

could, to make it appear whether the Person was guilty of the Facts that were alledged against him to condemn him for; and, I take it, the principal thing to be considered is, whether he be guilty of such a Crime as deserves such a Punishment. So that, I take it, the Question now is, Whether Sir *John Fenwick* hath had that Notice to produce his Evidence, as is convenient? For I think we should lose Time to let Counsel ramble upon the Reasonableness of our Proceedings; the Question is, Whether he is guilty of the Fact? Sir, I can never think the Counsel could understand your Order, when it says, to make his Defence, but it must be to the Fact upon which he is to be condemned. You have already determined that Point, as to his prevaricating, but that is not the Matter that shall make me find him guilty; but the Evidence that will weigh with me is the Evidence of High-Treason, and how far they can answer it.

Mr. *Hooper*. The Question is, Whether or no there be a sufficient Guilt laid to this Man's Charge? For in all Courts of Judicature this is a certain Rule, You must proceed *secundum Allegata & Probata*; and you shall not go about to prove a Thing unless it be alledged. Now the Question is, Whether this Thing be alledged in the whole Bill, that Sir *John Fenwick* is guilty of High-Treason? And if not, you will go about to prove what is not alledged. 'Tis true, it hath been alledged that a Bill hath been found; but several have been indicted who have been acquitted. It is possible the Prisoner at the Bar may be guilty; but I think we must observe that Method here, that is observed every where else, and that is not to go about to prove any thing that is not alledged.

Mr. *Clerk*. The learned Gentleman hath made an Objection that perhaps would hold very well in *Westminster-Hall*: But I suppose he may remember this Bill must have a second Reading before you, as a House; and then perhaps the Allegations may be different from what they are now. But the principal Matter before you is, Whether this Gentleman be guilty of High-Treason, or no? And if they did not prepare to that Part, I think they were negligent to their Client; for it appears to be that Part that is most sensibly like to affect him.

Mr. *Howe*. The more I hear the Matter debated, the more it seems strange to me. I have heard the Bill read, and took Notice of the Heads of it: I always understood the Preamble of the Bill to be the Inducement to the End of it; I was mightily surprized to hear the King's Council attempt to make good—I think they did not speak materially to one Point of the Allegations in the Bill, so that the Allegations do signify nothing: Or else, if they intended these Allegations should signify any thing, we must have these Allegations proved before we pass our Judgments upon the Bill: Whereas the Counsel, instead of endeavouring to prove that he was indicted for High-Treason, (tho' hinted at) would prove him guilty of High-Treason; instead of proving that he had prevaricated, they say not one Word of it; instead of proving that he has forged Papers, in order to alienate the Minds of the King's Subjects, they say nothing to it, tho' in the Bill it is alledged as High-Treason.

We must not go here upon private Fancies and Opinions; no Man that heard my Lord *De-*

lamere's Trial but believed him to be guilty of the Fact; yet he was acquitted, because there was not Evidence sufficient against him. I think you must stick to one of these Points; if you stick to this, to prove him guilty of High-Treason, you must alter the Bill; and then that must be proved out of the Mouths of two Witnesses. If you please to stick to the Bill, then I hope the King's Counsel will go on to prove the Allegations of it, or let us know why they do not: I shall no more give my Vote to hang him, because he is indicted of High-Treason, than I shall because he hath been in *Newgate*.

Mr. *Sloane*. I think a great deal of your Time in debating this Matter may be saved; though I will allow the Bill might have been drawn better, and that a Bar-Indictment is not a sufficient Ground of it self for a final Decision of this Matter: But when at the Time of the finding the Indictment there were two Witnesses, and one of them is withdrawn, and as is supposed by his Means; if the Bill seems imperfect for any thing before you now, you will not stay all the Proceedings upon it; but if you see it imperfect, and it may be amended, you will amend it at the Committee. I think the Favour you have given is abused, and that 'tis perfect trifling from the Bar. In one Breath they say, they could not get ready, for they had no Notice 'till last Night; and in the next Place they say, they will go on to every thing but his being guilty; and I believe they never will be prepared for that.

Mr. *Att. Gen.* Sir, I am very unwilling to speak any thing in this Matter; because, Sir, by the Place I have the Honour to serve his Majesty in, as one of his Counsel, if it was in the Courts below, I must prosecute on Behalf of the King: But I am very sensible while I am in this House, I am in another Capacity; I am to vote here as a Judge, and not as a Party.

That which I do now trouble you about, is in Relation to the Matter that hath been objected; That the Bill does not expressly affirm, that Sir *John Fenwick* was guilty of High-Treason, but only that he was indicted for it. Truly I thought, and do still, with humble Submission to the House, that that Matter of affirming him to be guilty of High-Treason was not to be inserted in the Bill; for that will be the Consequence of your Judgment, and Opinion, upon hearing of the Evidence. That worthy Member that spake last said, the Bill might be better drawn; I am sorry we had not his Assistance in it: But, with Submission to his Understanding, I think that had been too much Presumption, 'till you are satisfied whether he was guilty or no. We could only go so far as to let forth the Faults that we knew; as, that he was indicted, that we can verify, and can't take this to be like the Case of an Indictment; for there you must affirm such and such Things that cannot be altered afterwards. But a Bill in Parliament hath many Steps; you read it several Times, and commit it; so that you alter the Suggestions of the Bill, as the Case appears to you to be verified; and if you be of Opinion that he is not guilty, you will not condemn him because he is indicted: However, that is not unmaterial, but proper to be set forth for a Ground of your Proceedings, that there was a

Probability of his being guilty from that Accusation. Therefore, Sir, I confess I can't think that those Gentlemen that are Counsel for Sir *John Fenwick* could think, that you did intend to proceed otherwise than to hear Counsel as to the Fact; they could not think that upon Proof of his being indicted, that that would be Ground enough for you to proceed to pass the Bill: For how could any Body think, but you would come to examine the Fact? I can't see how they should come to mistake, unless 'twas wilfully.

Mr. *Price*. The Matter now debated, is, What Method shall be followed, or what Evidence shall be given upon this Bill; or whether Evidence shall be given of any other Matter than is suggested in the Bill. I must confess, making a false Step at first setting out, hath put us out of the Way hitherto; for in the Case of my Lord *Strafford*, Witnesses were examined, and Adjudication that he was guilty, before any Order for a Bill of Attainder. But since you are in this Way, consider whether the Counsel against the Bill have gone according to their Order: The Order was, that Counsel should be heard to prove the Suggestions of the Bill, and the Counsel for Sir *John Fenwick* do not oppose that; but the Counsel for the Bill open more Things than are comprehended in the Suggestions of the Bill: for the Suggestion is only a Recital, and hath no positive Averment. And though the Bill and an Indictment is not the same, yet they must be the same in this, to put a Charge upon the Person. If the Preamble is not to any Purpose, what need they have made any, but have said only, Let him be attainted? To what Purpose does Sir *John Fenwick* come to the Bar? If it is to any Purpose, 'tis to answer the Charge of the Bill. That learned Person says, to suggest that he is guilty till the Matter is proved, then there must be an Amendment in that Point, and that will make it a new Bill, and then he must have another Day to answer the new Charge: But they might as well have said he was guilty of High-Treason, as to say in the enacting Part, that he should be attainted. Therefore if the Gentlemen for the Bill will proceed and prove the Preamble of the Bill, let them; otherwise let there be another Day for Sir *John Fenwick* to attend, and let them do all together.

Sir *Christopher Musgrave*. I think, as to that learned Person, nothing is to be laid to his Charge, for I think they have drawn the Bill pursuant to the Directions; and I am sure if they had drawn it otherwise, before they had known the Sense of the House, I think they had been guilty of a Crime.

That which seems to be before you, is, what was opened by the King's Counsel, and that was to prove the Treason. Now, Sir, I would be glad to know of any Person, whether any thing is to be admitted to be proved at your Bar but what is in your Bill. For let us have a little Regard to the Proceeding in *Westminster-Hall*: Can any Person, upon an Indictment of High-Treason, offer Evidence of any Treason but what is express'd in the Indictment? And I think this is the same in Effect; for here you draw a Bill of Attainder against Sir *John Fenwick*, and in Justice you send him a Copy of it, and, with great Favour too, you allow him Counsel to defend himself to that, as to the Suggestions that are in the Bill; otherwise, to what End did you send him the Copy of the Bill? Now if you will admit of any thing to be proved but what is in your Bill, I know not of what dan-

gerous Consequence it may be, for 'tis impossible to be prepared for it.

Mr. *Sol. Gen.* If the Counsel against the Bill could be any way mistaken, or think the Bill defective, I am for giving them longer Time to make their best Defence; but think neither one nor the other of them true; but your Order was to draw a Bill for attainting Sir *John Fenwick* of High-Treason; and I think if the Bill had gone no farther, but enacted that he should be attainted of High-Treason, we had strictly pursued your Order; for the Preamble is no necessary Part of the Bill.

A Bill and an Indictment are of quite different Natures; there is a Form for an Indictment, but no Precedent for an Act of Parliament.

As to the Preamble, the Debate, when it was ordered, went no farther than that he was accused of High-Treason, and was like to have been brought to his Trial; and to delay it, he pretended to make an ingenuous Confession, and instead of that, there was produced a Paper which you have censured (as you thought fit) and upon that you voted a Bill to be brought in to attain him of High-Treason: What then could be expected more for the Inducement, but the Debate upon which it was ordered?

If this House had thought fit to examine Witnesses before (as now) no doubt but the Bill would have suggested that he was guilty of High-Treason; but 'tis Time enough for you to suggest that, after you have heard what Witnesses there are. If the Counsel did not know this, notwithstanding all that I have said, I am for giving them Time; but (with Submission) it was impossible for them to mistake it: If the Bill had went no farther than, Be it enacted, that he should be attainted of High-Treason, then they had some Colour to say there were different Species of High-Treason, and they could not tell to what particular Facts they must apply themselves: But when the Indictment is recited, which charges him with particular Facts, and tells him by what Witnesses the Bill was found, it was impossible not to know that this was the High-Treason you did intend to enact that he should be attainted for: But when they say they are not ready, truly there may be some Reason for it; for I believe they never will be ready: Sometimes Men will be wilfully mistaken, and sometimes 'tis their Misfortune to be so. They say they are mistaken; which of these are true, I know not, but we have seen already the Time when he hath trifled with the Courts of Justice; he hath delay'd his Trial till one Witness is withdrawn; if you give him longer Time, he may have the good Fortune to have the other gone too. I see no Reason for you to forbear hearing of the Evidence.

Mr. *John Montagu*. I am not surprized to hear Sir *John Fenwick* desire Time; for giving him Time is giving him Life; nor for his Counsel to tell you his Witnesses are not ready; 'tis a common Excuse; I hardly ever knew a Person brought upon his Trial, but that was his Excuse; and yet I have seldom known it allow'd as a good Excuse: But 'tis objected, you must go *secundum allegat' & probat'*; and nothing being in this Bill like what the Counsel for the Bill did open, 'tis not fit to hear them call Witnesses to what is not alledged in the Bill. I grant that; and yet I think they ought to be allowed to call Witnesses to prove every thing they have opened to you: 'Tis agreed they ought not to have brought in a Bill, to say in

in point blank Terms, he is guilty of High-Treason; but, they say, you should have charged with what Treason he is accused of, and then they should have been admitted to prove it. With Submission, the Bill does that thing; for the Bill does recite, that he is indicted of High-Treason, in compassing, &c. This is the Treason that is charged upon him by this very Bill: Now sure you will permit them to prove what is alledged in the Bill. What did the Counsel for the Bill open? That at several Meetings they met to consult of the Matter that this Bill takes Notice of. Did not he tell you when *Charnock* came first there for that Purpose, and when *Charnock* met them again for their Assurance? Now this being so plainly set forth in the Bill here, which recites, that this Matter was proved by two Witnesses, upon the Credit of whose Testimony this Matter was found, and that one of them is gone away; and, say they now, we are ready to prove the Matter then sworn: Is not that proper to satisfy Gentlemens Consciences that won't convict this Man without Evidence?

Sir Fr. Winnington. Mr. Speaker, I humbly conceive the Question is not now, Whether *Sir John Fenwick* is guilty or no? But, Whether the Objections the Counsel for him have made, be so strong as you will grant what they move to you? They tell you, if Counsel will proceed upon nothing but what is suggested in the Bill, according to your Order, we are ready to make our Defence. It was said the King's Counsel was ordered to give their Evidence; that can have no Interpretation but as to the Matters in the Bill.

Says the King's Counsel, We will prove him guilty: Says the Counsel on the other Side, I hope the House will give us Time to encounter them in that, for you have no such Thing in the Bill; the sending them the Copy of the Bill was as much as to say, You need not prove any thing but what is therein asserted. 'Twas said by the learned Gentleman there, that there might have been an Act of Parliament which might have said only, Be it enacted, that such a Man be attainted, without giving any Reason. I cannot deny but it might be so without any Reason, but I don't believe it will be so. And another learned Person was for mending of the Bill: Says he, When you have the Matter of Fact proved before you, it may lead you to the amending of the Bill, and inserting what you please, and enacting of it; but does not answer what the Counsel said on the other Side? Would you have us answer what we did not know that you would stand upon? The Question is not, Whether he be guilty or no? But, Whether the Objections that are made be good to give them Time?

Col. Granville. Sir, the Counsel (by what I observed from them) have started two Difficulties, and really (to me) both seem very material; the first is, Whether the King's Counsel shall be at Liberty to prove any thing that is not suggested in the Bill: The other is, Whether *Sir John Fenwick* had due Notice to make his Defence.

The first is a Matter of very great Moment: You are proceeding upon a Bill where not only the Life of *Sir John Fenwick*, but the Life of every Man in *England* is in some measure concerned: When a Precedent is made in this Case, No-body knows who may be affected or hurt by it; and therefore I desire you will settle that Matter, and

have the Judgment of the House, whether they will admit the Counsel to prove any thing that is not suggested in the Bill: If you will, I do not see how any Man that stands at the Bar of your House, can be prepared to make his Defence. For there shall be one Crime alledged in the Bill, and when he comes to the Bar, the Counsel that are to prosecute, shall go quite off from that which is laid in the Bill, and produce you Evidence to a new Crime; and he stares and looks round him, and you had as good allow him no Counsel, or Copy of the Bill. This you thought so necessary for every Man that was to come upon his Trial for his Life for Treason, that you altered that Trial, and declared no Man should have any Treason proved against him that is not alledged against him in the Indictment.

We have had great Complaints of *Wolmister-Hall*, and if the Parliament should proceed in this manner, may have the same again. If they are too rash in their Proceedings, they will be countenanced mightily in them, if you should proceed against a Man, and condemn him for one Thing, when he is accused of another. I desire to know, how we can proceed in a Bill upon which *Sir J. Fenwick* is to be proved guilty, and he hath no Opportunity to answer it? I take it, as this Bill is drawn, *Sir J. Fenwick's* Guilt is no way concerned in it: For whereas the worthy Gentlemen tell you the Treason is specify'd, there is no Treason specify'd, otherwise than he is indicted for it.

Mr. George Rodney Bridges. Sir, I think the proper Question before you is, Whether you will allow *Sir J. Fenwick* Time to produce such Witnesses as he shall desire for his Justification. 'Tis a little strange to me, that the Gentlemen that are of *Sir J. Fenwick's* Counsel, should insist upon those Things, to desire farther Time for his Preparation, when (I think) 'tis very plain, they were told what they were to prepare for by the Bill; which was, they were to justify *Sir J. Fenwick* against those Things he stands indicted for; and the Matter of the Indictment is the Thing to be proved before you, and the Witnesses to make it good are likewise mentioned; one of them is gone, but his Testimony remains upon Oath, not only to the Grand-Jury, but in another Place, that I am told of: I do not think you will think it reasonable, after the King's Counsel have made out their Evidence, to give him Time to make their Observations upon the Charge; so you will consider before you hear the King's Counsel, whether you will allow him farther Time, or no.

