded: in the time of Edward the Firſt, *Anno* 1289, the parliament finding, that all the judges, except two, had ſwerved from their duty, condemned them to ſeveral puniſhments according unto their crimes; as baniſhment, perpetual impriſonment, or the loſs of all their eſtates *, *&c.* Their particular offences are ſpecified in a ſpeech made by the archbiſhop of Canterbury in parliament. They had broken *Magna*

* *Ex Chron. Anno* 10 *Ed.* I. *ad finem.*

Charta;

Charta; incited the king againſt his people; violated the laws, under pretence of expounding them; and impudently preſumed to prefer their own counſels to the king, before the advices of parliament; as appears by the ſpeech, *&c.* thereunto annexed.

The like was done in the time of Edward II. when Hugh de Spencer was charged for having prevailed with the king to break his oath to the people, in doing things againſt the law by his own authority.

In Edward the Third's time, judge Thorpe was hanged, for having in the like manner brought the king to break his oath. And the happy reign of that great king * affords many inſtances of the like nature; among which, the puniſhment of Sir Henry Green, and Sir William Skipworth, deſerve to be obſerved, and put into an equal rank with thoſe of his brave and victorious grandfather.

In Richard the Second's time, eleven of the judges, forgetting the dreadful puniſhments of their predeceſſors †, ſubſcribed malicious indictments, againſt law; and gave falſe interpretations of our antient laws to the king, thereby to bring many of his moſt eminent and worthieſt ſubjects to ſuffer as traytors at his will; ſubjected the authority, and very being of parliaments to his abſolute pleaſure; and made him believe, that all the laws lay in his own breaſt. Hereupon ſentence of

* Daniel's *Hiſtory*, page 260, 261.

† See all the Engliſh Hiſtories of *Walſingham*, *Fabian*, *Speed*, &c. in the eleventh and twelfth years of Richard II.

death

0360

death passed upon them; and though upon their repentance, and confessing they had been swayed by fear and threatenings from the king, two only were executed; all the others were for ever banished, as unworthy to enjoy the benefit of that law, which they had so perfidiously and basely betrayed.

It were an endless work to recite all the examples of this kind that are to be found in our histories and records; but that of Empson and Dudley must not be omitted: they had craftily contrived to abolish grand juries, and to draw the lives and estates of the people into question, without indictments by them; and by surprize, and other wicked practices, they gained an act of parliament for their countenance. Hereupon false accusations followed without number: oppression and injustice broke forth like a flood. And to gain the king's favour, they filled his coffers. The indictments against them, mentioned in Anderson's *Reports*, p. 156, 157. are worth reading; whereby they are charged "with "treason, for subverting the laws and customs "of the land, in their proceedings without "grand juries; and procuring the murmur-"ing and hatred of the people against the "king; to the great danger of him and the "kingdom." Nothing could satisfy the kingdom, though the king was dead whom they had flattered and served, but such justice done upon them, and many of their instruments and officers, as may for ever make the ears of judges to tingle.

And

And it is not to be forgotten, that the judges in queen Elizabeth's time, in the case of R. Cavendish, in Anderson's *Reports*, page 152, and 155. "were," as they told the queen and her counsellors, "by the punishment of for-"mer judges, especially of Empson and "Dudley, deterred from obeying her illegal "commands." The queen had sent several letters under her signet; great men pressed them to obey her patent under the great seal; and the reasons of their disobedience being required; they answered, "That the queen "herself, and the judges also, had taken an "oath to keep the laws; and if they should "obey her commands, the laws would not "warrant them, and they should therein "break their oath, to the offence of God, "and their country, and the commonwealth "wherein they were born. And, say they, "if we had no fear of God, yet the exam-"ples and punishments of others before us, "who did offend the laws, do remember, "and recal us from the like offences."

Whosoever, being in the like places, may design, or be put upon the like practices, will do well to consider these examples, and not to think that he, who obliquely endeavours to render grand juries useless, is less criminal than he that would absolutely abolish them. That which doth not act according to its institution, is as if it were not in being. And whoever doth without prejudice consider this matter, will see that it is not less pernicious to deny juries the use of those methods of

5 discovering

0361

diſcovering truth, which the law hath appointed; and ſo by degrees turn them into a meer matter of form, than openly and avowedly to deſtroy them. Surely, ſuch a gradual method of deſtroying our native right is the moſt dangerous in its conſequence. The ſafety which our forefathers for many hundreds of years enjoyed, under this part of the law eſpecially, and have tranſmitted to us, is ſo apparent to the meaneſt capacity, that whoever ſhall go about to take it away, or give it up, is like to meet with the fate of Iſhmael, to have every man's hand againſt him, becauſe his is againſt every man. Artifices of this kind will ruin us more ſilently, and ſo with leſs oppoſition, and yet as certainly as the other more open oppreſſion. This only is the difference, that one way we ſhould be ſlaves immediately, and the other inſenſibly: but with this farther diſadvantage too, that our ſlavery would be the more unavoidable, and the faſter riveted upon us, becauſe it would be under colour of law, which practice in time would obtain.

Few men at firſt ſee the danger of little changes in fundamentals; and thoſe who deſign them, uſually act with ſo much craft, as beſides the giving ſpecious reaſons, they take great care that the true reaſon ſhall not appear. Every deſign therefore of changing the conſtitution ought to be moſt warily obſerved, and timely oppoſed. Nor is it only the intereſt of the people, that ſuch fundamentals ſhould be duly guarded, for whoſe benefit they were at firſt ſo carefully laid, and whom

whom the judges are ſworn to ſerve; but of the king too, for whoſe ſake thoſe pretend to act, who would ſubvert them.