Sir Jos. Williamson. Mr. Speaker, the Gentleman that spoke last, Rates the Case to be, Whether you will think it reasonable to allow *Sir J. Fenwick* farther Time to produce his Witnesses? You may, Sir, make that the Question; but that will depend upon another, which is, Whether you think that *Sir J. Fenwick* had not Notice enough to prepare to defend himself against the Charge contained in the Preamble of the Bill? And I add this further, Whether the Manner and Way of expressing that particular Charge in the Bill, is not so worded, so charged, as here expressly to become a Charge that he is to answer for, and not only as a Matter of Fact historically related, not to come in Proof here: For if it proves to be well charged in the Preamble, 'tis a particular
Fact

Fact of Treason he is to answer for in this House; and then he hath had Time enough; so that now you are to judge of your own Way of expressing your selves. I believe every Gentleman knows it was the Sense and Meaning of the House, that those are the particular Treasons mentioned in the Indictment with which he should be charged at the Bar, and have Time and Liberty to defend himself; and not only to the Allegations, that he had been indicted, &c. Now, Sir, if you shall allow these Gentlemen to except against your Way of expressing your selves, that I submit to you: But 'tis clear to me, that this was a very good and proper Way of expressing your selves, to charge him with these Facts, and to give him Liberty to disprove it. If he and his Counsel understood it otherwise, the Question is, Whether their differing with you in the Way of expressing it, shall be allowed to them, without taking a reasonable Exception to it? You are ty'd here to the strict Rules of Justice; but as to the Forms of Proceeding below, I do not think you are. Our Meaning was most certain (though he was indicted, that was nothing to us) that they should bring their Proof to our Bar to prove him guilty; and if you should give him two or three Days Time, you must mend your Bill to their Way of Expression, and to their Sense.

Mr. Brotherton. I take the Question to be now, Whether the King's Counsel should give Evidence of any other Matter than what is alledged in the Bill? As to that I must observe to you, that this Bill does not set forth any particular Charge against him; it does not say, that he such a Day did such a Fact, whereby he can make his Defence; 'tis only the Recital of an Indictment; and it does not say the particular Time and Place where the Fact was done. Now as to what that Gentleman says, if it had been said generally, that he should be attainted, it had been sufficient. 22 H. 8. the Statute for attainting one for putting Poison into a Pot, &c. there is the Day and Year when the Fact was committed; and so he might make his Defence. Then the King's Counsel offer to prove, that this Goodman was convey'd away by Sir John Fenwick; and there is no such Charge in the Bill; for the Bill only says, that he is withdrawn; and I am of Opinion they ought to give Evidence of nothing but what is in the Bill.

Mr. Whitaker. As to the Exceptions made by the Counsel to the Insufficiency of the Bill, by which they pretend Sir John Fenwick was led into an Error, so that he had no due Notice, I must needs say, if they were in Westminster-Hall they would be in the Right: But this House is not bound to those Forms; for I believe the enacting Clause would do the Business of Sir John Fenwick well enough, if all the rest were laid aside; and I will consider it with as much Tendernefs and Conscience for the Prisoner at the Bar, as any that brings Arguments from Westminster-Hall. I would consider, whether such a Defence as they have made, that from the Bill (as to what is laid in it) he had not Notice enough to prepare to make his Answer: They say, a Recital is no direct Affirmation in civil Matters: It is an Affirmation; for to say, *Whereas such a one is Bound*, is good in a Declaration upon a Bond. Now I would know, whether this be not enough, to say, That he is indicted, without any Allegation that he is guilty? Had the Bill no Recital at all, it had been an Objection; but it may be, it had been such an Objection,

that they ought to have done something of their Parts, as to have desired the Opinion of the House to what they should have answered: For suppose there had been no Recital at all (and you may make what Recital you think fit) what should Sir John Fenwick have done? There are some Instances at Common Law: A Man is indicted for being a common Barrater, and there are no Instances given in the Indictment; why then he comes and prays the Court, that they may declare what Instances they will give, and that they may give no other Words in Evidence: Therefore I question not but that should have come on his Part; he is to be heard as to the enacting Part of the Bill; and under Favour, you could do no otherwise. Now if they do offer to give Evidence of any Treason that is not specified in the Recital of the Bill, and the Counsel make an Objection to it, I shall agree with them.

Sir Ed. Seymour. My Lords and you Mr. Speaker, what hath been said to you by that worthy Person that spake last, no doubt, is true; That if there had been no more than the enacting Clause, it would have done Sir John Fenwick's Business with a Witness, or rather without a Witness: But that is not the Question we are disputing here; but the Question is, Whether you will give Sir John Fenwick longer Time to make his Defence to that Part he insists on, that is not contained in the Bill. You are well satisfied that you cannot go through with the Suggestions to Night, and the Debates, and what relates to it; and I find no Person against putting it off, but because it would be a Delay; and if it be no Delay, that Reason is out of Doors.

They tell you the Counsel could not but take Notice of the Matters suggested in the Indictment: I cannot think that is reasonably argued; because they do know the Practice and Method is such, that they can take Notice of nothing but what is specified and contained in the Bill. And therefore there being no Guilt charged upon Sir John Fenwick in the Bill, is it reasonable they should come and accuse themselves here, or make a Defence to what is not charged? No; but, say they, it is implied: This is an untrodden Path, and you ought to walk as securely in it as you can. 'Tis extraordinary that you bring Sir John Fenwick here to answer for Treason, when 'tis allow'd in the Suggestions of the Bill, you have but one Witness to that Treason; and when you take these extraordinary Steps, you should comply with him as much as you can in the Forms. For if Treason be not Treason unless it be proved by two Witnesses, and you will give him Liberty to make his Defence, I think it no Loss of Time; for you cannot go through the Bill to Night, to see whether Sir John Fenwick be guilty of what is contain'd in the Indictment. And I will give you one Reason why he could not be prepared to make his Defence in so short a Time; for he could not produce his Evidence if he had any; and if you give him longer Time, I suppose you will think fit that Sir John Fenwick should give an Account of what Witnesses he shall make Use of for his Defence; and you will give an Order for those Witnesses.

Mr. Harcourt. If Sir John Fenwick's Business must be done, I hope we shall do it like rational Men, and what we enact, be able to give a reasonable Account of it in the Preamble of the Bill.

As to the Question proposed, your Debates have run several Ways: The first is, Whether Sir *John Fenwick* shall be allowed further Time? And in this Case, whoever I differ with, 'tis of that Nature that I must desire the Liberty of speaking my Mind. I must confess, I see no Room for enlarging the Time; and I shall humbly submit my Opinion to other Gentlemen, whether he should have further Time to prepare his Witnesses: And for that, pray consider the Nature of the Matter before you.

Sir, there is nothing certain that is alledg'd in the Bill; and should you allow him further Time to answer that which is not alledg'd, I cannot imagine what Effect you would have of it. 'Tis said indeed, he stands indicted; but 'tis no where suggested, that he is guilty of that Indictment. This general Charge seems a great Hardship: There is no one Thing that so many have been unjustly taken off by, as the Uncertainty of alledging general Facts in Indictments of High-Treason; nor has any Thing been complain'd of in such Trials for a greater Grievance. What have you done in the Bill for regulating of Trials in Cases of High-Treason? In that Bill you have reformed that Abuse, and taken Care, that whatever Treason a Man might be guilty of, yet he shall never, upon his Indictment, answer to any Fact, unless the particular Overt-Act be expressly laid and affirmed in his Indictment.

That which seems most reasonable in this Case to be done, is not to enlarge the Time; but when you think fitting to proceed, proceed upon what is before you. Here are some Matters expressly alledg'd; let them go over the Recital, see whether they can prove that; but I cannot imagine to what Purpose you should give the Prisoner further Time to answer nothing; for that which is not charged is so.

Mr. *Winch.* Mr. Speaker, Sir, this is a Question, in my Opinion, of very great Consequence: You are very well told from below, that this is an untrodden Path; and I am the more confirm'd 'tis so from this Debate.

We are told, that Sir *John Fenwick*, or his Counsel, could not be ignorant of what they were to prepare themselves for. For this was our Meaning, says one Gentleman, though I find the Path is so untrod we are very unfortunate in expressing of it, for we have not said it at all in this Bill; we have said, Sir *John Fenwick* was indicted, &c. Sir *John Fenwick* hath had a Copy of this Bill sent him, Counsel allow'd him, and upon a second Reading he comes to make his Defence. We are told, the Proceeding upon this Bill is not to be resembled to the Proceeding in *Westminster-Hall*, and this is sufficient in a Bill (tho' in an Indictment it would not) without alledging that Sir *John Fenwick* is guilty. But one would think, that if Sir *John Fenwick* is guilty, every Allegation in the Bill, that is, the Inducement to the Bill, which is for attainting him, should be a good and just Ground for the Attainder; and then, this Gentleman that hath had a Copy of the Bill to prepare for his Defence, and shew you Reasons why the Bill should not pass, though our Proceedings are not to be resembled to the ordinary Proceedings, yet we are to expect from him such a Defence as the ordinary Proceedings in *Westminster-Hall* would require: But I think this is hardly to be expected; one might have thought, and reasonably enough, that it might have come into his Imagination, that if

there had been Ground to attaint him, by the ordinary Proceedings and Methods of Justice, the Parliament would not have taken an extraordinary Course to come at it: For I can never think it a good Reason to proceed this Way, that is, for the saving of Time; and if there be extraordinary

they must guess at that out of the Bill: Now that is grounded upon those Suggestions that I have cited; and then I should have imagined, that whereas he had been indicted upon the Oaths of two Witnesses, as the Law requires, and one of them was withdrawn; that you had rather intended to have charged him with some Contrivance to elude Justice, whereby you had Reason to exert your extraordinary Authority to proceed against him by Way of the Legislative; and I do not find we have any Precedent to warrant this Proceeding, tho' in our Debates we have endeavoured to find one; yet I cannot but observe the Consequence of this hereafter: For whether we can find a Precedent to warrant this Proceeding in former Ages, or not, we are making a Precedent for our Posterity. And consider the Consequence of this Precedent you are making; I think all the Bills in Parliament are grounded by the most serious Ways of Deliberation, before you come to Judgment: And Bills of Attainder ought much more, sure, to require the Seriousness of your Debates; but I cannot but observe the Steps now made; I am afraid there was a wrong Step at first; I was not here the first Day: But I recollect some Things from the Bill it self; the Tenderness of those Things upon which this enacting Clause does stand. Here was no Evidence given to induce the House to bring in this Bill of Attainder; when this Bill is brought in the House, and the Preamble that suggests that which is the Ground of the enacting Part, consider'd in the House; and the House did not think it reasonable to proceed to the Reading of it a second Time; I remember we were told, Won't you read it a second Time, when you may have an Opportunity of having those Suggestions prov'd to you? This was the Ground why this Bill was read a second Time. For consider, otherwise a Gentleman may in any other Case as well as this, desire Leave to bring in a Bill for attainting such a one; and tell you, you shall have a good Reason given to you for it afterwards; and tho' the Reasons suggested in the Bill, are not sufficient, you may have Reasons out of the Bill that are sufficient. What a Precedent will this be! Why, Sir, Length of Time gives a Sanction to those Precedents which the Age that makes them think not of; and they become good Examples to Posterity, that were even very heinous Precedents to the present Times. Now if this shall stand, as now in the Bill, I would ask, what Man in *England* is secure when a Parliament shall arise that hath a Mind to attaint him? Why then, Sir, if you do amend the Bill, consider the Method of your Proceedings; you do your selves, in effect, declare, that for bringing in of the Bill, for twice reading of the Bill, you had no Ground at all; for otherwise you had good Grounds recited in the Bill, and that must be a sufficient Ground to attaint him; and if you declare it no sufficient Ground to attaint him, you declare you have brought in a Bill, and read it twice, without any Ground. Whether you will allow Liberty to offer at your Bar any Suggestions otherwise than in the Bill, that I must submit to you; and for giving Time, since that is a Question of a very extraordinary Nature; but

have

have humbly offered my Thoughts, whether any thing shall be offered otherwise than is suggested in the Preamble of the Bill? I hope you will not, for the Precedent sake you are now making; which if you do, I am afraid Bills of Attainder may become now as frequent as Bills of Attainder were in *Richard II's* Time; which I hope never shall be.

Lord *Norreys*. Mr. Speaker, I will not pretend to tell you that you are bound by other Rules than Rules of Justice; but what is Justice in *Westminster-Hall*, is so here, and every where. And last Year you thought it Justice, that no Man should be brought to a Trial, but he should know what were the particular Facts that were alledged against him.

Lord *Cutts*. I think it, in some measure, a Misfortune, that a Matter of this Nature, as is your present Debate, hath held you so long; and conceive it a Thing to be wished, that every Gentleman that speaks upon this Occasion, would apply himself more closely to Reality, and less to Forms; I mean, to Forms, consider'd merely as Forms; for it ought to be true Reason that is convincing to you: And you ought not to tie your selves to any Forms upon this Occasion, but such as are grounded upon Reason; and really I have not heard any thing that fell from any Gentleman that shews his Doubt of the Nature and aggravating Circumstances of the Crime of the Prisoner; but it hath consist'd with the great Candour and Justice of this House, to shew this Favour to the Prisoner before you. The Counsel say, they are unprepared; if they mean they should prepare themselves for more Grounds of Difference and Chicanry, I would not give them farther Time; I can't perceive there is any Reality of Argument in it; and there is in Reasoning, as in Religion, sometimes a Form without a Power.

Sir *Tho. Dike*. Sir, you have now two or three Questions before you: I desire you will confine our Debates to one Point: I think, whatever Opinion Gentlemen may be of concerning the Proof, I think the Point under your Consideration, if you will make a right Judgment, is the Preamble of your Bill, which I take to be the Foundation of it, and the Cause for which you attain this Gentleman: Now the Preamble does not recite, and say, he is guilty, but only indicted; nor set forth any Time; nay, it does not say he was arraigned. So that these Things are very uncertain, and yet you must attain him for the Things recited in your Bill. And you know these Acts of Attainder are extraordinary Methods in Cases of Treason; and if you put it upon this Point, that the Act attains him for one thing, and the Counsel shall prove another, it makes it more uncertain than it is, and no Man can be safe; and therefore I hope you will confine the Counsel to Proofs of the Matter contained in the Bill.

Mr. *J. Howe*. Sir, I shall not move you to any thing that may tend to a Delay of the Matter before you: I think, if you please to go on upon the Matter suggested in the Bill, they are Allegations which must be proved before the Bill is committed; and that will not hinder Sir *J. Fenwick* from being examined to the Treason likewise. Therefore all that is alledged in this Bill, I suppose, being thought necessary to be proved, I desire he may be called in, and the Counsel may go on to prove what is alledged in the

Bill, and afterwards Sir *J. Fenwick* may answer them.

Lord *Coningsby*. If the Question was, whether you should grant this Gentleman Time or no to make his Defence, I should not have troubled you. But the Question now seems to be, Whether the Bill does depend upon the bare Suggestions of the Bill, or upon the Guilt of Sir *J. Fenwick*? And therefore if Gentlemen do insist upon it, that he should have longer Time to defend himself, as to his being innocent or guilty, I shall not oppose it; but if you think fit to put it off, as if the Fate of the Bill did depend upon the Suggestions of it, I can't agree to that Matter; therefore I desire a short Time may be given him to answer the Matter of his Guilt.

Mr. *Harley*. I find all Gentlemen that speak of this Subject, to say this Matter is of a very extraordinary Nature, and you have entered into it by very extraordinary Methods: But I must only observe, that this being the first Bill of this kind that hath been brought into the House, before any Proof, Gentlemen must be excused if they are cautious what Steps they do take; and when the Wisdom of the House has thought fit to take quite different Methods, as to the Preliminaries, 'tis not to be wondered if they meet with Difficulties in their Proceedings.