Our kings, as well as judges, are ſworn to maintain the laws: they have themſelves, in ſeveral ſtatutes, required the judges, at their peril, to adminiſter equal juſtice to every man, notwithſtanding any letters or commands, *&c.* even from themſelves to the contrary. And when any failure hath been, the greateſt and moſt powerful of them have ever been the readieſt to give redreſs. It appears by the preface to the ſtatutes of the twentieth of Edward the IIId, that the judicial proceedings had been perverted; that letters, writs, and commands had been ſent from the king and great men to the juſtices; and that perſons belonging to the court of the king, the queen, and the prince of Wales, had maintained and abetted quarrels, *&c.* whereby the laws had been violated, and many wrongs done. But the king was ſo far from juſtifying his own letters, or thoſe illegal practices, that the preamble of thoſe ſtatutes ſaith, they were made for the relief of the people in their ſufferings by them. That brave king, in the height of his glory, and vigour of his age, choſe rather to confeſs his error, than to continue in it; as is evident by his own words: — "Edward, by the grace of God, "*&c.* Becauſe by divers complaints made "unto us, we have perceived that the law of "the land, which we by our oath are bound "to maintain, is the leſs well kept, and exe- "cution

0362

" cution of the ſame diſturbed many times by
" maintainances and procurements, as well
" in the court as the country, we, greatly
" moved of conſcience in this matter, and
" for this cauſe, deſiring as much for the
" pleaſure of God, and eaſe and quietneſs of
" our ſubjects, as to ſave our conſcience, and
" for to ſave and keep our ſaid oath, by the
" aſſent, &c. enact, That judges ſhall do
" juſtice, notwithſtanding writs, letters, or
" commands from himſelf, &c. and that
" none of the king's houſe, or belonging to
" the king, queen, or prince of Wales, do
" maintain quarrels, &c."

King James, in his ſpeech to the judges in the Starchamber, in the year 1616, told them, "That he had after many years reſolved to renew his oath, made at his coronation, concerning juſtice, and the promiſe therein contained for maintaining the law of the land." And in the next page ſave one ſays, "I was ſworn to maintain the law of the land, and therefore had been perjured if I had broken it: God is my judge, I never intended it." And his majeſty that now is, hath made frequent declarations and proteſtations, of his being far from all thoughts of deſigning an arbitrary government; and that the nation might be confident he would rule by law.

Now if after all this, any officer of the king's ſhould pretend inſtructions from his maſter, to demand ſo material an alteration of proceedings, in the higheſt caſes againſt law,

law, as are above mentioned; and the court (who are required to ſlight and reject the moſt ſolemn commands under the great ſeal, if contrary to law) ſhould upon a verbal intimation allow of ſuch a demand, and ſo break in upon this bulwark of our liberties, which the law has erected; might it not give too juſt an occaſion to ſuſpect, that all the legal ſecurities of our lives and properties are unable to protect us? And may not ſuch fears rob the king of his greateſt treaſure and ſtrength, the people's hearts, when they dare not rely upon him in his kingly office and truſt, for ſafety and protection by the laws? Our Engliſh hiſtory affords many inſtances of thoſe that have pretended to ſerve our king in this manner, by undermining the people's rights and liberties, whoſe practices have ſometimes proved of fatal conſequence to the kings themſelves, but more frequently ended in their own deſtruction.

But after all, imagining it could be made out that this method of private examination by a grand jury, (which, from what has been ſaid before, hath appeared to be ſo extremely neceſſary for the public good, and to every private man's ſecurity) were inconvenient, or miſchievous, and therefore fit to be changed; yet being ſo eſſential a part of the common law, it is no otherwiſe alterable than by act of parliament. We find by precedents, that the bare forms of indictments could not be reformed by the judges. The words *Depopulatores agrorum, inſidiatores viarum, Vi & Armis,*

0363

Armis, Baculis, Cultellis, Arcubus & Sagittis, could not be left out but by advice of the kingdom in parliament. A writ iſſued in the time of king Edward III. giving power to hear and determine offences, and all the juſtices reſolved, (Coke's 4th *Inſt*. p. 164.) "That they could not lawfully act, having "their authority by writ, where they ought "to have had it by commiſſion: though it "was in the form and words that the legal "commiſſion ought to be. John Knivett, "chief juſtice, by advice of all the judges, "reſolved that the ſaid writ was *contra legem*. "and where divers indictments were before "them found againſt T. S. the ſame, and all "that was done by colour of that writ, was "damned."

If in ſuch ſeeming little things as theſe, and many others that may be inſtanced, the wiſdom of the nation hath not thought fit to intruſt the judges, but reſerved the conſideration of them to the legiſlative power; it cannot be imagined, that they ſhould ſubject to the diſcretion and pleaſure of the judges, thoſe important points in the eſtabliſhed courſe of adminiſtring juſtice, whereupon depends the ſafety of all the ſubjects lives and fortunes. If judges will take upon themſelves to alter the conſtant practice, they muſt either alter the oath of the grand jury, or continue it: if they ſhould alter it, ſo as to make it ſail with any ſuch new method, and thus in appearance charitably provide that the grand jury ſhould not take a mock oath, or forſwear themſelves; they

they then make an incroachment upon the authority of parliaments, who only can make new, or change old legal oaths, and all the proceedings thereupon would be void.

If they ſhould continue conſtantly to impoſe the ſame oath, as well when they have notice from the king, that the jury ſhall not be bound to keep his ſecrets and their own, as when they have none; they muſt aſſume to make the ſame form of law to be of force, and no force; and the ſame words to bind the conſcience, or not bind it, as they will have them: whereby they would profane the natural religion of an oath, and bring a foul ſcandal upon chriſtianity, by trifling in that ſacred matter worſe than heathens. And whilſt the judges find themſelves under the neceſſity of adminiſtering the oath unto grand juries, and not ſuffer them to obſerve it according to their conſciences, they would confeſs the illegality of their own proceedings, and can never be able to repair the breaches by pretending a tacit implication if the king will; but muſt unavoidably fall under that approved maxim of our law, *Maledicta eſt interpretatio quæ corrumpit textum*: It is a curſed interpretation that diſſolves a text.

There are two vulgar errors concerning the duty of grand juries, which, if not removed, will in time deſtroy all the benefit we can expect from that conſtitution, by turning them into a mere matter of form, which were deſigned for ſo great ends. Many have of late thought, and affirmed it for law, that the grand

 jury

0364

jury is neither to make ſo ſtrict inquiry into matters before them, nor to look for ſo clear evidence of the crime, as the petit jury; but that of their preſentments, being to paſs a ſecond examination, they ought to indict upon a ſuperficial inquiry and bare probabilities: whereas ſhould either of theſe opinions be admitted, the prejudice to the ſubject would be equal to the total laying aſide grand juries. There being in truth no difference between arraigning without any preſentment from them at all, and their preſenting upon ſlight grounds.