Some Gentlemen press for more Time to be given to Sir *J. Fenwick* to be prepared; and others urge, that you should declare, whether the Counsel should be heard to any thing but what is suggested in the Bill. And I think you must give a Determination to the last Question, though the whole House agreed to give him longer Time: For if you give him longer Time, it will after come to the same Debate, whether they shall be heard to any thing but what is suggested in the Bill? If you should think fit to add any thing, then it will be reasonable that he also should be heard to that; for in the Case of the Death of a Man, let him deserve never so much, yet he does not deserve to die unjustly by your Hands.

It seems a very plain Proposition, that when a Man is accused, he should not answer to what he is not charged with; and to charge it with *Innuendo's* and *Implications* is so uncertain, that as I always have seen it denied in this House, so I hope I shall not see so great an Assembly give any Countenance to it. They did tell you, they were prepared to speak to the Reasonableness of the Bill; but this Matter not being suggested in the Bill, they are not prepared to speak to it.

Sir *Tho. Littleton*. I see now where your Debates have led you: I thought the regular Subject of our Debates had been the Point upon which the Counsel withdrew; and that was for Time. For what? Why, to prepare themselves to answer any Evidence that might be given against them; because they perceived you did expect the Counsel for the Bill should produce their Evidence. But they made an Objection: Say they, We did not understand your Order was, that we should come prepared to oppose any Testimony *viva voce* to be given against us, but only prepared to speak to the Reasonableness of the Bill. Now, Gentlemen, after five or six Hours Debates, have been willing to accommodate the Matter (that no Body might think that any one pressed a Matter unreasonable) that they might have

have Time: But some Gentlemen will not be satisfied with granting what the Counsel desired, but they desire more. And what is that? Why, that is, to know the Opinion of the House, whether you will admit any one thing to be proved that is not suggested in the Bill? And I do take this to be within the Suggestions of the Bill, as fully as can be expressed. For what does the Bill say? The Bill does say he was indicted of High-Treason, and that one of the Witnesses is gone: And, Gentlemen, come to the Conclusion, and skip over the immediate Part of the Bill; for the Bill does say, that he did incite and consult, &c. And the Objection of the Counsel was not against the Evidence; but they said, they were not prepared at that Time to answer it, and there they leave it; and thereupon the House go on upon the Debates. What can we expect that they intended? They might think, either we shall gain our Point, and the House will give us Time; or otherwise, if they go on and hear this Evidence, then we say we wanted Time. And that will be only Evidence *ex Parte*, and not carry so much Weight with it, tho' we have nothing to say to it; or they might think it may have this Effect, that the House will not go on, and hear any Evidence at all: In either of these Cases, we have the fairest Advantage that we can have, on the second Reading of the Bill, in Defence of our Client: All they desired was, that they might have Time; and I hope that which satisfied them that are most concerned, may satisfy any Gentleman of the House.

Mr. *J. Howe*. The Question is not, what they asked, but what is reasonable for us to grant: I was in the Beginning against any Delay, and I think there is no Occasion of Delay: All I desire is, Sir, that the King's Counsel may be desired to prove the Suggestions of the Bill *ex Tolo*.

Mr. *Sol. Gen.* Most that have spoke of this Matter have said, that the Matter is very generally laid in this Bill, and the Counsel could not very well know to what to apply themselves: That it speaks of High-Treason in general, and of aiding the King's Enemies, which is very general: It recites that indeed; but the Indictment is legal, according to the late Act of Parliament. 'Tis not only said, that he designed the Death of the King, but for that Purpose he and others met together and agreed to send *Charnock* to France, to go to King James, to induce the French King with an armed Power to invade England. Now how can any thing be more particularly charged? And the Indictment is so charged in your Bill. I think therefore the Counsel could not be ignorant to what they ought to apply themselves: But by what I perceive, Gentlemen are very well contented to give him further Time. I remember, when the Bill was first brought in, there was a long Debate for a second Reading; and some Gentlemen thought it hard to be tried by so great an Assembly, and said, they had rather be tried by a fewer Number: But I shall observe, that you have sent the Copy of the Bill to Sir *J. Fenwick* beforehand, and you sent him Notice that he should provide himself. But I remember a much better Man than Sir *J. Fenwick*, who had the Misfortune to be under an Accusation of High-Treason, had his Indictment one Hour, and was tried the next; and tho' he pleaded to have his

Trial put off 'till the Afternoon, he could not prevail with the Court of Justice to do it: Sir *John Fenwick* hath had a Copy of his Bill for two or three Days, but he never had any Copy 'till he had pleaded.

Mr. *Waller*. I stand up only for my Information; that which I would know is, whether the Counsel did not ask you the Question, whether they should be bound to answer any thing that is not in the Bill? If they asked that, then the Gentleman that spake here is answered; and the Gentlemen of the House do not insist upon what Sir *J. Fenwick's* Counsel did not insist on. And I do think the King's Serjeant, who opened the Proceedings, after he had opened what had been before the Grand Jury, seemed to make it a Charge, as if Sir *J. Fenwick* had been condescending to the withdrawing of *Goodman*. Now that seemed as if they designed to make that a Part of the Evidence.

Sir *Richard Temple*. The Counsel did not insist upon it only to answer the Suggestions of the Bill: Every Body knows, they objected to the others going on with the Evidence they opened, because it was not in the Bill; and the King's Counsel could not so much as alledge, that it was in the Bill; and they would have gone on to have prov'd the Indictment. There is another Thing: It is told you, as if the Preamble had suggested something of this kind, that there was a Meeting. Now that Gentleman that spake last but one, has cleared it, that it only recites he was indicted for these Things, and this brings nothing in Issue, whether he be guilty or no? Now I think the present Question, and only Question before you, is upon the Suggestions of the Bill; for you can bring nothing in Issue here, but what is in the Bill; and Nobody can insist, by the Rules of Reason or Justice, that any Man should be heard to any Matter of Fact but what is in the Bill. And therefore I think there is nothing before you, but that you should give Direction to hear them to what is suggested in the Bill.

Mr. *Metwren*. Sir, I speak to the Method of your Debates: Your Debates arise upon an Objection that was made by Sir *J. Fenwick's* Counsel, against the Counsel for the Bill going on with their Evidence to prove Sir *J. Fenwick* guilty of High-Treason.

I must beg Leave to differ, as to what the Counsel did say, from some of the Gentlemen that spake last; the Force of their Objection was, that they should not now go on, for they were not prepared to answer them; and the Reason they gave was, that they had not formal Notice; and the other afterwards spake to the Shortness of the Time: Your Debates for a long Time went pursuant to this, whether you should allow them further Time or not? But the Length of your Debates hath raised a new Matter. Though I think that Doubt, though it was not made by the Counsel, may be very properly made by any worthy Member that hath that Doubt, whether, as the Bill is brought in, the King's Counsel might at any Time speak to that Point, though Sir *J. Fenwick* be acquainted with it? And I must always agree, that Doubt ought to be resolved, before you come to resolve, whether farther Time shall be allowed him or not; and therefore I propose it, that this Question may be put, Whether the House will hear, at the Bar of the House, the Evidence there is to prove Sir *John Fenwick* guilty

guilty of the High-Treason whereof he was indicted?

Col. *Wharton*. You have three or four Questions upon your Paper; and now after so long a Debate as we have had, I hope Gentlemen will not think fit to start new ones; and I hope you will take Care that Gentlemen shall not rise up three or four Times to speak to this Matter. You have another Rule of the House, That when a Question is moved, and seconded, though another Question is moved afterwards, yet that must be the first Question that is to be put; and I hope you will keep us to these Rules.

I wonder at some Objections: 'Tis told you, that this is such a Proceeding that never any Thing of this Kind was before; and that you are here going to read a Bill of Attainder before you have had any Manner of Evidence, upon which you should ground the bringing in of this Bill. Gentlemen must remember, or should have informed themselves; for 'tis very certain that you had very good Grounds to vote this Bill to be brought in: I see the Gentleman that brought in his own Accusation; you had his own Discovery read, and Mr. Attorney did inform you what was against him, and how he stood indicted. And another Gentleman by me, told you, he was with him, and there was a Treaty for his Pardon; this was Evidence for reasonable Men to go upon. And to tell you that these Precedents will endanger your Liberty! Under Favour, this is the Ground of all your Liberty. 'Tis by this Power of Proceeding, when you have not that Evidence that *Westminster-Hall* requires, by which you will keep great Men in Awe.

Now give me Leave to speak to the Question that I think you ought to put: 'Tis told you, by the Counsel for the Prisoner, that they are not apprised what the Sense of the House was, and upon that Account they desired further Time: I confess, when you allow'd Counsel, I was of Opinion it was a Favour; and now since they have made this Objection, though I do not believe you are obliged to allow them further Time; yet I had rather err on that than the other Side; and therefore I think the fairest Thing is to allow them some further Time.

Mr. Secretary *Trumbal*. Mr. Speaker, I have attended all this Day to your Debates, which are now in my Opinion of a very extraordinary Nature; for a great deal of your Time hath been spent upon Motion of the Counsel for the Prisoner at the Bar, whether you should allow them further Time or no: And now, by what I recollect from the Sense of several Gentlemen, the House seems willing to allow them further Time; even that is oppos'd at this Time of Day.

Sir, the King's Counsel have open'd the Matter of Facts, upon which they did intend to produce their Evidence; and when they had open'd the several Heads, the whole Objection that I heard made by the other Side, was, They did not think the King's Counsel could have proceeded to examine Witnesses upon those Facts; and that they were not prepared to bring Witnesses on the Side of the Prisoner, and therefore pray'd for further Time: Truly, whether that be reasonable or no, or whether upon one Favour, the House think fit to grant another; I cannot tell what might appear, if it had come to a Question; since the Life of a Man is concerned, we ought to be tender of it, and I shall be as tender as another; there-

fore I am of Opinion, that a reasonable Time should be allow'd. To do what? Why, upon the Evidence the King's Counsel should produce, they shall bring their Witnesses on the other Side to answer them. Whether the King's Counsel will produce Evidence that is foreign to the Bill, that will be in Judgment of the House; but it was a good Motion made below, which I close withal, that a short Time may be allowed them to make their Defence, and bring their Witnesses.

Mr. *Speaker*. Gentlemen, you have had a long Debate; I do not remember any formal Question that was propos'd at first, till such Time as I read to you what I thought was the Question upon the Debate; when I read you the Question for further Time, there were several Members stood up, and said, that was not the Question; and took Exceptions to it, and propos'd that the Counsel should be confin'd to produce Evidence only to the Matters suggest'd in the Bill; so that now I have two Questions upon my Paper, which I will read to you, and put which you will. One Question is, That they be confin'd to make their Proof to what is suggest'd in the Bill. The second Question is, That Sir *John Fenwick* be allowed further Time, &c.

Sir *Christopher Musgrave*. A Gentleman said, the second Question upon your Paper was but lately started; but I remember, a little after the Counsel was withdrawn, it was moved, Whether you would give them further Time? And I, presently after, in the Debate, did take the Freedom to ask, Whether it was intended they should answer to any Thing but what was contained in the Bill? And, I remember, there was a Gentleman of the long Robe said, That there was nothing offer'd by the King's Counsel, but what was within the Suggestions of the Bill. Another Gentleman said, When they may have longer Time, they'd not seem so fond of it; 'tis indifferent to me, provided he be prepar'd to answer. But I cannot but observe, that the Conclusion of that honourable Person was, that at last you must come to determine the Question. You are likewise told, by an honourable Person nearer the Bar, Why do you dispute this, now you have order'd the King's Counsel to produce the Evidence; and so you have concluded your selves? But for my self, I must confess, I did never think the Evidence was to be heard otherwise than as to the Suggestions of the Bill. And if that Point be to be determin'd, why will not you determine it now, rather than to have another Debate upon it?

Mr. *Boscawen*. That which is press'd by some Gentlemen, is begging of the Question. What have we here brought Sir *John Fenwick* for? Was it not to satisfy our selves, whether Sir *John Fenwick* was guilty of High-Treason? Now that is suppos'd, by some Gentlemen, not to be within the Bill: If it be not within the Bill, I desire you would throw out the Bill. But the Thing is, we must not examine to those Things that will make Sir *John Fenwick* guilty. Sir, this is a very nice Thing, and very curiously woven. The great Thing, say some Gentlemen, we must take Care of, is the Blood of a Man: Does any one say he is innocent? No: But we must have some Way or another that he must not be brought to his Trial. I desire, as *English* Men, you will not only take Care of the Life of one Man, but of the Life of the King; of the Lives of our Wives and Children,

dren, and all our Families. What will they say without Doors? You are afraid to meddle with Sir *John Fenwick*; and therefore you will slide it away upon another Point; that his being guilty of High-Treason is not within the Bill. I am not for taking the Advantage of Time; I desire, as it was moved before, that you will give him Time, and try whether he be guilty of this Treason or no, or otherwise do nothing in it at all.

Then the Order was made for Candles to be brought in.

Sir Thomas Littleton. Now you have Candles brought in, it will be fit for you to return to the Question: For my Part, I am willing to put both: But I think the last Question that you have upon the Paper, properly speaking, is to be put first; and that is, That the House will proceed to examine Witnesses to the Treason in the Bill for which he stands indicted.

Mr. J. Howe. I think the Question ought to be, That his Counsel be directed to bring Witnesses to the Allegations in this Bill.

Sir Thomas Littleton. I propose it to you thus; That the House will proceed to examine Witnesses at the Bar, to the Treasons mentioned in the Bill for which he was indicted.

Mr. J. Howe. I think that Gentleman might very well have moved the Question without that Limitation; for that is as much as to say, that Witnesses shall be examined to none of the Treasons in the Bill, except those for which he hath been indicted; and that is a Limitation, I hope, shall not be put to the Enquiries of this House. I hope you will put it, That they shall bring Evidence to the Matters alledged in the Bill generally: There are several other Allegations in the Bill which I would have him answer to; as the alienating the Affections of the King's Subjects from him, which I take to be High-Treason.

Members. No, no.

Mr. J. Howe. Why? If it be not High-Treason, it hath nothing to do in that Place. I believe 'tis a very high Crime, and would induce me very much for the Punishing of Sir *John Fenwick*.

Mr. Norris. Sir, I do not know how the Questions may be carried since Candles are come in; but I think 'tis for the better. I think there are two Things have been spoken to; one is this Bill: I find those Gentlemen that were against the Bill on *Friday*, are more against it now. I was for the Bill then, and am now for a second Reading of it: I think the Bill is very plain, and know not what they would have mentioned in it more, unless they would have had the *King's-Head Tavern*, and what Wine they drank there. I think there is all the Reason in the World to hear the Witnesses to prove him guilty of High-Treason. As to the Point of Time, I should be very willing to allow it them, if that Question was put; and, I think, you have been very favourable to him already, in allowing him Counsel.

Mr. Smith. I would only observe, when the Bill was to be brought in, the Objection was, that you had not Witnesses. And now the Question is, Whether you can hear Witnesses upon Facts not particularly assigned in the Bill. I believe no Man can say, but that in the Indictment there are particular Facts that ought to be examin'd: I do own for my Part, if Sir *John Fenwick* was a greater Man than he is, it were better he should escape, than you should spend so much Time about him.

Sir, the Indictment is mentioned in the Bill; no Man thinks that *Goodman's* going away, is Reason enough for bringing in such a Bill against Sir *John Fenwick*.

Mr. Speaker. Shall I read you the Question?

That Sir John Fenwick be allow'd further Time to produce Witnesses in his Defence, against the Charge of High-Treason, and that he name his Witnesses.

Which Question was put, and passed in the Affirmative.

Mr. Speaker. The other Question is,

That the Counsel, who are to produce their Evidence against Sir John Fenwick, be allowed to prove Sir John Fenwick guilty of High-Treason.