For the firſt, that grand juries ought not to make ſo ſtrict inquiry, it were to be wiſhed, that we might know how it comes to paſs, that an oath ſhould be obligatory upon a petit jury, and not unto the grand; or in what points they may lawfully, and with good conſcience, quit that exactneſs: whether in relation to the witneſſes and their credibility; or the fact and all its circumſtances; or the teſtimony and its weight; or, laſtly, in reference to the priſoner, and probability of his guilt; and withal, upon what grounds of law or reaſon their opinion is founded. On the contrary, he that will conſider either the oath they take or the commiſſion, where their duty is deſcribed, will find in all points, that there lies an equal obligation upon them and the petit juries.

They ſwear "diligently to inquire, and "true preſentment make, *&c.* and to preſent "the truth, the whole truth, and nothing but "the truth," *&c.* And in the commiſſion of oyer

oyer and terminer, their duty, with that of the commiſſioners, is thus deſcribed; "to inquire by the oath of honeſt and lawful men, "*&c.* by whom the truth of the matter may "be beſt known, of all manner of treaſons, "*&c.* confederacies, falſe teſtimonies, *&c.* as "alſo the acceſſories, *&c.* by whomſoever or "howſoever done, perpetrated or committed, "by whom or to whom, how, in what way, "or in what manner. And of other articles "and circumſtances premiſed, and of any "other thing or things howſoever concerning "the ſame." Now for any man after this to maintain, that grand juries are not to inquire, or not carefully, is as much as in plain terms to ſay, they are bound to act contrary to the commiſſion and their oath: and to affirm that they can diſcharge their duty according to the obligations of law and conſcience, which they lie under, without a ſtrict inquiry into particulars, is to affirm that the end can be obtained without the means neceſſary to it.

The truth is, that grand juries have both a larger field for their inquiry, and are in many reſpects better capacitated to make a ſtrict one, than the petit juries: theſe laſt are confined as to the perſon and the crime, ſpecified in the indictment; but they are at large obliged to ſearch into the whole matter, that any ways concerns every caſe before them, and all the offences contained in it, all the criminal circumſtances whatſoever, and into every thing, howſoever concerning the ſame. They are bound

0365

bound to inquire whether their informations of suspected treasons or felonies, brought by accusers, be made by conspiracy, or subornation; who are the conspirators, or false witnesses; by whom abetted, or maintained; against whom, and how many, the conspiracy is laid; when, and how, and in what course it was to have been prosecuted.

But none of these most intricate matters (which need the most strict and diligent inquiries) can come under the cognisance of the petit jury; they can only examine so much, as relates to the credit of those witnesses brought to prove the charge against the parties indicted; wherein also they have neither power, nor convenient time to send for persons, or papers, if they think them needful, nor to resolve any doubts of the lawfulness, and credibility of the testimonies.

Yet further, if the crimes objected are manifest, it is then the grand jury's duty to inquire after all the persons any ways concerned in them, and the several kinds of offences, whereof every one ought jointly, or separately to be indicted as they shall discover them to have been principals, or accessories, parties or privy thereunto, or to have comforted, or knowingly relieved either the traitors or felons, or concealed the offences of others: but the inquisition into all these matters, which require all possible strictness in searching, as being of the highest importance unto the public justice and safety, is wholly out of the power and trust of the petit juries. The guilt or innocence

cence of the parties put upon their trials, and the evidence thereof given, are the only objects of their inquiries. It is not their work, nor within their trust, to search into the guilt, or crimes of the parties, whom they try; they are bound to move within the circle of the indictment made by the grand jury, who are to appoint, and specify the offences, for which the accused shall be tried by the petit jury.

When a prosecutor suggests that any man is criminal, and ought to be indicted, it belongs to the grand jury to hear all the proof he can offer, and to use all other means they can, whereby they may come to understand the truth of the suggestion, and every thing or circumstance that may concern it; then they are carefully to examine the nature of the facts, according unto the rules of the common law, or the express words of the statutes, whereby offences are distinguished, and punishments allotted unto each of them: it is true, that upon hearing the party, or his witnesses, the petit jury may acquit or judge the facts in the indictment to be less heinous, or malicious, than they were presented by the grand jury, but cannot aggravate them; which being considered, it will easily appear, by the intent and nature of the powers given unto grand juries, that they are by their oaths obliged, and their institution, ordained to keep all injustice from entering the first gates of our courts of judicature, and to secure the innocent not only from punishmen, but from all disgrace, vexation, expence or danger.

To

0366

To underſtand our law clearly herein, the jurors muſt firſt know the lawful grounds whereupon they may and ought to indict, and then what truly and juſtly ought to be taken for the ground of an indictment. The principal and moſt certain is the jurors perſonal knowledge, by their own eyes or ears, of the crimes whereof they indict: or ſo many pregnant concurring circumſtances, as fully convince them of the guilt of the accuſed; when theſe are wanting, the depoſitions of witneſſes, and their authority, are their beſt guides in finding indictments. When ſuch teſtimonies make the charge manifeſt and clear to the jury, they are called evidence, becauſe they make the guilt of the criminal evident, and are like the light that diſcovers what was not ſeen before: all witneſſes for that reaſon are uſually called the evidence, taking their name from what they ought to be: yet witneſſes may ſwear directly and poſitively to an accuſation, and be no evidence of its truth to the jury; ſometimes ſuch remarks may be made upon the witneſſes, as well as in relation to their reputation and lives, as to the matter, manner, and circumſtance of their depoſitions, that from thence the falſhood may appear, or be ſtrongly ſuſpected: it is therefore neceſſary to know what they mean by a probable cauſe or evidence, who ſay that our law requires no more for an indictment.