Sir Thomas Littleton. I do think one of the Reasons why this Bill was brought, was, because possibly, by the Absence of this Witness, he could not, strictly speaking, be proved guilty; though all Mankind is satisfied in his Guilt. And therefore I question whether it will amount to a legal Proof: And if you had such a Proof as would convict him by the common Proceedings of Law, I should not have been for a Bill of this Nature; for 'tis against the Honour and Dignity of this House, to do the Work that an inferior Court can do. But probably, by the Absence of this Witness, Sir *John Fenwick*, at a Trial in the *Old-Bailey*, might escape; though at the same Time 'tis highly probable, the Witness that is wanting to convict him, is by his Means gone out of the Way. Therefore I speak to the Wording of the Question; you say, *Shall be allowed to prove.* I would willingly prevent what may be objected when we come upon this Debate: If you do use the Word *Prove*, they may say, this is not Proof; for still *Goodman* is not here. If you please to say, That we will examine Witnesses to the Treason, and we will be Judges how far it appears to us, whether he be guilty, or not guilty.

Mr. Speaker. Will you let me propose it to you thus then? That the Counsel, in producing their Evidence against Sir *John Fenwick*, be allowed to examine Witnesses touching the Treasons mentioned in the Bill, for which Sir *John Fenwick* is indicted.

Mr. Montagu. I do not observe, that in reading of it, you say any Thing as to the other Allegations of the Bill: I think you should word it, That the Counsel be allowed to produce Evidence to the Allegations in the Bill, and the Treasons whereof he stands indicted.

Mr. Speaker. Well then, the Question is this, That the Counsel that manage the Evidence against Sir *John Fenwick*, be allow'd to produce Witnesses touching the Allegations in the Bill, and the Treasons whereof he stands indicted.

Which Question being put, it passed in the Affirmative.

Mr. Speaker. Will you please to appoint a Time for it?

Mr. J. Howe. That I would move you is this: You were so extremely late before you went upon this Information, that you had not Time to go through any Part of it; therefore I would move you

you, that you would appoint early in the Morning for Sir John Fenwick to be here.

And thereupon it was Ordered, That Sir John Fenwick should be remanded to Newgate, and brought to the House on Monday Ten a-Clock.

Mr. James Montagu. Sir John Fenwick now insisted he had not Notice; I humbly move, that he may be brought in, and acquainted with what you have ordered. (And accordingly Sir John Fenwick was brought to the Bar.)

Mr. Speaker. The House have consider'd of what Sir John Fenwick hath said at the Bar, by his Counsel, and they are of Opinion, That Witnesses ought to be examined there, to prove the Allegations of the Bill, and to prove him guilty of High-Treason whereof he stands indicted; but in Favour to you, because your Counsel said you were not prepared, the House is willing to give you Time till Monday next, to make your Defence; and they require you to give in a List of your Witnesses; and if you send to me, you may have a Warrant for their appearing at that Time; and they require you to be here, so that they may proceed upon the Bill exactly at Ten a-Clock.

And Sir John Fenwick being withdrawn,

Resolved,

That the Bill for Attainting Sir John Fenwick of High-Treason, be read a second Time on Monday next.

Lunæ 16 die Novembris, 1696.

Mr. Speaker. Gentlemen, I would receive your Directions in one Thing: You have ordered a Member to produce a Letter, and the Counsel, in opening the Evidence, have referred to it. That Member desires to know the proper Time for him to do it; Whether, while the Counsel are managing the Evidence at the Bar, or whether he must stay till they are withdrawn?

Mr. Sloane. As to this Matter, I do not question but 'tis to be offered as an Evidence: and by the same Reason that you give him the Favour to examine the Witnesses that are produced against him, for the same Reason the Letter ought to be read in his Presence, that he may explain it, or deny it: And give me leave to tell my Thoughts of another Matter: If that worthy Member is to offer Evidence of what he took from Sir John Fenwick's Mouth, (though a Member commonly gives his Evidence in his Place, after the Counsel is withdrawn) I think 'tis not only fit to produce the Letter in his Presence, but that Sir John Fenwick should hear what he says, and deny it if he can.

Mr. Speaker. Is that your Pleasure, that the Letter be produced before Sir John Fenwick, and that the Evidence to be given by Mr. Vernon shall be in the Presence of Sir John Fenwick?

The Question being accordingly put, it passed in the Affirmative.

Then the Serjeant was ordered to take his Mace, and go into Westminster-Hall, and summon the Members.

And being returned, The Order of the Day for proceeding on the Business of Sir John Fenwick

was read. [It being a Quarter before Eleven a-Clock.]

Then Sir John Fenwick, and the Counsel and Solicitors on both Sides, were brought in.

Mr. Speaker. Sir Thomas Powys, when you were here last, you insisted upon it, That the Counsel against Sir John Fenwick should be kept to the Proofs relating to the Allegations in the Bill only; or else that you might have further Time, because the Witnesses were not ready. The House have considered that Matter, and in favour to Sir John Fenwick, that he might have no Surprize, have given him to this Day; but they do allow the Counsel to give Evidence not only as to the Allegations in the Bill, but to prove Sir John Fenwick guilty of High-Treason; and therefore, Mr. Serjeant Gould, you are at liberty to go on with your Evidence.

Mr. Serjeant Gould. May it please you, Mr. Speaker, We are here to give in our Charge, and the Evidence that we have against Sir John Fenwick. I find by your Order, that we are now allowed to produce Evidence touching the Allegations of the Bill, and likewise of the Treasons for which he stands indicted; therefore I shall beg leave to open first, how he stands charged by the Indictment.

The Indictment first charges him with Compassing and Designing to depose the King, and put him to Death. The second Charge is, For inciting the French King to send an Army of Soldiers to invade this Kingdom, and to make a miserable Slaughter amongst the Subjects of this Kingdom. The third Thing is, For adhering to the King's Enemies. The fourth Part is, That to effect this, he, together with several others, that is to say, Charnock, Sir John Friend, and others, did consult, propose, treat, and agree to invite the French King to send a Number of Soldiers to invade this Kingdom, and to procure great Numbers of armed Men against the King, to rise and be formed; and with these Enemies, upon their landing and invading this Kingdom, to join, for to make and carry on a Rebellion and War in this Kingdom. And further it charges, That he did consult, consent and agree, to send Charnock as a Messenger from Sir John Friend, and others, into France to the late King James, to propose to him, to procure the French King to send Soldiers and armed Men to invade this Kingdom. Then likewise to effect this, the Indictment charges him with providing Horses, Pistols, and other warlike Arms. This is the Charge of the Indictment; and these Matters are in the Bill: For the Bill does charge him with compassing and imagining the Death and Destruction of the King, with adhering to his Enemies, by consulting and agreeing with several Persons at several Times, to send Charnock to the late King James in France, to invite and encourage the French King to invade this Kingdom with armed Forces, and Promises to join them, and assist them with Men and Arms.

Then the Bill does take notice of other Matters, That Sir John Fenwick hath protracted his Trial, by giving Assurances to the King to make a plain Discovery; by Reason of which he did not come to his Trial, and now one of the Witnesses against him is withdrawn. May it please you, Sir, This is the Charge as it stands before this honourable House; and the Evidence we shall charge him with, will be of this Nature: We shall give you

an Account, That the latter End of *May*, or Beginning of *June*, Sir *John Friend* and *Charnock*, and several other Persons, met at the *King's-Head*, and upon that Meeting they consulted how to invade this Kingdom; and they concluded in this, That they would send *Charnock* into *France*; and he was to propose it to King *James*, That he should procure 8000 Foot, and 2000 Horse and Dragoons; and upon their Landing they were to join them with 2000 Horse. After this they had another Meeting; for *Charnock*, to be sure of the Matter, would have another Meeting; and then he proposed it to them, Whether they continued in the same Resolution? And they all then declared, particularly Sir *John Fenwick*, That they did approve of it, and stuck by it; and that *Charnock* should go for that Purpose to *France*. *Charnock*, in pursuance and execution of this Treason, does go to *France*, and brings back a Message, That the Matter had been communicated to the *French King*, but at that Time he was not ready for them, and could not spare his Soldiers, and his Troops. Then it rested for some Time, till towards *Christmas*, when Sir *George Barclay* came into *England*, and he brought with him a Detachment of about Sixteen, and their Province was to assassinate the King. But there was another Part, and that was the Invasion; and in that Part was Sir *John Fenwick* concerned, which we shall produce our Evidence to prove upon him; but it does fall out that we have but one Witness to this Matter, that we can produce *viva voce*; though when this Indictment was found, (for it was found upon the Act last Sessions, which required two Witnesses to each Species of Treason) we had two, but one is since withdrawn, and that is touched in the Bill, as in Truth the Fact is. Now if Sir *John Fenwick* had come on in the ordinary Course of Proceedings to be tried, Sir *John Fenwick* might have been tried upon this Indictment, for then *Goodman* had been there; but he procrastinates his Trial, he makes Application to the King, and gives him Assurances from Time to Time of an ingenuous Discovery; but instead of that, when *Goodman* now is withdrawn, these Assurances have terminated in this counterfeit Confession that hath been laid before the House, and is charged in the Bill.

But, Sir, to supply this, we shall produce the Examination of Mr. *Goodman*; we shall prove to you not only the Evidence that hath been given upon this Indictment, upon which he hath been arraigned, but also the Evidence which hath been given upon the Trial of *Cook*, who was convicted upon that Evidence. We shall go by these further Steps in the Case; and humbly offer it to the Consideration of this House, how far Sir *John Fenwick* will be affected with it: And that is this; Here hath been *Goodman*, and Captain *Porter* who still stands his Ground; but they have tempted him with 300 Guineas in Hand, and 300 more was to be remitted to him upon his first landing in *France*, with Assurance likewise of King *James's* Pardon, and likewise 300 *l.* a Year; 100 *l.* a Year whereof was to be settled by Sir *John Fenwick*. This Proposition sprung from one *Clancy*: It could not be expected that Sir *John Fenwick* should appear in his proper Person, but he did by his Lady, who was with Captain *Porter*, and gave him Assurance of all that was proposed by *Clancy*, that That should be performed, and a great deal more.

We shall further give this Account, That when Sir *John Fenwick* was taken, there was a Letter handed to a third Person; and it appears by That, that he thought himself at that Time not safe, unless they could corrupt the Jury: For, says he, we must now get two or three stanch Persons that will starve the rest. These Steps we shall proceed upon, and begin with the Indictment, and call our Witnesses to it.

Mr. Serjeant *Lovel*. Mr. Speaker, I shall not repeat what hath been said; because I know what hath been materially said, can't pass the Observation of this House. The Method we desire leave to proceed in, is the Method you have prescribed us; and that is, first to prove the Allegations of the Bill. And that we shall make appear to you by undoubted Proofs, That Sir *John Fenwick* does stand indicted for these Treasons at the Sessions at the *Old Bailey*, the 28th of *May*, upon the Oaths of *Porter* and *Goodman*; that we shall prove by Records, and that is not capable of any Traverse or Denial. We shall also prove, by Matter of Record, That several who were concerned with Sir *John Fenwick* in this Conspiracy have been tried and attainted; and then we shall call a living Witness to prove Sir *John Fenwick* guilty of Treason in the highest Manner. Mr. *Tanner*, deliver in the Indictment of Sir *John Fenwick*.

Which was delivered in, and read at the Table.

Mr. Serjeant *Lovel*. The Bill does charge, That he stands indicted upon the Oaths of these two, Captain *Porter* and Mr. *Goodman*; Besides, I must beg leave to observe, that by the Act of Parliament made last Sessions, 'tis enacted, That no Person shall be indicted unless upon the Oaths of two Witnesses: Had not these Witnesses been sworn before the Grand Jury at that Time, this Bill could not have been found according to that Law, nor would Sir *John Fenwick* have pleaded: But he hath been arraigned, and pleaded; so that we submit it to this House, that it does appear upon Record, That this Indictment was found upon the Oaths of two Witnesses. Besides that, two Witnesses are subscribed to the Bill. Now that other Persons have been indicted, and convicted upon the same Evidence, we shall prove, and that likewise by Records.

Mr. Serjeant *Gould*. I thought when we came to give you an Account of the Absence of *Goodman*, then to have given you an Account of this, and other Matters.

Mr. *Speaker*. You will agree upon your Method, Gentlemen: Who do you call in the first Place?

Mr. Serjeant *Gould*. Captain *Porter*, Sir. (*Who being present.*)

Mr. Serjeant *Gould*. I desire, Mr. Speaker, that he will give an Account of what he know; concerning this Matter, as also of what is charged in the Indictment.

Mr. *Speaker*. Captain *Porter*, the House requires you to give them an Account of your Knowledge of any Conspiracy, by Sir *John Fenwick*, against the King and this Government; and likewise of your Proceedings upon the Indictment against him for High-Treason.

Captain *Porter*. About the middle of *May* was twelve Months, there was two Consultations, one at the *King's-Head* in *Leadenball-Street*, and the other

other in *Pall-mall*; these two Consultations were for the Considering of the best Means to bring the late King *James* into *England* again: For it was said, that King *William* being gone beyond Sea, he had left but few Forces, and therefore they thought they could not have a fitter Opportunity than that Juncture; upon which, they pitched upon *Charnock* to go into *France*, and make some Proposals to the late King *James*, to borrow 10000 Men of the *French King*, whereof there should be 8000 Foot, 1000 Horse, and 1000 Dragoons; and it was proposed, when they came over, to meet them with 2000 Horse.

Mr. Speaker. Where was this?

Captain Porter. Our first Meeting was at the *King's Head* in *Leadenball-street*; after that, Mr. *Charnock* desired another Meeting, and then we met at *Muntjy's* in *St. James's*, and we all stood to what we had before resolved, That he should go over to King *James*, and make this Proposal; and that if he could get so many Men of the *French King*, we would meet him with so many Horse.

Mr. Speaker. Sir, you say the first Meeting was at the *King's Head* in *Leadenball-street*; who was then present?

Captain Porter. There was my Lord *Aylesbury*, my Lord *Montgomery*, Sir *John Fenwick*, Sir *John Friend*, Sir *William Perkins*, *Charnock*, Mr. *Cook*, and my self; we dined there, and after Dinner Mr. *Goodman* came in to us.

Mr. Speaker. Did Sir *John Fenwick* hear this Discourse?

Captain Porter. Yes, Sir.

Mr. Speaker. Did Sir *John Fenwick* consent to it?

Captain Porter. He did absolutely consent to it. Sir *John Friend* did propose it; says he, Do not let us propose more than we can bring.

Mr. Speaker. Then you say you had a second Meeting.

Captain Porter. When we agreed upon this Business in *Leadenball-street*, Captain *Charnock* desired another Meeting, to know if we continued in our Resolution; and the next Meeting was at Mrs. *Muntjy's*; I think then my Lord *Montgomery* was not there, nor Mr. *Goodman*; but there was my Lord *Aylesbury*, Sir *John Fenwick*, Sir *John Friend*, Sir *William Perkins*, Mr. *Charnock*, and my self.

Mr. Speaker. How long after?

Captain Porter. About eight or ten Days, to the best of my Remembrance.

Mr. Speaker. What was said at that Meeting?

Captain Porter. The second Meeting was to agree to the same Thing: We desired *Charnock* to go as soon as possible to acquaint King *James*, that the sooner he came that Year, the better.

Mr. Speaker. Did Sir *John Fenwick* consent and agree, at the second Meeting, to his going into *France* to procure the Forces?

Captain Porter, Yes, Sir.

Mr. Speaker. Will you give the House an Account of any Thing else you know, relating to this Matter?

Captain Porter. That is all.

Mr. Serjeant *Gould*. Was you examined by the Grand-Jury, when the Bill was presented against Sir *John Fenwick*?

Captain Porter. Yes, Sir.

Mr. Serj. *Gould*. What Evidence did you give to them?

Captain Porter. The very same I give now.

Mr. Speaker. Mr. Serj. *Gould*, what have you to say further to him?

Mr. Serj. *Lovel*. We would ask, whether Mr. *Cook* was at the first Meeting?