Probable, is a logical term, relating to ſuch propoſitions, as have an appearance, but no certainty of truth, ſhewing rather what is not

not, than what is, the matter of ſyllogiſms: theſe may be allowed in rhetorick, which worketh upon the paſſions, and makes uſe of ſuch colours as are fit to move them, whether true or falſe; but not in logick, whoſe object is truth; as it principally intends to obviate the errors that may ariſe from the credit given unto appearances, by diſtinguiſhing the uncertain from the certain, *veriſimile à vero*, it cannot admit of ſuch propoſitions as may be falſe as well as true; it being as impoſſible to draw a certain concluſion from uncertain premiſes, as to raiſe a ſolid building upon a tottering or ſinking foundation. This ought principally to be conſidered in courts of juſtice, which are not erected to bring men into condemnation, but to find who deſerves to be condemned: and thoſe rules are to be followed by them, which are leaſt liable to deception. For this reaſon the counſel of the Areopagites, and ſome others of the beſt judicatures that have been in the world, utterly rejected the uſe of rhetorick, looking upon the art of perſuading by uncertain probabilities, as little differing from that of deceiving, and directly contrary to their ends, who, by the knowledge of truth, deſired to be led in the doing of juſtice: but if the art that made uſe of theſe probabilities was baniſhed from uncorrupted tribunals, as a hindrance unto the diſcovery of truth, they that would ground verdicts totally upon them, declare an open neglect of it; and as it is ſaid, that *uno abſurdo dato mille ſequuntur*, if juries were to be guided by probabilities, the next queſtion would be concerning the more or leſs probable,

0367

bable, or what degree of probability is required to persuade them to find a bill: this being impossible to fix, the whole proceedings would be brought to depend upon the fancies of men; and as nothing is so slight but it may move them, there is no security that innocent persons may not be brought every day into danger and trouble. By this means certain mischiefs will be done, whilst it is by their own confession uncertain whether they are any ways deserved by such as suffer them, to the utter overthrow of all justice.

If the word *probable* be taken in a common, rather than a nice logical sense, it signifies no more than likely, or rather more than unlikely: when a matter is found to be so, the wager is not even, there is odds upon one side, and this may be a very good ground, for betting in a tennis-court, or at a horse-race; but he that would make the administration of justice to depend upon such points, seems to put a very small value upon the fortunes, liberties and reputation of men, and to forget that those who sit in courts of justice have no other business there than to preserve them.

This continues in force, though in a dialogue between a Barrister and a Grand-Jury Man, published under the title of the Grand-Jury Man's Oath and Office, it be said, p. 8, and 9. "That their work is no more than to "present offences fit for a trial, and for that "reason, give in only a verisimilar or probable "charge; and others have affirmed, that a "far less evidence will warrant a grand jury's

 "indict-

"indictment, than a petit jury's verdict." For nothing can be more opposite to the justice of our laws, than such opinions: all laws in doubtful cases direct a suspension of judgment, or a sentence in favour of the accused person: but if this were hearkened unto, grand juries should upon their oaths affirm, they judge him criminal, when the evidence is upon such uncertain grounds that they cannot but doubt, whether he is so or not.

It cannot be hereupon said, that no evidence is so clear and full, but it may be false, and give the jury occasion of doubts, so as all criminals must escape, if no indictment ought to be found unless the proofs are absolutely certain, for it is confessed that such cases are not capable of an infallible mathematical demonstration; but a jury, that examines all the witnesses, that are likely to give any light concerning the business in question, and all circumstances relating to the fact before them, with the lives and credit of those that testify it, and of the person accused, may and do often find that which in their consciences doth fully persuade them, that the accused person is guilty; this is as much as the law, or their oath doth require; and such as find bills, after having made such a scrutiny, are blameless before God and man, if through the fragility inseparable from human nature, they should be led into error? For they do not swear that the bill is true, but that they in their consciences believe that it is so; and if they write *ignoramus* upon the bill, it is not thereby de-

 clared

0368

clared to be falſe, nor the perſon accuſed acquitted, but the matter is ſuſpended, until it can be more clearly proved, as in doubtful caſes it always ought to be.

Our anceſtors took great care that ſuſpicious, and probable cauſes, ſhould not bring any man's life, and eſtate into danger; for that reaſon, it was ordained, by the Stat. of 37 Ed. III. cap. 18. "That ſuch as made ſuggeſtions to the king, ſhould find ſurety to " purſue, and incur the ſame pain, that the " other ſhould have had if he were attainted, " in caſe their ſuggeſtion be found evil; " and that then proceſs of the law ſhould be " made againſt the accuſed."

This manner of proceeding hath its root on eternal, and univerſal reaſon: the law given by God unto his people, *Deut.* 19. allotted the ſame puniſhment unto a falſe witneſs, as a perſon convicted. The beſt-diſciplined nations of the world learned this from the Hebrews, and made it their rule in the adminiſtration of juſtice. The Grecians generally obſerved it, and the Romans, according to their *Lex Talionis,* did not only puniſh death with death, but the intention of committing murder by falſe accuſations, with the ſame ſeverity, as if it had been effected by any other means. This law was inviolably obſerved, as long as any thing of regularity or equity remained amongſt them; and when through the wickedneſs of ſome of the emperors, or their favourites, it came to be overthrown, all juſtice periſhed with it. A crew of falſe informers broke

out,

out, to the deſtruction of the beſt men, and never ceaſed, until they had ruined all the moſt eminent and antient families: circumvented the perſons, that by their reputation, wealth, birth or virtue, deſerved to be diſtinguiſhed from the common ſort of people, and brought deſolation upon that victorious city. Tacitus complains of this, as the cauſe of all the miſchiefs ſuffered in his time and country *.

By their means the moſt ſavage cruelties were committed under the name of law, which thereby became a greater plague, than formerly crimes had been: no remedy could be found, when thoſe *Delatores,* whom he calls, *genus hominum publico exitio repertum, & pœnis quidem nunquam ſatis coercitum* †, were invited by impunity, or reward: and the miſerable people groaned under this calamity, until thoſe inſtruments of iniquity were by better princes put to the moſt cruel, though well-deſerved deaths.

The like hath been ſeen in many places; and the domeſtic quiet, which now is enjoyed in the principal parts of Europe, proceeds chiefly from this, that every man knows the ſame puniſhment is appointed for a falſe accuſation, and a proved crime.

It is hardly ſeven years ſince Monſieur Courboyer, a man of quality in Britany, ſuborned two of the king of France's guards to ſwear treaſonable deſigns againſt La Motte, a Norman gentleman; the matter being brought to

* *Tacitus, Ann.* 3. † *Ibid. Ann.* 4.

Monſieur

0369

Monsieur Colbert, he caused the accused person and the witnesses to be secured, until the fraud was discovered by one of them, whereupon he was pardoned, La Motte released, Courboyer beheaded, and the other false witness hanged, by the sentence of the parliament of Paris. Though this law seems to be grounded upon such foundation, as forbids us to question the equity of it, our ancestors, (for reasons best known unto themselves) thought fit to moderate its severity, by the Statute of 38 Ed. III. cap. 9. yet then it was enacted, and the law continues in force unto this day, "that whosoever made com-"plaints to the king, and could not prove "them against the defendant," by the process of the law limited in former statutes, which is first by a grand jury; he "should "be imprisoned until he had made gree to the "party of his damages, and of the slander "he suffered by such occasion, and after "shall make fine and ransom to the king," which is for the common damage that the king and his people suffer by such a false accusation and defamation of any subject: and in the 42d of Ed. III. cap. 3. "to eschew the "mischiefs and damage done by false accu-"sers," it is enacted, "that no man be put "to answer such suggestions, without pre-"sentment before the justices;" *i. e.* by the grand jury: it cannot surely be imagined, that the suggestions made to the king and his counsel, had no probability in them, or that there was no colour, cause or reason for the king to put

put the party to answer the accusation: but the grievance and complaint was, that the people suffered certain damage and vexation upon untrue, and at best uncertain accusations, and that therein the law was perverted by the king and his counsel's taking upon them to judge of the certainty or truth of them, which of right belonged to the grand jury only, upon whose judgment and integrity our law doth wholly rely, for the indemnity of the innocent, and punishment of all such as do unjustly molest them.

Our laws have not thought fit so absolutely to depend upon the oaths of witnesses, as to allow, that upon two, or ten men's swearing positively treason or felony against any man, before the justices of peace, or all the judges, or before the king and his council, that the party accused, be he either peer of the realm, or commoner, should without farther inquiry be thereupon arraigned, and put upon his trial for his life: yet none can doubt but there is something of probability in such depositions; nevertheless the law refers those matters unto grand juries, and no man can be brought to trial, until upon such strict inquiries, (as is before said) the indictment be found. The law is so strict in these inquiries, that though the crime be never so notorious, nay, if treason should be confessed in writing under hand and seal, before justices of peace, secretaries of state, or the king and council; yet before the party can be arraigned for it, the grand jury must inquire, and be satisfied, whether such

0370

ſuch a confeſſion be clear and certain: whether there was no colluſion therein: or the party induced to ſuch a confeſſion by promiſe of pardon: or that ſome pretended partakers in the crime may be defamed, or deſtroyed thereby; they muſt inquire, whether the confeſſion was not extorted by fear, threatenings, or force, and whether the party was truly *compos mentis*, of ſound mind and reaſon at that time.

The Stat. of 5 Eliz. cap. 1. declares the antient common law concerning the truſt and duty of juries; and enacts, that none ſhould "be "indicted for aſſiſting, aiding, comforting, "or abetting" criminals in the treaſons therein made and declared, "unleſs he, or they be "thereof lawfully accuſed by ſuch good and "ſufficient teſtimony or proof, as by the jury, "by whom he ſhall be indicted, ſhall be "thought good, lawful, and ſufficient to "prove him, or them guilty of the ſaid of-"fences." Herein is declared, the only true reaſon of indictments, *i. e.* the grand jury's judgment that they have ſuch teſtimonies as they eſteem ſufficient to prove the party indicted guilty of the crimes whereof he is accuſed, and whatſoever the indictment doth contain, they are to preſent no more, or other crimes, than are proved to their ſatisfaction, as upon oath they declare it is, when they preſent it. This exactneſs is not only required in the ſubſtance of crimes, but in the circumſtances, and any doubtfulneſs or uncertainty in them makes the indictment, and all proceedings

ceedings upon it by the petit jury, to be inſufficient, and void, and holden for none, as appears by the following caſes.

In Young's caſe, in the Lord Coke's Reports, *lib.* 4. *fol.* 40. an indictment for murder was declared void for its incertainty, becauſe the jury had not laid certainty, in what part of the body the mortal wound was given, ſaying only, that it was about his breaſt; the words were, *Unam plagam mortalem circiter pectus.* In like manner, in Vaux's Caſe, Coke's Reports, *lib.* 4. *fol.* 44. he being indicted for poiſoning Ridley, the jury had not plainly and expreſly averred, that Ridley drank the poiſon, though other words implied it, and thereupon the indictment was judged inſufficient; "for (ſaith the book) the matter "of an indictment ought to be full, expreſs, "and certain, and ſhall not be maintained by "argument or implication, for that the in-"dictment is found by the oath of the neigh-"bourhood." In the ſecond part of Roll's Reports, p. 263. Smith and Mall's caſe, the indictment was quaſhed for incertainty, becauſe the jury had averred that Smith was either a ſervant or a deputy, *Smith exiſtens ſervus ſive deputatus,* are the words: it was doubtleſs probably enough proven to the jury, that he was either a deputy, or ſervant, but becauſe the indictment did not abſolutely and certainly aver his condition either of ſervant or deputy, it was declared void: if there be any defect of certainty in the grand jury's verdict, no proof or evidence to the petit jury can ſup-

 ply

0371

ply it, ſo it was judged by Wrote and Wig's caſe, Coke, 4. *Rep.* fol. 45, 46, 47. It was laid, that Wrote was killed at Shipperton, but did not aver that Shipperton was within the verge, though in truth it was, and no averment or oath to the petit jury, could ſupply that ſmall failure of certainty to ſupport the indictment; and the reaſon is rendered in theſe words, *viz.* "The indictment being "*veredictum*, id eſt, *dictum veritatis*, a verdict, "that is, a ſaying of truth, and matter of "record, ought to contain the whole truth, "which is requiſite by the law, for when it "doth not appear, it is the ſame as if it were "not, and every material part of the indict-"ment ought to be found upon the oath of "the indicters, and cannot be ſupplied by "the averment of the party." The grand jury's verdict is the foundation of all judicial proceeding againſt capital offenders (at the king's ſuit) if that fail in any point of certainty, both convictions and acquittals thereupon are utterly void, and the proceedings againſt both may begin again, as if they had never been tried, as it appears in the caſe laſt cited, fol. 47.