Capt. Porter. Yes, Sir, he was at both Meetings.

Mr. Serj. *Lovel*. Was Mr. *Goodman*, at the preferring of the Bill of Indictment at the *Old Bailey*?

Captain Porter. I saw him go in to the Jury, and he told me it was for the same Thing.

Mr. Serj. *Lovel*. We have some of the Jury here, and we will call them to that.

Mr. Serj. *Gould*. Now, if it please you, Sir, we will ask him to the Matter concerning *Clancy's* tampering with him.

Mr. Speaker. Will you give the House an Account of that Matter?

Sir *Tho. Powys*. By your Favour, I hope you will give us leave to interpose in this Matter: For I am sure in the Case of Life, and in Case where there is a Law prepared to be made subsequent to the Fact, to condemn any Man to Death, you will not only have good Evidence, but that which is legal Evidence. And I take it, that in Cases of this Nature, of a subsequent Law, the Evidence ought to be much stronger, and much fairer than when a Man is to be tried by a Law in Being. If they should offer that which was said in the great Case of my Lord of *Strafford*, (which Attainder there hath been an Act of Parliament to reverse) by a Gentleman that did then appear against my Lord of *Strafford*, That where the House proceed in a legislative Way, there needs no Evidence at all; but every Man may follow the Dictates of his own Thoughts and Conscience: ('Tis in *Rushworth's Collections*, fol. 377.) Yet, I hope, you will be of another Opinion, and expect stronger Evidence, than if a Man was to be tried by a Law in Being. Now that which is offered now, cannot be allowed in any Court of Justice: They were going about to shew, That my Lady *Fenwick*, the Wife of the Gentleman at the Bar, that she had used some Means to take off *Goodman's* Evidence, and they would make use of that against her Husband. Now, what any Man's Wife says cannot be made use of against him, as nothing that she says or does can be made use of for him; and, by the same Rule of Justice, it cannot be made use of against him: For otherwise the Rule would be unequal, That she might be a Witness against him, but not a Witness for him; that seems so unjust, that it will not be admitted in any Court whatsoever.

Sir *Barth. Shower*. By your Votes the Prisoner is allowed Counsel, and the King's Serjeant is to produce the Evidence against the Prisoner: That Phrase of Evidence makes us believe, or at least to hope, that you will give us leave to object to that which is not so; and in this I appeal to the Knowledge of the Gentleman on the other Side, who hath had a great deal of Experience of this Kind; and I am sure, in all his Observations in the *Old Bailey*, he can't say this was ever admitted in Case of Treason, nay not in Felony, the Actions or Sayings of other Persons; and I must confess I wonder to hear him move it now.

When attempted on behalf of a close Prisoner, that was not visited by any Body, it was not admitted that the Actions of a third Person at large, should be admitted against him: There the Actions of a Wife cannot be Evidence for, nor against her Husband. It was never but in one Case, and

that for Sodomy, allowed, and that was after two or three Witnesses besides had been produced; and by the Opinions ever since, it hath been allowed not to be Law; and that for the Oeconomy, the Danger might follow in Cafes of Matrimony and Families. Now they both do concern the Acts of other Persons, and not Sir *John Fenwick*. Besides, I have one Objection more, and that is, There is no such Thing alledged in the Bill: and, with Submission, you have declared, That they should produce Evidence as to the Allegations in the Bill, and the Treasons in the Indictment; but I can't find any Order that they should produce Evidence concerning the carrying away of any Witnesses; and 'tis not alledged, that *Goodman* is withdrawn by Sir *John Fenwick's* Privy. As to *Porter's* being tampered with, there is no Colour of Suggestion in the Bill; so that this neither being in the Bill, nor being Evidence at Law, we must be surprized very much by it, if you should admit it.

Mr. *Speaker*. You hear the Exception, What do you say to it?

Mr. *Serj. Gould*. I think what these Gentlemen say, will receive a plain Answer. They have made an Objection without answering the subject Matter; it is an Allegation in the Bill, That *Goodman* hath withdrawn himself. Now the Use we make of this, is to let us in to give an Account of what *Goodman* hath sworn, and to entitle us to read his Examination: For, say we, he hath been tampering to stifle this Conspiracy, to take off the King's Evidence. For no Body doubts of the execrable and wicked Conspiracy; and 'tis as plain, here hath been two Witnesses to prove it; and as plain that this Indictment is found according to the late Act of Parliament, upon the Evidence of *Porter* and *Goodman*. Now to shew this Conspiracy is carrying on, we offer to prove the Tampering that hath been to take off the King's Evidence, and to lay that before the Consideration of this House; so the Use we make of it, is only preparatory to let us in to tell you what *Goodman* hath sworn, and in good Time we shall produce to you an Indictment, where, upon his very Oath, and upon the same Evidence as we offer here, another of the Traitors hath been convicted; and therefore we humbly offer it, Whether, as this Case is, we shall not be admitted to prove this Tampering?

Mr. *Serj. Lovel*. Before we withdraw, I beg two Words as to what is objected on the other Side, for the learned Gentleman appeals to me; and I must appeal to the Knowledge of some Members that are learned in the Law, and to all, That even in criminal Cafes, Courts are not bound up to positive Evidence, but that the Evidence of Circumstances, and some Persons to corroborate them, is admitted: And if it should be so, that nothing but positive Evidence should convict, we should have very few Convictions at the *Old Bailey*; as to Clipping and Coining, where One is convicted by positive Evidence and direct Proof, Forty are convicted and attainted by Circumstances, as Materials found about them, and putting off Counterfeit-money. Sir, I must submit to you, Whether, as the Nature of this Case is, this House will not think fit to hear all Evidence that may concern this Matter, whether Certain or Circumstantial; and the Wisdom of this House will distinguish afterwards, what they think is Material, and what is not. We do take

this to be Part of the same Conspiracy we do charge the Prisoner at the Bar with, that he might not come to condign Punishment; and therefore we pray, that let the Proceedings of other Places be what they will, that you will hear the whole Matter in this Case, whether the Evidence be positive or circumstantial.

Sir *Thomas Powys*. I think they mistake us when they give us such an Answer. We doubt not but there is positive Evidence and circumstantial; but we suppose this to be no Evidence at all. Mr. Recorder tells us true, That circumstantial Evidence is frequently made use of; but we say, That whatever my Lady *Fenwick* hath said or done, is not to be admitted as Evidence against the Prisoner at the Bar; because what she hath said by Way of Endeavour to draw off *Goodman*, is no Evidence at all to be offered against her Husband, and is not so much as circumstantial Evidence.

Sir *Barthol. Shower*. We do agree, If the Bill had been brought in against my Lady *Fenwick*, or against *Clancy*, this had been proper Evidence; and they did, and may deserve Punishment for it themselves: But this is no Evidence against Sir *John Fenwick*, that is here.

Mr. *Serj. Lovel*. We think 'tis properly before the House, even by the Order of the House itself: For in the first Place, we are to speak to the Matters contained in the Bill. One Matter is, That Sir *John Fenwick* had been tryed before now but for Reasons mentioned in the Bill; and that he delayed his Trial till such Time as *Goodman* was withdrawn; therefore what lies before us by the Direction of the House, is, That till such Time as *Goodman* was withdrawn, Sir *John Fenwick* did pretend to go on to make a Discovery, and afterwards put it off with what is charged in the Bill: But say they, What is done by my Lady *Fenwick*, is no Evidence against him. When all the Circumstances are laid before the House, what Dealings there was with Captain *Porter*, and what was said at that Time, and the Consequence presently after *Goodman's* going away, I hope it is as much Evidence as the Case will bear.

Sir *Richard Temple*. Sir, Desire they may withdraw.

Accordingly they withdrew.

Sir *Richard Temple*. I think it much concerns the Honour of the House, when a Prisoner is at the Bar, that he should be allowed the Right of an *Englishman*; what you do here, may be a Precedent in after Ages: You are told what is offered as Evidence here is admitted in no Court, and the Answer that is made to it, is of no Force at all; they tell you there is no Allegations in your Bill, That Sir *John Fenwick* had any Hand in his withdrawing, nor nothing in the Indictment of it, and for that Reason the Evidence seems improper; and if it was, this would be no Evidence at all; for the Oaths of other Persons is no Evidence against the Prisoner, to make him guilty of any Thing.

Lord *Cutts*. I think 'tis agreed already, That the Counsel for the Prisoner should not meddle with the Authority and Jurisdiction of this House: For if we are to be ty'd up to all the Forms and Niceties observed in inferior Courts, then to what End is the Prisoner brought here? I think, Evidence ought to be admitted, that may clear every Man's Conscience, that this Bill against Sir *John Fenwick* ought to pass.

Mr. *J. How.* A Gentleman said, We are not ty'd to the Forms of inferior Courts; but tho' we are not ty'd to the Forms of inferior Courts, we are ty'd to that which was the Ground of them, and that is, right Reason and true Sense: They have alledged that he was indicted; no Body doubts it. That *Goodman* is withdrawn, no Body doubts it. But what is that to Sir *John Fenwick*? It might be with a Design for Good or Evil to Sir *John Fenwick*. My Lord *Jefferies* said, at my Lord *Delamere's* Trial, (as I am informed) That one Witness, with good Circumstances, was enough to convict a Man of High-Treason. And I am told, it was told him then, that if they ever met him in the House of Lords, he should answer it with his Head. I desire you would ask Captain *Porter*, when he comes in, Whether this was discoursed before Dinner, at Dinner, or after Dinner? And whether he knows that *Goodman* heard this or no?

Mr. Chancel. of the *Exchequer*. There seems a particular Shyness to know the Truth of this Matter, I mean in the Counsel t'other Day: The Gentleman says, That *Goodman* might be withdrawn to the Prejudice of Sir *John Fenwick*, as well as for his Good: I desire you will not let the Government be so stigmatized. You have given leave to the Counsel to examine to any Thing that may be added to the Bill; for upon a Commitment, I can move you to put any Thing that shall be thought reasonable.

Sir *Thomas Dyke*. It may be a reasonable Thing to enquire why *Goodman* is withdrawn? But the Question is, Whether this be a proper Time? The House is not ty'd to the common Forms, but they are ty'd to the common Rules of Equity: And the Question is, Whether the House will permit any Person to suffer by the Acts of another?

Mr. *Sol. Gen.** It is discretionary, whether you will determine that this is Evidence now, or after you have heard it. I can't tell at whose Trial it has, but I won't enter upon the Legality of the Thing; 'tis one Thing when a Man is to be tried by a Jury, and another Thing when he is to be tried before Judges. A Jury may be so sway'd and possessed by it, that it may not be fit for them to hear it: But look into the Court of *Chancery*; and there Depositions, if one Side say they are Evidence, and the other Side say they are not, are every Day admitted; and the Rule is, That it is sooner dispatched by hearing of it than not. You do not sit here as a Jury, but as Judges; and will consider how far the Actions of a Wife shall concern her Husband; you will do the Prisoner Right, and your selves Right, if you will hear them.

Sir *Francis Winnington*. The Question is, Whether the King's Counsel ———

Mr. *Speaker*. Let me set you right; they are not here as King's Counsel.

Sir *Francis Winnington*. Very well: But in this House you are the Judges and Jury too. The Evidence that is opened, is to induce you to believe that he is guilty; and the Gentleman that spake last will not allow it to be a legal Evidence. Then the Question is, Whether you, being Judges of the Fact as well as of the Law, should be afraid to be induced to believe a Fact, by that which is not legal Evidence? Suppose my Lady *Fenwick* had had the Design, and had told her

Husband what she intended to do, and he should have said, he scorn'd it: This is possible, if you go to supposing; and that he might apprehend it would do him a Mischief. Now it can be to no purpose to hear this Evidence, unless it be to satisfy the House, in order to attain the Prisoner. No, but say they, Let us hear, and we will judge afterwards: Why so? It can't affect the Prisoner: And if any Person hereafter have a Mind to have my Lady *Fenwick* punished, they may examine it.

Mr. *Sloane*. The Gentleman that spake last hath made one Supposal; let me make another. He supposes, That it may appear by the Evidence, upon the Examination of Witnesses, that what my Lady *Fenwick* or *Clancy* did, was contrary to the Direction of Sir *John Fenwick*: If the Evidence happen to be so, 'tis nothing. But we may suppose again, Suppose it happens, that it appears by the Evidence, that it was for the Benefit of Sir *John Fenwick* to the greatest Degree, to get away one of the Witnesses; & *cui bono*, is the strongest Presumption to me. I do allow, in *Westminster-Hall*, that a Woman should not be a Witness for or against her Husband; but if she be directed by her Husband, *Qui facit per alium, facit per se*; you do not alledge all the Evidence in the Indictment, that runs in general; if the Evidence differs as to Time and Place, ye may find him guilty of the Indictment.

Lord *Norryes*. Because I would not willingly go upon Suppositions, I desire the Clerk may read the Question that you have passed the last Day, to examining Evidence.

Which was accordingly read.

Now I desire to know, Whether this be Treason within the Indictment, or any of the Allegations of the Bill: Otherwise, I think you have tied your selves up by that Rule.

Mr. *Pelham*. I did expect the Gentleman that spake lately would have cleared the Matter. He gave you a Distinction between the Proceedings of *Westminster-Hall* and the *Court of Chancery*. I am ignorant of both. I desire to know, Whether we are to go here by the Proceedings of *Westminster-Hall*, or the *Court of Chancery*. If we are not tied by these Rules, we may let our selves into any Evidence that will induce us to believe him guilty or not guilty. If we are tied to those Rules that are observed in all Courts of Justice, where Trials of Treason are had, this can be of no Validity: So I desire to know, Whether we are to go according to the Proceedings of those Courts, or whether we may proceed as the *Court of Chancery*.

Sir *Tho. Littleton*. The honourable Member that spake last, desires to know, Whether we are bound by the Rules in *Westminster-Hall*, in their Proceedings, or not. I believe it would have been to very little Purpose to have thought of this Bill, if those Courts could have convicted him. I believe if the Counsel had tied you to the Proceedings of *Westminster-Hall*, and therefore that you could not have proceeded on this Bill, you would have taken Notice of them, and reprimanded them for saying so. I know not what to say to the Proceedings of *Chancery* in this Case; but I suppose upon this Trial, you will inform your selves by the best Methods you can; and every Man, according to his Judgment, be for or against the

the Bill. If upon what I hear, I am of Opinion he is notoriously guilty, I shall freely pass the Bill. If I do so much as doubt that he is guilty, according to the old Rule, *Quod dubitas ne feceris*, I shall not be for it; and in order to this I am for hearing every body that comes before us. It is said, that possibly *Goodman* is withdrawn to Sir *John Fenwick's* Prejudice; I would be glad to hear that; if so, I shall have the worse Opinion of the Bill. They say, 'tis not alledged in the Bill, concerning Captain *Porter's* being tamper'd with; but 'tis alledged, That *Goodman* is withdrawn, and that 'tis not alledged, that Sir *John Fenwick* was privy to it; but it may weigh to Gentlemens Judgments, how he comes to be withdrawn. They that tamper with one Witness may be thought like to tamper with another. They tell you, That the Evidence of a Man's Wife will not weigh against her Husband. It may be so in point of Law; but if you think your selves bound up to the strict Rules of Law, dispose of your Bill presently.