Now as the law requires from the grand jury, particular, certain, and preciſe affirmations of truth, ſo it expects that they ſhould look for the like, and accept of no other from ſuch as bring accuſations to them. For no man can certainly affirm that which is uncertainly delivered unto him, or which he doth not firmly believe. The witneſſes that they receive

receive for good, are to depoſe only abſolute certainties about the facts committed, that is, what they have ſeen or heard, from the accuſed parties themſelves, not what others have told them; they are not to be ſuffered to make probable Arguments, and infer from thence the guilt of the accuſed; their depoſitions ought to be poſitive, plain, direct and full: the crime is to be ſworn without any doubtfulneſs or obſcurity; not in words qualified, and limited to belief, conceptions, or apprehenſions. This abſolute certainty required in the depoſition of the witneſſes, is one principal ground of the jury's moſt rational aſſurance of the truth of their verdict. The credit alſo of the witneſſes ought to be free from all blemiſh, that good and conſcientious men may rationally rely upon them in matters of ſo great moment as the blood of a man. It muſt alſo be certainly evident, that all the matters which they depoſe, are conſiſtent with each other, and accompanied with ſuch circumſtances as in their judgment render it credible. All juſt indictments muſt be built upon theſe moral aſſurances, which the wiſdom of all nations hath deviſed as the beſt and only way of deciding controverſies. Neither can a grand juryman, who ſwears to preſent nothing but the truth, be ſatisfied with leſs.

It is ſcarce credible, that any learned in our laws ſhould tell a grand jury, that a far leſs evidence will warrant their indictment, being but an accuſation, than the petit jury ought to

 have

0372

have for their verdict. Both of them do, in like manner, plainly and poſitively affirm upon their oaths the truth of the accuſation; their verdicts are indeed one and the ſame in ſubſtance and ſenſe, though not in words. There is no real difference between affirming in writing that an indictment of treaſon is true, as is the practice of grand juries, and ſaying that the party tried thereupon is guilty of the treaſon whereof he is indicted, as is the courſe of petit juries. They are both upon their oaths; they are equally obligatory unto both: the one therefore muſt expect the ſame proof for their ſatisfaction as the other; and as clear evidence muſt be required for an indictment as for a verdict. It is unreaſonable to think that a ſlighter proof ſhould ſatisfy the conſciences of the greater jury, than is requiſite to convince the leſs; and uncharitable to imagine, that thoſe ſhould not be as ſenſible as the others of the ſacred ſecurity they have given by oath, to do nothing in their offices but according to truth.

If there ought to be any difference in the proceedings of the grand and petit juries, the greater exactneſs and diligence ſeems to be required in the grand jury: for as the ſame work of finding out the truth, in order to the doing of juſtice, is allotted unto both, the greateſt part of the burthen ought to lie upon them that have the beſt opportunities of performing it. The invalidity, weakneſs, or defects of the proofs, may be equally evident to either of them; but if there be deceit in ſtifling true teſtimonies, or malice in ſuborning

ing

ing wicked perſons to bring in ſuch as are falſe, the grand jury may moſt eaſily, nay probably only can diſcover it: they are not ſtraitened in time; they may freely examine in private, without interruption from the counſel or court, ſuch witneſſes as are preſented unto them, or they ſhall think fit to call: they may jointly or ſeverally inquire of their friends or acquaintance after the lives and reputations of the witneſſes, or the accuſed perſons and all circumſtances relating unto the matter in queſtion, and conſult together under the ſeal of ſecrecy. On the other ſide, the petit jury being charged with the priſoner, acts in open court, under the awe of the judges; is ſubject to be diſturbed or interrupted by counſel; deprived of all opportunity of conſulting one another until the evidence be ſummed up; and not ſuffered to eat or drink until they bring in a verdict. So is it almoſt impoſſible for them, thus limited, to diſcover ſuch evil practices as may be uſed for or againſt the priſoner, by ſubornation or perjury to pervert juſtice. If therefore the grand jury be not permitted to perform this part of their duty, it is hard to imagine how it ſhould be done at all; and it is much more inconceiveable how they can ſatisfy their conſciences, if they ſo neglect as to find a bill upon an imperfect evidence, in the abſence of the priſoner, in expectation that it will be ſupplied at the bar: it concerns them therefore to remember, that if they proceed upon ſuch uncertainties, they will certainly give incurable wounds to their

neighbour's

0373

neighbour's reputations, in order to the deſtruction of their perſons.

Whatever ground this doctrine of indicting upon ſlight proofs may have got in our days, it is, as we have ſeen, both againſt law and reaſon, and contrary to the practice of former times. My lord Coke, in his *Comment on Weſtminſter* 2d, tells us, " That in thoſe days, (and as yet, it ought to be) " indictments " taken in the abſence of the party, were " formed upon plain and direct proofs, and " not upon probabilities and inferences." Herein we ſee that the practice of our forefathers, and the opinion of this great and judicious lawyer, were directly againſt this new doctrine: and ſome that have carefully looked backward, obſerved, that there are very few examples of men acquitted by petit juries, becauſe grand juries of old were ſo wary in canvaſſing every thing narrowly, and ſo ſenſible of their duty in proceeding according unto truth, upon ſatisfactory evidence, that few or none were brought unto trial till their guilt ſeemed evident.

It is therefore a great miſtake, to think that the ſecond juries were inſtituted for the hearing of fuller proofs: that was not their work, but to give an opportunity to the accuſed perſons to anſwer for themſelves, and make their defence; which cannot be thought to ſtrengthen the evidence, unleſs they be ſuppoſed to play booty againſt their own lives. By way of anſwer, the priſoner may avoid the charge: he is permitted to take exceptions:

he may demur or plead to the indictments in points of law. Herein the judges ought to aſſiſt him; and appoint counſel, if he deſire it. He may ſhew the indicters, that is, the grand jury, or ſome of them, are not lawful men, or not lawfully returned by the ſheriff. Embracery or practice may be proved in the packing of a jury; a conſpiracy or ſubornation may be diſcovered. Falſhood may be found out in the witneſſes, by queſtions about ſome circumſtances that none could have aſked or imagined, except the party accuſed. And beſides doing right to the indicted in theſe and many other things, it is the people's due to have all the evidence firſt taken in private, to be afterwards made public at the trial, that the kingdom may be ſatisfied in the equal adminiſtration of juſtice, and that the judgments againſt criminals may be of greater terror, and more uſeful to preſerve the common peace.

If any object, that this doctrine would introduce double trials for every offence, and all the delays that accompany them; it may be anſwered, that *Nulla unquam de morte hominis cunctatio longa eſt*, Juv. Sat. " No delay is to " be eſteemed long, when the life of a man is " in queſtion." The puniſhment of an offender, that is a little deferred, may be compenſated by its ſeverity; but blood raſhly ſpilt cannot be gathered up; and a land polluted by it is hardly cleanſed. Wiſe and good men, in matters of this nature, have ever proceeded with extreme caution, whilſt the ſwift of

0374

foot for that business are in the scripture represented under an ill character, and have been often found in their haste to draw more guilt upon themselves, than what they pretended to chastise in others. To avoid this mischief, in many well-polished kingdoms, several courts of justice are instituted, who take cognizance of the same facts, but so subordinate unto one another, that in matters of life, limb, liberty, or other important cases, there is a right of appeal from the inferior, before which it is first brought, to the superior: where this is wanting, means have been found to give opportunity unto the judges to reflect upon their own sentences, that if any thing had been done rashly, or through mistake, it might be corrected: man, even in his best estate, seeming to have need of some such helps. Tiberius Cæsar was never accused of too much lenity, but when he heard that Lutorius Priscus had been accused of treason before the senate, condemned, and immediately put to death, *Tam præcipites deprecatus est pœnas*, he desired that such sudden punishment might for the future be forborn, and a law was thereupon made, "That no decree "of the senate should in less than ten days "be transmitted to the treasury," before which time it could not be executed, *Tacit. Ann.* 3. Matters of this nature concerning every man in England, it is not to be doubted but our ancestors considered them; and our constitution neither admitting of subordinate judicatures, from whence appeals may be made,

made, nor giving opportunities unto juries to re-examine their verdicts after they were given, they could not find a way more suitable unto the rules of wisdom, justice and mercy, than to appoint two juries, with equal care, according unto different methods, the one in private and at leisure, the other publicly in the presence of the party, and more speedy, to pass upon every man; so as none can be condemned unless he be thought guilty by them both. And it cannot be imagined, that so little time as is usually spent in trials at the bar, before a petit jury, should be allowed unto one that pleads for his life, or unto them, who are to be satisfied in their consciences, unless it were presumed, that the grand jury had so well examined, prepared, and digested the matter, that the other may proceed more succinctly, without danger of error.

Therefore let the grand juries faithfully perform their high trust, and neither be cheated nor frighted from their duty: let them pursue the good old way, since no innovation can be brought in, that will not turn to the prejudice of the accused persons and themselves. Let them not be deluded with frivolous arguments, so as to invalidate a considerable part of our law, and render themselves insignificant ciphers, in expectation that petit juries will repair the faults they commit; since that would be no less than to slight one of the best fences that the law provides for our lives and liberties, and very much to weaken the other.

0375

When a grand jury finds a bill againſt any perſon, they do all that in them lies to take away his life, if the crime be capital; and it is ridiculous for them to pretend they rely upon the virtue of the petit jury, if they ſhew none in themſelves. They cannot reaſonably hope the other ſhould be more tender of the priſoner's concernments, more exact in doing juſtice, or more careful in examining the credit of the witneſſes, when they have not only neglected their duty of ſearching into it, but added ſtrength unto their teſtimony, by finding a bill upon it.

They cannot poſſibly be exempted from the blame of conſenting, at the leaſt, unto the miſchiefs that may enſue, unleſs they uſe all the honeſt care that the law allows to prevent them; nor conſequently avoid the ſtain of the blood that may be ſhed by their omiſſion, ſince it could not have been, if they had well performed their part before they found the indictment, whereby the party is expoſed to ſo many diſadvantages, that it is hard for the cleareſt innocence to defend itſelf againſt them.

But when the one and the other jury act as they ought, with courage, diligence and impartiality, we ſhall have juſt reaſon, with the wiſe lord chancellor Forteſcue, to celebrate that law that inſtituted them*: to congratulate with our countrymen the happineſs we enjoy, "whilſt our lives lie not at the mercy "of unknown witneſſes, hired, poor, uncer-

* Fortefc. *de Laud. Leg. Ang. cap.* 26.

" tain;

" tain; whoſe converſation or malice we are " ſtrangers to; but neighbours of ſubſtance, " of honeſt report, brought into court by an " honourable ſworn officer: men who know " the witneſſes, and their credit, and are to " hear them and judge of them: that want no " means for diſcloſing of truth; and from " whom nothing can be hid, which can fall " within the compaſs of human knowledge."