Sir Will. Coryton. You have been pleased to give Leave to the King's Counsel to prove Matters against Sir *John Fenwick*. You have heard Captain *Porter* upon the Fact. If they had opened the Matters, that Sir *John Fenwick* was instrumental to convey *Goodman* away, I should have been willing to have heard it: But they opened it, That my Lady *Fenwick* was instrumental in Conveying away *Goodman*; and this ought in no sort to be admitted. An honourable Gentleman of the Long Robe, made a Difference in the Proceedings between the Court of *Chancery*, and the Courts of *Westminster-Hall*; but I would fain know, if a Fact was stated, Whether my Lord Keeper could determine the Matter before a Commission went to prove it. 'Tis true, we are not tied to the Forms of Law, but we are tied to the Forms of Justice. I know no Case where a Wife is admitted to be a Witness for or against her Husband. In *Brown's* Case indeed, who took a Woman away, and forced her to marry him; the Question was, Whether she should be admitted? And in that Case she was admitted as a Witness, because the Necessity of the Thing required it; and there was no other Way to prove, whether he had her Consent or not. Another Case there was of my Lord *Castlehaven*, where from the Nature of the Thing it was admitted; for it was impossible there should be any other Proof of it. But if my Lady *Fenwick* be guilty of this Matter, it must only by way of Inference affect Sir *John Fenwick*. They tell you, they insist upon it as an Indictment; then it comes to be a Matter of Consequence; and therefore since the Matter hath been fully stated to the House, as to what they would prove, I think we may now give our Judgment upon it.

Mr. Boscorven. You are here in your Legislative Power, and are no more tied to the Rules of Law in Examining of Witnesses, than you are in giving of Judgment; for you can give those Punishments that never are given in *Westminster-Hall*. I am of Opinion, that my Lady *Fenwick* cannot be examined for or against her Husband; but if he send her to sollicite for him, it shall have some Weight with me. Those that don't believe it from what he says, may give their Judgment accordingly: I desire to know of this Gentleman, if I don't believe it, whether I can give Judgment against him? I believe a Man's Conscience ought to go with his Judgment.

Mr. Speaker. I will read the Question. That Captain *Porter* be examined to the Attempt of taking off his Testimony as to the late Conspiracy.

Which Question being put, it passed in the Affirmative.

Mr. Harley. I suppose you will let the Counsel of both Sides have first done with their Questions, and then there will be some Questions proposed to you.

Mr. J. Horne. They tell you how that Sir *John Fenwick* was indicted, and that *Goodman* is withdrawn; but there is one Thing the Counsel of both Sides slip over, and that is, Sir *John Fenwick* hath given in false Informations; it looks as if they were agreed on both Sides in that Matter: I desire the King's Counsel may be asked, Whether they have any Evidence of that Matter?

Col. Crawford. Since I am mention'd in that Paper——

Adm. Ruffel. I believe though that Gentleman was afraid that Matter would have been passed over, yet that the Gentlemen of this House that are therein named will take Care, for their own Vindication, That that Matter should not be slipped over; I suppose the proper Time for that is, when the Evidence is over: I assure you, if no Body else will, I will.

Then Sir John Fenwick, and the Counsel of both Sides, and Captain Porter, were brought in.

Mr. Speaker. Sir *Tho. Powys*, the House hath considered of your Exception to the Testimony of Captain *Porter*, as to the Point he was to be examined to, and they are agreed, That 'tis fit that all the Evidence should be laid before them, and they can judge afterwards, whether it be material or fit to be allowed, or not. Therefore, Captain *Porter*, pray do you give the House an Account at large of what Attempts have been made upon you, at any Time, to draw you off from your Testimony, with respect to the late Conspiracy.

Capt. Porter. I had a Meeting with one *Clancy*, first in *Mitre-Court*, at

and afterwards at the *King's-Head Tavern* by the Play-house: At those Meetings he proposed to give me 300 Guineas to bear my Charges to *France*, and to send me a Bill for 300 more; and likewise that I should be allowed 300 *l.* a Year.—

Mr. Speaker. How long had you been acquainted before?

Capt. Porter. Several Years.

Mr. Speaker. Did he tell you who he came from?

Capt. Porter. He said, he had been with —— *Fenwick*, who desired him to make this Proposal to me.

Mr. Speaker. How often had you Meetings with him.

Capt. Porter. About seven or eight Times.

Mr. Speaker. What Satisfaction did he give you, that Sir *John Fenwick* would perform the Agreement?

Capt. Porter. He told me, my Lady *Fenwick*, and my Lady *Montgomery*, should meet and confirm every Thing that Night. The Day before I was to go, I met with my Lady *Fenwick*, who told me, my Lady *Montgomery* could not come, because one of her Children was fallen sick.

Mr.

Mr. Speaker. What Satisfaction did she give you, that Sir *John Fenwick* would perform what *Clancy* had proposed?

Capt. Porter. She said, what *Clancy* had proposed should certainly be made good.

Mr. Serj. Gould. Did you receive any Thing in part, in pursuance of this Agreement?

Capt. Porter. I received 300 Guineas of *Clancy*, and he promised to me a Bill of 300 more, which was deposited by ——— *Fenwick* in his Hands, to be sent after me into *France*.

Mr. Serj. Gould. Pray what Letter was that he brought you?

Capt. Porter. He brought me a Letter, and said it was writ by Sir *John Fenwick* to King *James* on my behalf.

Mr. Speaker. Did he deliver that to you?

Capt. Porter. No; he delivered it to the Gentleman that was to go with me, one Captain *Donelagh*.

Mr. Speaker. Why did you not take that Letter into your own Hands?

Capt. Porter. I had it, and read it, before it was seal'd up.

Mr. Serj. Gould. Do you remember the Contents of it?

Capt. Porter. As much as I remember was, He desired his Majesty, by reason that my going away was to save my Lord *Aylesbury*, and my Lord *Montgomery*, &c. to pardon what I have done.

Mr. Serj. Lovel. Who subscribed it?

Capt. Porter. It was not Sir *John Fenwick's* Name, but they told me, King *James* would know who it came from.

Mr. Serj. Lovel. How did you proceed after the Meeting with my Lady *Fenwick*?

Capt. Porter. The next Night after that he had paid me my Money, and shewed me the Bill, and I was to go away the next Day after; They said, the Boat was provided.

Mr. Serj. Lovel. Can you tell whether the Boat was provided?

Capt. Porter. They were taken up presently after.

Mr. Serj. Gould. We will now produce a Record to confirm the Evidence that he hath given you: This Person hath been convicted for this Tampering.

Accordingly the Record for *Clancy's* Conviction was produced.

Sir *Tho. Powys*. I desire to know, Whether they offer this as Evidence against Sir *John Fenwick*?

Mr. Speaker. They offer to prove, That this very Person hath been tampered with, to take off his Testimony; and they leave it then to the House to judge, who is most likely to be guilty of *Goodman's* Withdrawing. They begin to shew you, there hath been an Attempt to take off this Person's Testimony; you have heard the Person himself to it already: So now they offer to read the Conviction of *Clancy* to this Matter.

The Record of *Clancy's* Conviction was read.

Mr. Serj. Lovel. We will prove the like Solicitation hath been made by Mr. *Dighton*, who is the Solicitor for the Prisoner at the Bar.

Mr. Speaker. What is your Witness's Name?

Mr. Serj. Lovel. *Thomas Roe*: If you please, Sir, to ask him what Endeavours have been used

by Mr. *Dighton*, to make Use of him, that *Goodman* might withdraw himself.

Mr. Speaker. Mr. *Roe*, You are required to give this House an Account of what hath passed between Mr. *Dighton* and you, in order to take off the Testimony of Mr. *Goodman*.

Mr. *Roe*. About the middle of *September* last, I had Occasion to go to Mr. *Dighton*, to enquire, Whether the Commissioners of the Land-Tax in *Surrey* sate; for I knew he was concerned in some Affairs for that County: He told me, he did not positively know, but would speedily enquire. At the same Time he took Occasion to tell me, he knew it was in my Power to do Sir *John Fenwick* Service. I asked him, What he meant by it? Says he, I know you know *Goodman* well, and it will be the better for you if you will tell me: I asked him, What he meant by that Way of talking? He desired I would meet him some other Time, and I should know further of his Mind. Accordingly I did meet Mr. *Dighton*: Says he, you know *Goodman* well, and if you can say any Thing that can discredit *Goodman's* Testimony, you shall have 100*l.* a Year settled upon you for your Life. Says I, Sir, I do know him well: Says he, Did you never hear him talk of Poisoning the Duke of *N.* and Robbing on the Highway, and that he is concerned with Clippers. Says I, I have heard him talk of those Matters several Times; but you can't think I will be a Witness, and expose myself, and disparage People, till I know for what. Says he, For that you shall be satisfied; you shall have 100*l.* a Year settled upon you, provided you can discredit *Goodman's* Testimony, that Sir *John Fenwick* may come off, and it will be done by a Friend of yours.

We accordingly agreed to meet the next Day at a Coffee-House in the City, and appointed a Friend to be there; but Mr. *Dighton* did not meet at the Time; and the Reason he told me was, because Sir *John Fenwick* was that Day to be arraigned. As soon as Mr. *Dighton* had made this Proposal, I told Mr. *Goodman* of it, and he advised me to go on with him, and see if I could get any Offer under his Hand: I told him he had appointed to meet me in the City, and a Friend to be there to hear me. I went, and told Mr. *Dighton*, but Mr. *Goodman* would not be satisfied with that, but said I must go to the Archbishop, and tell him what passed; so I did go and tell the Archbishop what I have told you now.

Mr. Speaker. Had you any Meeting after that?

Mr. *Roe*. Yes, on the 19th of *September*, and then he made great Asseverations, that what he said should be performed; and that I should not only oblige Sir *John Fenwick*, but my Lord *Montgomery*; and that *Goodman* was a lost Man by being become a common Evidence; and that it would not be in his Power to oblige any Man, my Lady *Dutchess* having discharged him of his Employ, and he would not be in a Condition to do further for me; and says he, whatever you would have gotten by serving my Lady *Dutchess* in her Concerns shall be made up over and above this 100*l.* a Year that I have promised.

Mr. Serj. Gould. I desire he may be asked, Whether *Goodman* did not acquaint him, that a Sister of Sir *John Fenwick's* had been with him, and upon what Occasion?

Mr. *Roe*. About the Time of the Preferring of the Bill against Sir *John Fenwick* I saw *Goodman* at *Hick's-Hall*; and a little after he told me, that

a Sister of Sir *John Fenwick's* had come to him, and made some Proposals to him, and I acquainted the Duke of *Shrewsbury's* Deputy, Mr. *Vernon*, with it.

Mr. *Speaker*. Did you pursue this Discourse with Mr. *Dighton*, so as to come to any positive Agreement?

Mr. *Roe*. No otherwise than what I told you; my Design was to have Mr. *Dighton* to have given it me in Writing, or else for him to have said it before some other Man; but I don't know any thing whereby I could have discredited Mr. *Goodman*, if he would have done it.

Mr. *Serj. Gould*. You observe, Sir, that one of the Witnesses whose Name is subscribed to the Bill of Indictment, is withdrawn: Now to give you an Account that he is withdrawn, I desire the King's Proclamation may be read.

Members. No, no.

Mr. *Serj. Lovel*. We have Mr. *Goodman's* Examination under the Hand of Mr. *Vernon*; we pray it may be read.

Sir *Tho. Powys*. Mr. *Speaker*, I desire to be spared a Word to this Matter: I take this to be a great Point, not only as it concerns the Life of this Person, but as it may be a Matter of Example in all Times hereafter; that which they would offer is something that Mr. *Goodman* hath sworn when he was examined by Mr. *Vernon*; Sir *John Fenwick* not being present or privy, and no Opportunity given to cross-examine the Person; and I conceive that cannot be offered as Evidence; for if that should be allowed for Evidence, then what is sworn behind a Man's Back, in any Case whatsoever, may as well be produced as Evidence against him; and they know, that in a Case of the Value of Five Shillings, no Depositions or Examinations of any Man can be made use of; and I am sure they will not say, that the Depositions taken between other Persons, where a Man is not a Party, can be made use of as Evidence against him; and if not admitted where Property is concerned in the lowest Degree, I hope you will never admit it in this great Place, from whence inferior Courts (as to Justice) take their Measures.

Sir *Bartholomew Shower*. Mr. *Speaker*, I desire you would spare me a Word of the same Side. I humbly oppose the Reading of this Examination, as not agreeable to the Rules of Practice and Evidence, and that which is wholly new; and this in civil Causes can't possibly be done: No Deposition of a Person can be read, though beyond Sea, unless in Cases where the Party it is to be read against was privy to the Examination, and might have cross-examined him, or examined to his Credit, if he thought fit; it was never pretended, Depositions could be read upon other Circumstances. But in criminal Cases, I appeal to the Gentlemen on the other Side, who know the Proceedings in the *Old Bailey* very well, it was never admitted: Nay, in an Appeal of Murder, if Depositions be taken before the Coroner, and there be an Examination of Witnesses upon the Indictment, though the Appeal be for the same Fact, and in order to bring the Person to the same Punishment; yet, in that Case, those Depositions can't be read, because 'tis another Suit: But it was never attempted in any Court of Justice, that the Examination of Witnesses behind a Man's Back, could be read in any Place whatsoever. Our Law requires Persons to appear, and give their Testimony *viva voce*; and we see that their Testimony

appears credible; or not, by their very Countenances, and the Manner of their Delivery: and their Falsity may sometimes be discovered by Questions that the Party may ask them, and by examining them to particular Circumstances, which may lay open the Falsity of a well-laid Scheme; which otherwise, as he himself had put it together, might have looked well at first; and this we are deprived of, if this Examination should be admitted to be read.

Now, though the Practice of other Courts does not oblige this House, yet we know you will consider the Rules of Justice; 'tis but Justice in criminal Cases, especially as our Constitution is, that the Person shall see his Accuser. A Man may swear a Deposition reduced into Writing, whose Conscience perhaps would not let him publicly accuse the Prisoner Face to Face: Experience hath shewed it often, that several that will calumniate another privately, will not justify the same in open Court of Justice. What *Goodman* is, 'tis not proper for us at present to give an Account of, but we oppose it at present, for that we were not present, nor privy, nor could have cross-examined him; 'tis only an Information before a private Justice; for if not so, we know not what Authority he had to examine him: and then if so, Mr. *Recorder* knows, that in the *Old Bailey*, if *Goodman* had died it had not been Evidence; in case he had been sick, or withdrawn without our Privy, they could not have read it; nay, if he were withdrawn by our Privy, it could not be read: 'Tis true, the Inciting him to withdraw had been punishable in another Man, but could not have been read to have convicted the Party; and since this Examination could never have been read there; and if it must be unjust, and hath not been practised, I hope you will not do it now.

Mr. *Speaker*. Mr. *Serjeant Gould*, What do you say to it?

Mr. *Serj. Gould*. I observe this Gentleman's Objection, why this Examination should not be read; and, under Favour, we think we are regular, as this Case is, to have his Deposition read. 'Tis true, as long as the Witnesses can be produced in all Courts, and Practice of the Law, you shall not read his Examination, or what is taken before a Justice of Peace: But that is not our Case; it is now fully proved before you, that he is withdrawn: and it is fully before you, that he hath given Evidence for the King, and hath been examined; and this is an extraordinary Case, and that is the Reason we are in Parliament: He hath sworn this Matter, and before a proper Officer; why then shall not his Evidence be read and allowed when he is wilfully withdrawn, and we say, by the Contrivance of the Prisoner at the Bar? And the Thing speaks it self. Now, with Submission, I take it to be every Day's Practice, that where an Evidence is dead, his Deposition shall be read. It appears to you, that there was to have been a Trial, but the Witness is withdrawn; and it appears plainly that he hath been tampering. The Evidence is full in the Case as to *Porter*; and we have produced a Record of Conviction, that does confirm it: Now this is such a Practice, we come into Parliament to have it remedied; for otherwise Men shall commit Treason, and by their Contrivance and Art, the Witnesses shall be drawn away, and the Prisoner shall not be brought to condign Punishment. Here is the Record in which he gave Evidence, and he is withdrawn: and

therefore I hope, in this Case, we shall be admitted to read his Deposition: For I deny what the Gentleman says to be Practice; and Mr. Recorder can give you a better Account, who knows more of the Practice of it, That if a Witness is dead, they may read his Depositions. We are here before you in Parliament; and by the same Reasons that others have been tampered with, this Witness may be presumed to be tampered with; and therefore we are in your Judgment, Whether in this Case his Depositions shall not be read.