" AFTER that the King for the ſpace " of three years and more, had remain- " beyond ſea*, and returned out of Gaſcoign " and France into England, he was much " vexed and diſturbed by the continual cla- " mour both of the clergy and laity, deſiring " to be relieved againſt the juſtices, and other " his majeſty's miniſters, of ſeveral oppreſ- " ſions and injuries done unto them, contrary " to the good laws and cuſtoms of the realm; " whereupon king Edward by his royal letters " to the ſeveral ſheriffs of England, com- " manded that in all counties, cities, and mar- " ket towns, a proclamation ſhould be made, " that all who found themſelves aggrieved " ſhould repair to Weſtminſter at the next " parliament, and there ſhew their grievances, " where as well the great as the leſs ſhould " receive fit remedies and ſpeedy juſtice, ac-

* *Poſtquam rex per ſpatim trium annorum et amplius in partibus tranſmarinis remanſiſſet, &c.*

" cording

0376

" cording as the king was obliged by the bond
" of his coronation oath: and now that great
" day was come, that day of judging even
" the juſtices, and the other miniſters of the
" king's council, which by no colluſion or re-
" ward, no argument or art of pleading they
" could elude or avoid: the clergy therefore
" and the people being gathered together, and
" ſeated in the great palace of Weſtminſter, the
" archbiſhop of Canterbury (a man of emi-
" nent piety, and as it were a pillar of the
" holy church and the kingdom) riſing from
" his ſeat, and fetching a profound ſigh, ſpoke
" in this manner: Let this aſſembly know
" that we are called together concerning the
" great and weighty affairs of the kingdom,
" too much alas of late diſturbed, and ſtill
" out of order, unanimouſly, faithfully and
" effectually with our lord the king to treat
" and ordain: ye have all heard the grievous
" complaints of the moſt intolerable injuries
" and oppreſſions, of the daily deſolations
" committed both on church and ſtate, by
" this corrupt counſel of our lord the king,
" contrary to our great charters, ſo many
" and ſo often, purchaſed and redeemed,
" granted and confirmed to us by the
" ſeveral oaths of our lord the king that
" now is, and of our lords king Henry
" and John, and corroborated by the dread-
" ful thunderings of the ſentence of excom-
" munication againſt the invaders of our com-
" mon liberties of England in our ſaid char-
" ters contained; and when we had conceived
" firm

" firm and undoubted hopes, that theſe our
" liberties would have been faithfully pre-
" ſerved by all men, the king, circumvented
" and ſeduced by the counſels of evil miniſters,
" hath not been afraid to violate it by in-
" fringing them, falſly believing that he could
" for rewards be abſolved from that offence,
" which would be the manifeſt deſtruction of
" the kingdom.

" There is another thing alſo that grieves our
" ſpirits, that the juſtices ſubtilly and malici-
" ouſly, by divers arguments of covetouſneſs
" and intolerable pride, have the king againſt
" his faithful ſubjects ſundry ways incited and
" provoked, counſelling him contrary to the
" good and wholeſome advice of all the liege-
" men of England, and have not bluſhed nor
" been afraid, impudently to aſſert and prefer
" their own fooliſh counſels, as if they were
" more fit to conſult and preſerve the com-
" monwealth, than all the eſtates of the
" kingdom together aſſembled; ſo that it may
" be truly ſaid of them, they are the men,
" that troubled the land, and diſturbed the
" nation under a falſe colour of gravity, have
" the whole people grievouſly oppreſſed, and
" under pretence of expounding the antient
" laws, have introduced new, I will not ſay
" laws, but evil cuſtoms: ſo that through the
" ignorance of ſome, and partiality of others,
" who for reward or fear of great men have
" been engaged, there was no certainty of
" law, and they ſcorned to adminiſter juſtice
" to the people, their deeds are deeds of wick-
" edneſs,

0377

edneſs, and the work of iniquity is in their hand, their feet make haſte to evil, and the way of truth have they not known; what ſhall I ſay? there is no judgment in their paths.

"How many free-men of this land, faithful ſubjects of our lord the king, have like the meaneſt ſlaves of loweſt condition without any fault been caſt into priſon, where ſome by hunger, grief, or the burden of their chains, have expired, they have alſo extorted at their pleaſure infinite ſums of money for their ranſoms; the coffers of ſome, that they might fill their own, as well from the rich as the poor, they have exhauſted, by reaſon whereof they have contracted the irreconcilable hatred and dreadful imprecations of all men, as if they had purchaſed and obtained ſuch an incommunicable privilege, by their deteſtable *Charter of non obſtante*, that they might at their own luſt be free from all laws both human and divine.

"Moreover, there is another more than ordinary grievance, which hitherto hath, and in ſome meaſure doth ſtill rage among us: all things are expoſed to ſale, if not as it were to plunder and theft. Alas! how great power hath the love of money in the breaſts of men? Hear therefore, O ye wicked, from my mouth the dreadful decree of Heaven; the dejection of your countenances accuſe you, and like the men of Sodom, ye have not hidden but proclaimed

claimed the ſin: Wo be to your ſouls, wo be to them that make laws, and writing write injuſtice, that they may oppreſs the poor in judgment, and injure the cauſe of the humble, that widows may become their prey, and that they might deſtroy the orphan. Wo be to thoſe that build their houſes in injuſtice, and their tabernacles in unrighteouſneſs: wo be to them that covet large poſſeſſions, that break open houſes, and deſtroy the man and his inheritance: wo be to ſuch judges who are like wolves in the evening, and leave not a bone till the morning. The righteous judge will bring ſuch counſellors to a fooliſh end, and ſuch judges to confuſion: ye ſhall all preſently with a loud cry, receive the juſt ſentence of the land.

"At the hearing of theſe things all ears tingled, and the whole community lifted up their voice, and mourned, ſaying, Alas! alas for us! what is become of that Engliſh Liberty which we have ſo often purchaſed, which by ſo many conceſſions, ſo many ſtatutes, ſo many oaths, hath been confirmed to us?

"Hereupon ſeveral of the criminals withdrew into ſecret places, being concealed by their friends; ſome of them were brought forth into the midſt of the people, and deſervedly turned out of their offices; one was baniſhed the land, and others were grievouſly fined, or condemned to perpetual impriſonment.

"This

"This is confirmed by Spelman, An. 1290.
" All the justices of England, saith he, were
" An. 18 Ed. I. apprehended for corruption,
" except John Mettingham, and Elias Bleck-
" ingham, whom I name for their honour,
" and by judgment of parliament condemn-
" ed, some to imprisonment, others to banish-
" ment, or confiscation of their estates, and
" none escaped without grievous fines, and
" the loss of their offices."

F I N I S.