Mr. S. Lovel. 'Tis objected, on the other Side, That this Evidence ought not to be offered; and for what Reason? Because, say they, a Jury ought to go *secundum allegata & probata*; and what is not strictly Evidence by Law, you are not to take notice of; but in criminal Cases (which is this Case) where Persons do stand upon their Lives, accused for Crimes, if it appears to the Court, that the Prisoner hath, by fraudulent and indirect Means, procured a Person, that hath given Information against him to a proper Magistrate, to withdraw himself, so that he can't give Evidence as regularly as they used to do; in that Case his Information hath been read; which, I suppose, with humble Submission, is this Case; but I suppose we are not here tied up to formal Evidence; but 'tis our Duty, since the House hath commanded, to lay the whole Fact before you, and you are Judges what is material, and what is not material.

Sir Thomas Powys. 'Please, Sir, to spare me a little; for sure this is no small Matter. I did expect that they, if they intended to have supported this Evidence, would have mentioned some Author, some Case, or some Precedent, where this has been before: — But he makes such a Distinction, I am mightily surprized at; for Mr. Recorder cites no one Instance, that ever he saw such a Thing in his Life; nor cites one Book that hath such Authority; but he gives you a Distinction, whether it be of his Side or ours, I must submit to you; for he seems to agree, that in Cases of Property, such Evidence is not allowed; but in Cases of Life, in which we ought to be more tender, he says, 'tis to be allowed. Sure if it be not Evidence where five Shillings only may be at Stake, I submit it to you, whether it ought to be admitted in the Case of Life? For my Part, I know nothing of it, if it be a Rule; but I always thought the Evidence ought to be more clear and full in the Case of Life, than in the Case of Property; but Mr. Recorder turns it upon us, and says, though it is not Evidence in Case where Property is concerned, yet 'tis Evidence in Case of Life: But I desire he will shew any one Lawyer in *England*, that ever said it, but himself.

Sir Bartholomew Shower. I answer to what Mr. Serjeant Gould says: That this is an extraordinary Case, I will not pretend to say any thing, you are the proper Judges of that; we now oppose it in respect of the Rules of Justice. As to Mr. Recorder's Distinction between civil and criminal Causes; he hath admitted, that in civil Causes it would not be allowed; and I hope you will be of Opinion, that it ought not to be admitted in criminal. The Jury must go *secundum allegata & probata*. I desire to know what other Rules a Jury hath in criminal Cases? But they say, that a Jurymen hath not as much upon his Oath in trying

a Prisoner for his Life, as in trying an Action of Trespas. Is not the Oath, *You shall well and truly try, &c. according to the Evidence you have heard?* Now, I would know whether the Form of the Oath, which the Wisdom of our Ancestors hath thought fit to use for 1000 Years past, does not direct what shall be Evidence? Evidence of *Prima Facies* must be Evidence of living Persons: I am speaking for the Life of a Man, and for maintaining the Rules of Law, which I hope shall continue for ever: And that is, that the Examination of a Person that is absent, shall not be red to supply his Testimony. What you shall think fit to do here, we must submit to; but that 'tis allowed below, we must deny.

Mr. Recorder. Sir, I do, with humble Submission, stand to what I said: As to the Definition of *Allegata & Probata*, in Matter of Property, we agree with them; but as to *Allegata & Probata*, in Matters Criminal, we must differ with them: I did say it before, and do say it again, with Submission, That in many Cases criminal, there need no positive Evidence at all; and yet the Jury, according to *Allegata & Probata*, in that Case, may convict a Criminal. And I do say, with Submission, that where there is no positive Proof at all; yet in that Case, many Criminals are, and still will be convicted. I did instance before in the Case of Clipping and Coining, which are Matters so secretly practised, as 'tis very rare, there can be any positive Witness to prove the Fact: What is then the Method? Why, we go by Circumstances, by Information of other Persons, by Tools, and other Instruments that are found; and tho' no Body ever saw them do the Thing, yet they are convicted. We do not offer this Evidence to be as concluding Evidence, as if *Goodman* was here; but a corroborating Evidence of what Captain *Porter* hath said. If it did wholly depend upon this Evidence, it may be it might have no great Weight; but since there is other Evidence *viva voce*, and since you have been pleased to order us to lay before you all the Evidence, we humbly offer it to you, and pray it may be read.

Mr. Manley. I humbly pray they may withdraw.

Mr. Speaker. If you please to withdraw; but first I am required to ask, if on both Sides you insist upon this Point?

And the Counsel for both Sides declared, they insisted on it;

And then withdrew.

Mr. Manley. I should not have presumed to have given you this Trouble of their withdrawing, but that a Thing is insisted on by the Counsel for the Bill, which I think is of the greatest Consequence to all the Freemen of *England*. 'Tis true, the Rules of *Westminster-Hall* are not binding to the Legislative Power; but I would not have the Legislative Power to be governed by the private Sense of any Man whatsoever, but by those Rules that are the Rules of Justice and common Equity. God forbid that we should, upon Suppositions, suppose our selves out of all the Rights of the Law! I never heard any Gentleman of the Long Robe, before the learned Serjeant at the Bar, assert, that an Examination before a Justice of the Peace could be read against a Man for his Life. 'Tis known to all that have looked into the *A B C* of the Law, that it was never practis'd. 'Tis true, in Equity, Depositions may be read, because

they are taken by the Consent of all Parties ; and 'tis as well a Deposition of one Side, as of the other, and the Witnesses may be cross-examin'd : But that is nothing to this Purpose.

Mr. *Sloane*. I believe I may save you a great deal of Trouble in this Matter ; for those Gentlemen from the Bar that made Objections, spake without Book, but I speak by Book ; (*having my Lord Chief-Justice Hales's Pleas of the Crown in his Hand.*) No less a Man than my Lord Chief-Justice *Hales* (and I think he was past his *A B C* of the Law ; I know not how far this Gentleman is advanced) in his Pleas of the Crown ; in that Part where he shews what is Evidence to the Petit-Jury, he says :

First, By the Statute 1 and 2 *Phil. and Mary*, c. 13. and 2 and 3 *Phil. and Mary*, c. 12. the Justice hath Power to examine the Offender, and Informer ; and so he goes on in several Particulars : And then, 5. He says, these Examinations, if the Party be dead or absent, may be given in Evidence. I must allow, such an Examination not of the same Authority, as if the Witness was present it would be, because he can't be cross-examin'd ; but still it must be of some Weight, and it must be read : But in this Case, 'tis of greater Weight than in that which my Lord Chief-Justice puts ; for he says, it would be Evidence, if the Party was dead ; or if he was withdrawn without the Consent of the Party against whom he is a Witness, and that comes to the Case in Chancery, every Day practis'd ; That if any Person gets my Deeds and Evidences into his Hands, and he hath imbezzel'd the Deeds, they shall be presumed to say what I alledged, because 'tis his Fault he does not produce them. So this Withdrawing by the Instigation of Sir *John Fenwick*, is a strong Presumption, that what he swears against Sir *John Fenwick*, is true.

Sir *Richard Temple*. No Man can give Evidence of any Depositions, nor was it ever admitted to be Evidence either upon the Party's Death or Absence ; and I would not have that Doctrine pass, that we are not tied to the Rules of Law. My Lord Chief-Justice *Vaughan*, when he was of this House, told us, we were not bound to the Forms of Law, but we were tied to the Rules of Law ; and if you are not, how will you judge of this Crime ? How will you judge it to be Treason in the worst of Times ? In the Trial of my Lord *Mordaunt*, who was try'd before the High Court of Justice, they would not allow of this Piece of Evidence, though they had thrown aside Juries. We are tied by the Rules of Law, or we are tied by nothing.

Sir *Thomas Littleton*. The worthy Member here tells us, we are tied by the Rules of Law, or we are tied by nothing. I hope he does not intend to put the Pun upon us, that was by a noble Lord, You are tied by Rules or no Rules ; if you are tied by no Rules, what Rules are you tied by ? I think you may act by Rules, and yet admit of this Evidence. I told you before, I should not reckon my self so tied by the Rules of Law, but that I would hear all Evidence that should be offered : And I do not think 'tis for our Honour to stifle any thing that may bring out the Truth. A worthy Lawyer said, Let them produce one Evidence that is of the Recorder's Opinion ; and a Member hath produced the Opinion of my Lord Chief-Justice *Hales* : And I hope

we shall not be debarr'd from the Satisfaction of hearing what they might hear in the Courts below. Here are two Witnesses that have been examin'd against him, which the Jury did believe that found the Bill. If we cannot have these two Witnesses, let us have as much as we can. We have heard what one said : We have an Opportunity of hearing what the other said. No, says the Gentlemen, we do not desire to be informed ; but I believe it must come to that at last.

Sir *Richard Temple*. The Gentleman that spake last, insinuated, as if I had dropped something he could not understand. Give me leave to tell you, there was the Courts of the Presidents of *Wales* ; when they urged Rules of Law, then they were a Court of Equity ; and when they argued from Points of Equity, then they were tied up by the Rules of Law ; and so gave Judgment neither according to the one nor the other ; and so it was taken away by Act of Parliament.

Mr. *Boscawen*. I have seen it my self, that a Justice of Peace has been examined himself, as to Depositions he hath taken ; and I take it to be an ordinary Examination.

Mr. *Harcourt*. Sir, I must say, if you were to pick all the Absurdities out of the Trials in the last Reign, you could not pick out more than has been endeavour'd by the King's Counsel to be impos'd upon you this Day : This does in some Measure convince me of what was said by another Gentleman the other Day, that it is much better to be tried by an Assembly of 400 Gentlemen, than at the *Old-Bailey*. There was a Quotation of a learned Author ; and the Gentleman read you what was Evidence, and what was not : And the Conclusion was, That these Depositions, if the Party was dead or absent, is Evidence. Why Sir, if these Depositions be Evidence if the Party be absent, then what are we doing of all this Day ? If that be a certain Rule, there is no manner of need of applying to this extraordinary Way ; but if you please to enter into the Consideration of that Point (I am neither afraid, nor unwilling to be informed.) If Gentlemen will take it *De bene esse*, for better for worse, with all my Heart ; but if you enter into that Matter, I will freely tell you my Opinion of it.

Sir *Edward Seymour*. It hath been made a Question, how far you are bound to pursue the Rules of Law ? I suppose it is no new Thing I am going to say, That Bills of Attainder, and Judgments of Attainder, have been reversed for no other Reason, but because the Parliament have not proceeded according to the Rules of Law : I will not say, you are bound by the Rules of inferior Courts, but you must be bound by the Rules of Parliament, and by the Proceedings and Practice of Parliaments, which is the Law of Parliament. And then I would know, whether this House did admit of an Affidavit for Evidence ? And the Reason is this, because by that you make this, which is the superior Court, lame, without the Assistance of an inferior Court.

Mr. *Geo. Rodney Bridges*. The Matter before you is, whether Sir *John Fenwick* be guilty, in your Judgments, of this Conspiracy ? And if so, I cannot imagine why you should not take all the Information that is offer'd to you ; and why not hear all the Circumstances of it : If you do not read this Affidavit, I do not say but 'tis a Kindness to Sir

John Fenwick; but what Kindness will it be to the Country and Government?

Mr. James Montagu. I hope you will not spend much more Time about this, because the Law is so plain: If there be any thing in the Objection, 'tis this, That if it be Evidence, the other Courts below may proceed upon it: but that I take to be no Objection neither; for though it be Evidence, there are not two Witnesses; and the Courts below require two Witnesses, though there be other Evidence, and one Witness besides; so that you can't try him without two Witnesses: It would be admitted in the Case of Felony, and there two Witnesses are not required expressly by the Law. And I can tell you, upon my Reputation, I have seen it done several times.

The learned Gentleman tells you, my Lord Chief-Justice *Hale's* Opinion is so, and that is grounded upon an Act of Parliament; and I think that is of greater Authority than any Judge; and therefore I think that Objection will vanish. He says, you have no Authority to receive Affidavits; but sure we must take Notice of Acts of Parliament; and if that requires Depositions to be taken, and to be Evidence against Criminals, we ought to take notice of it; so that what the Law makes to be Evidence will be good in this Place.

Mr. Harley. I look upon this Matter under your Debates to be of the greatest Consequence to the Lives of the Subjects of *England*, that possibly can come before you: Gentlemen have given you several Reasons for reading these Depositions; one, that it was my Lord Chief-Justice *Hales's* Opinion; another, that there is an Act of Parliament for it: Now, I think, it would be proper to join Issue in these two Points: If any Act of Parliament can be produced for this, then the Debate will be at an end; but if there be an Act positive in Fact against it, then I hope you will not receive it: And if my Lord Chief-Justice *Hales's* Book have not one Word relating to this, then I hope that will be no Argument. He begins his Chapter of Evidence, and says, that the Evidence to the Jury, in Cases of Treason, must be two Witnesses; and then comes to the Cases of Felony: But is that any Debate before us? And he tells you, that Informations might be taken of the Person himself, but that was not by the Common-Law, but was allowed of by particular Acts of Parliament; and then tells you, that his Information, and that Depositions before the Justice, were to be admitted (but he was to be by:) But is this any thing to lead you? Have they brought any Statute that tells you, there must be two Witnesses in this Case? If you will take notice of a Statute, you must take notice of a Statute that is in Point. If any Man suffers by one Witness, I believe all the World must say, he suffers unjustly: I think 'tis of the greatest Consequence to admit of Affidavits. Here it is, that the Boundaries are established for the Lives and Liberties of Mankind: And this is an Observation that is found in History, that those that have broke their Bounds down, it hath returned upon them to their Prejudice.

Sir Robert Richard. I am sure now we are not upon the Point of Reading, whether it be much or little, but upon the Point of Hearing, and that I speak to: And, I think, the Gentleman near the Table did not mistake what the Bar

said; for the Counsel on the other Side insisted positively, that neither by the Practice, nor by the Books, was a Deposition to be read as Evidence: Against that the Gentleman near the Chair produced that Book. As to the Matter of Treason, every Parliament-Man can remember, that you have made an Act, that there shall be two Witnesses in Cases of Treason. Now at the same time, it will be taken notice of, that you have taken Care in that Act, that the Proceedings of this House shall not be tied up. The Gentleman tells you of a Court that wavered between Law and Equity; and so came to nothing; and I am afraid, if we bring the House of Commons down to the Courts of *Westminster-Hall*, they will make nothing of us neither. I do not say, that this Paper shall be as strong Evidence as if *Goodman* was at the Bar; but to say, it shall weigh nothing, I can't agree neither: I agree also, to make a common Practice of reading Affidavits, will be of ill Consequence: And if you take this to be a Matter of small Consequence, I am not for reading this Affidavit. Now I aim not at Sir *John Fenwick's* Blood, but the Safety of the King and Government: And I would not refuse any Evidence in this Case, be it never so small. These Gentlemen speak against a Matter being Evidence before it is read; 'tis offered as Evidence; if it be small, or come to nothing, it is the better for the Prisoner at the Bar.

Mr. Pelham. I am indifferent whether I hear that Paper read, or no; but what is said by a learned Gentleman startles me: Says he, in *Westminster-Hall* they are bound to the Evidence of two Witnesses, and there this Evidence would not be proper, but here we are upon another Foot. I hope we are not here upon another Foot; I hope, though here we are not to be tied by the Chicanry of the Law, we are to be tied by the Equity and substantial Reasons of it. I desire to know, if any one can be tried for Treason upon one Witness? And if we are not tied by the Rules of Law, we may hear any Evidence whatsoever; if the King's Counsel thinks it may satisfy your Fancies, it must be received.

Lord Cutts. I conceive, Gentlemen, we are out in the Way of arguing; I must put you in Mind that we are, at the Bottom, only arguing against the Jurisdiction of this House; and though that Matter hath been settled before, we are told very often of the Law, and Rules of *Westminster-Hall*. In Answer to that, I must observe there are several Sorts of Laws; there is the Law of Nature, the Law of Nations, the Law of God, and there is the Legislative; and 'tis a Self-evident Maxim, not to be contradicted, That no Superiour is to be circumscribed by an Inferiour: And I would ask, if the Courts below are not inferiour to the Parliament? There is nothing can limit us, but the Law of Nature, the Law of God, and the Law of Parliaments; and though I cannot tell you very well what is the Law of Parliaments, yet no Gentleman hath said any thing upon that Subject, that is against the Question before you: The Matter was in a Course of Law; but upon an extraordinary Accident, and for extraordinary Reasons, 'tis brought before you. The Accident is the withdrawing of a Witness; the Reason is the securing of the King, the Government, your Selves, and Posterity. I don't think any Man that spoke against it, is for favouring Sir *John Fenwick*; for I think

this is the worst Way: I would appeal to every Man, what Prejudice 'tis to you to hear this Paper read? And it may be a Disadvantage to you not to hear it.

Mr. *How*. There have been many Arguments given for and against the Reading of this Paper; and if I did not take it that the Reading of this Paper could be of no use to the Judgment we are about to make, I should be for the Reading of it: Either it amounts to a Proof of High-Treason against Sir *John Fenwick*, or it signifies nothing to you. If you suppose it to weigh any thing, I can never agree to the Reading of it; for 'tis only an Hearsay brought to convict a Man that is tried for his Life. But there is a greater Argument which weighs more than the Reason hath been urged; and that is, your Enemies will have an Advantage, and your Government is at stake: But I don't take that to be so much an Argument of their Strength, as of their Weakness and Neglect; however, when they prove that, I will see how far I can go. 'Tis said, that in the worst of Times, they would not convict a Man upon one Evidence. As to Sir *John Fenwick*, though he should not be a good *Englishman*, yet his Cause may be a good *Englishman's*. The Question is, whether there be more danger by the withdrawing of a Witness, and the escaping of Sir *John Fenwick*, or the withdrawing of the Witness, and the convicting of Sir *John Fenwick*? Here they let *Goodman* (such a Rake) go about, and he is gone; and now the Fate of the Government seems to depend upon it. The Precedent on the other Side is not so much to be feared; for I suppose future Governments will take care not to let a Witness go about the Streets again: But it may happen that certain Men, for asserting the Liberties of their Country, may be run upon by ill Governments, and Attempts made upon their Lives by false Witnesses. But the Bill of Treason provides, that no Person shall be prosecuted without two Witnesses. Now it may happen that they shall have no such Witnesses as can convince a Jury; (I believe this Man to be as much guilty, in my own Thoughts, as I believe any Thing in the World, and yet I will condemn no Man upon my primate Fancies;) but here are two Witnesses brought before the Grand Jury, and nothing is so easy as to get a Bill found by them (and that is all that is done by *Goodman*.) Now say they, if this should come before a Petit Jury, one of these Witnesses may not be credited; so they will carry him away, and urge this for a Precedent, and so this Man may be convicted.

Mr. *Smith*. I think we are come to the Debate of the Bill, instead of reading the Paper. Was the Question, Whether this Paper should be allowed as a second Witness? Then it would be a great Question with me, whether it should be read; but the Question, as to Col. *Sidney*, was not whether the Paper should be read, but whether it should supply the Place of a second Witness? But your Debate is extraordinary; your Bill takes notice of *Goodman* being gone away, and now you won't take notice of what he hath left behind him, which I should the rather be satisfied in, because I saw a Gentleman soliciting at the Bar, that did endeavour to get him away. If *Goodman* had been brought a Prisoner to the Bar, I do not know, whether it might

not have been reckoned as great a Fault, as now his having too much Liberty. It hath been cited as a great Lawyer's Opinion, that it might be given in Evidence; but he does not say what Weight shall be laid upon it.

Mr. *Pelham*. I am sorry that honourable Gentleman mistook me so much; I thought I had spoke very plain; I told you, I was not against reading of the Paper, till the learned Gentleman told you, you were not tied up as the Courts of *Westminster-Hall*, to two Witnesses. As to what I said of Mr. *Sidney's* Case, it was not against reading that Paper; but I said, he did rely upon it as against common Justice, to be attainted upon one Witness: And that Attainder you have thought fit to reverse; and the Reason he gives for it was, because it was impossible for a Man to make any Defence against one single Witness.

Mr. *Att. Gen.* The Matter you are now debating upon, is, whether these Papers should be now read. And Gentlemen have let themselves into a Debate foreign to the Question. A great many are against it upon this Argument, that they would not be of Opinion to condemn him, unless there were two Witnesses: That is not the Question, for I think no Man is ready to give his Opinion to condemn or acquit him, unless there were two Witnesses: One Gentleman is against the reading of it, and yet believes Sir *John Fenwick* guilty. I must respite my Judgment till I have heard his Defence: I think that the Counsel for Sir *John Fenwick* at the Bar, are very much mistaken, when they said, that such a Thing as an Examination in Writing was never read in any Court of Justice. I think that is a great Mistake, and a good Authority hath been cited for it; and every one knows the Practice is otherwise; 'tis often allowed, that the Examinations before a Justice of Peace are read. The Question is now, whether the Examination shall be read? If there do not appear another Witness to prove him guilty, you will debate that Matter then, Whether you will condemn him without two Witnesses? You might as well have debated before, whether *Porter* should be examined, because no Man will condemn him without two Witnesses, and therefore do not examine one. Why, we know not what further Witnesses may be produced, if Sir *John Fenwick* was upon his Trial; I think this Information might have been admitted for Proof, if *Goodman* was out of the Way; but if it was admitted, unless there was another Witness produced, I believe the Court will tell the Jury, here are not two Witnesses, and therefore you must acquit him.

Sir *William Coryton*. I must crave leave to differ from that worthy Gentleman: I think this is the proper Time to determine, whether this Evidence is to be admitted afterwards. Indeed you may determine how far it is available. I thought both in Law and Justice, before I came into the House, that this ought not to be admitted for Evidence. A Gentleman grounded his Argument, upon what? My Lord Chief-Justice *Hales's* Opinion; but the Fate is, that my Lord Chief-Justice *Hales* states the Difference in Cases of Treason, and in Cases of Felony. Now in Felony, they make use of Depositions; and the Reason is, because 'tis more for the Advantage of the Prisoner than his Disadvantage; for if the Wit-

ness differ from his Examination before the Justice of Peace, that turns to the Advantage of the Prisoner. In the Nature of the Thing it seems not to be reasonable, for it is easy to turn the Tables. And suppose *Goodman* in the Place of *Sir John Fenwick*, and *Sir John Fenwick* in the Place of *Goodman*; it would be hard (take the Informations to be as they are) to admit them for Evidence; which in my Opinion, are great Reflections upon Persons of great Honour and Worth.

Sir Charles Musgrave. That which I perceive to be your Debate, is that upon which the Counsel withdrew; you heard it asserted, That there was no Instance in a criminal Case, where an Affidavit was allowed for Evidence: And I think the learned Counsel at the Bar did not much insist upon it; and yet I don't think they were ignorant of the Case quoted out of my Lord Chief-Justice *Hales*, but they thought it was not applicable to this Business before the House; but only related to Felonies, and when Depositions were taken in the Presence of the Party. 'Tis said, we are not tied up to the Rules of *Westminster-Hall*; and that Parliaments may denominate Crimes after they are committed; but I never did hear, that the Parliament did take upon them to determine that to be Evidence which is not Evidence in any Court of the World. If you read this Paper to inform your selves, you admit that to be Evidence which is no where else to be admitted. You are told, you are not tied to the Forms of inferior Courts of Law nor Equity: If you are not bound by them you are bound by your own Constitutions. You are told, you are used to read Affidavits in common Causes; but if my Memory serves me right, you have always had it opposed in this House; therefore I think, according to the Rules of your own House, we shall not read Affidavits. Will you make a new Rule in this Case? Pray consider the Consequence of it hereafter. Suppose there came down Affidavits upon another Person, against a great Man for High-Treason, Whether that may not be thought sufficient for to govern your Judgments: I hope those that hear me will have a Care of the Matter. Why, by the Parity of Reason, may not two Affidavits do by the help of the Legislative Power? I would be glad to know, Whether in the Case of an Impeachment, they ever heard of Affidavits being read? And this is much in that Nature; and therefore, why should you admit of an Affidavit now, when the Party charged was not present when that Affidavit was taken?

Sir Joseph Williamson. I am sorry this Point costs us so much Time; the Gentleman that spake last hath brought us to the Question, How far you will admit this Affidavit (as they call it) to be read: I am of Opinion notwithstanding all that hath been suggested, that it not only may be read, but that it ought to be read. None of the Cases that have been instanced, comes up to the Case in Question; all the Cases that are brought are from inferior Courts, and the last that is brought is from the Example and Usage, in less considerable Cases, and indeed of a different Nature.

This Bill of Attainder is indeed a Thing so extraordinary (as hath been said) as it never ought to be used but upon extraordinary Occasions; and upon that Principle, all that is feared is all answered and avoided. It is to be thought

never to come but upon the like Occasion; and then God forbid, but they should be governed by the like Precedent; and if that was proper to speak now, which will be at the bottom of it, when we come to give Judgment, and we have time to consider of it, I can't think we shall differ in many Voices. Whether it be Evidence, and how far it is so, is not now the Question; but the Question is only, whether it be such an Evidence as ought to be read? And all the Inconveniencies that have been alledged, depend only upon this, that it should not be admitted in the ordinary Proceedings in the Courts of Justice. Now I say, there was a Power lodged in the Parliament of *England* to make a Man guilty of Treason, that was not so before; and that even in a Reign when they came to determine what Treasons were: They did not think it for the Safety of the Community of Mankind, but that there should be a Power lodged in the whole, to declare that to be a Crime, that was no Crime before it was committed, giving them more than is asked here: For here can be no Question, but as to the Forms of Proceedings. The Question is not upon his Crime, that is no Question; and I take it, that if upon any Occasion 'tis to be justified in this, and the Law hath trusted the Parliament with a greater Power than now they are about to execute, and there are only Objections to it raised from another Place, which I think can never conclude in this.

Mr. Chancellor of the Exchequer. I am for reading of this Paper, though I don't think it Evidence equivalent with *viva voce*; nor do I think, that in like Cases it ought to be admitted below; but I think, in your Proceedings in Parliament, it ought to be read, whether it be an Affidavit or not; and I am more of that Opinion, from what happened in a Case to Day. We had a Dispute, whether *Porter* was to be examined, because the Testimony of a Man's Wife was not good below. But when that came to be examined, it was not the Testimony of a Man's Wife, but his own Letter appear'd in Evidence; and *Clancy* told *Porter* he came from *Fenwick* himself, and therefore the Evidence, which at first, for that Reason, was urged not to be heard, did amount to more when it came to the Proof. I would have this Paper read; not because it should supply the Place of a Witness; no, but because you see he hath been indicted by the Evidence of *Goodman* and *Porter*, and the first is withdrawn; and by whose Means you have heard: And I would know, whether *Goodman's* Evidence did amount to accuse him of the same? I do say, in your Power of judging, you are not constrained to the Rules of *Westminster-Hall*: And I would say, that for your Constitution, the Courts of *Westminster-Hall* are to be governed by the Letter of the Law; but there is lodged in the Legislative a Power to judge those Crimes that are sheltered behind the Law; and I believe, if the several Attainders were examined, there was never any Attainder that went upon a more just Proceeding than this. I take the Crime to be a Plot with your Enemies to bring in a foreign Power; and as if that was not sufficient, he hath made a false and scandalous Confession, to bring a Distrust and Jealousy among the King and his People; and he hath dallied and gain'd so much Time, as he hath had Opportunity to corrupt one of the Witnesses; and therefore it would be hard

hard, if no Law should reach him. 'Tis said, Why did not you keep the Witness? It would be hard, after a Person hath made a Confession for the Good of the Kingdom, that he should be always kept in Irons. We are debating of the Bill, while we are now only purely to see what is in this Paper. I should not have offered to have made use of this as a second Witness; but the being an Affidavit or not, is not material in this Point; the Commons proceed upon Impeachments, without Affidavits. 'Tis offered as Evidence: That *Goodman* was a Witness against him (you have had Proof of;) and that he hath been tamper'd with to withdraw, by the Friends of this Gentleman. I do think we have gone more fairly and equally to work, than upon any of the Records of Attainder in your Journals.

Mr. Brotherton. The Question is, Whether this Paper shall be read? First, It hath not been proved before whom it was taken, nor nothing at all. It hath been objected, that there ought to be two Witnesses by the late Statute. But I must put you in mind, that it was so by the Statute of *Edward VI.* and so was the Common-Law before; and my Lord *Coke* says, there must be two Witnesses, and they brought Face to Face: And so goes to the Divine Law; and if it should not be so, I will put you in mind of an Inconveniency: Eleven Witnesses were produc'd before the Grand Jury; and when they came to give Evidence Face to Face, before the Petit Jury, the first Witness did not know the Criminal that he had sworn against. It was in the Case of *Sir Rowland Stanley*.

They mention a Paper against *Algernon Sidney*; but that Paper was wrote by himself. 'Tis said, this House is not bound by the Rules of other Courts; for that Reason they ought to give Rules for other Courts. Nothing is more common than to say, Judgment was so in the House of Lords, and that settles the Law in other Courts below.

Sir Godfrey Copley. Several Gentlemen have spoke to the Reading this Paper; some have said, That it should be read as Evidence: Some others are for reading of this Paper; but yet at the same time tell us, it is not to be looked upon as Evidence, at least not equivalent to a Witness. If the Paper be to be read at all, I would know for what Reason? If it be to have any sway upon our Judgment? If it hath any Effect upon my Judgment, then in some measure it is equivalent to a Witness, when 'tis in the Nature of a Witness; and if it should be read to supply the Defect of a Witness, then I would know, what the Consequence of this might be? I do very well understand, that the Court of Parliament does take no Precedent from *Westminster-Hall*; nor am I afraid of any Precedent they should give to *Westminster Hall*: But I am afraid of a Precedent to future Parliaments. Suppose the Information of *Sir John Fenwick*, that hath been delivered in here, should be produced as Evidence against any of those honourable Persons that are charged in it, though I believe they are very innocent; and some Knaves or Rascals in future Reigns should come in against them, and this Paper should be brought to supply another Witness, what a Consequence would that be!

Sir Henry Hobart. I must differ with the Gentleman that spake last; as to the Gentleman that spake before, I did not expect any thing to be

quoted out of *Lancashire* against the Reading of it. I will tell you why I think this Paper should be read; you have it suggested in the Bill, that *Goodman* was one of the Evidence against *Sir John Fenwick*; they are to make good the Suggestions, and this will shew, that *Goodman* was an Evidence. You are told the Danger of the Precedent, and there may come ill Reigns, and ill Parliaments; as to that, I shall only say, in a good Reign, and a good Parliament, there is no Danger; and in an ill Reign, and ill Parliament, they will make Precedents without your giving of them. *Mr. St. John* tells you in his Arguments, 'Tis true in inferiour Courts, by the Statute of *Edward VI.* they are bound by two Evidences *viva voce*; but you are not prescribed by that here, but you are to judge in your own Consciences as the Thing appears. I may say as another did upon another Occasion, let it be read; *Valcat quantum valere potest.*

Sir Marmaduke Wyvell. I desire to take notice of one Argument that hath been made use of by one or two honourable Persons; which is, that they tell us, that *Goodman* hath been tampered with by *Sir John Fenwick*: I remember no such thing that hath been proved; but indeed it was said, that *Mr. Dighton* offered *Mr. Roe* 100*l.* a Year, to invalidate *Mr. Goodman's* Testimony.

Lord Castleton. Let me ask you this Question, Whether if you read this Affidavit, you read it as Evidence?

Mr. Sol. Gen. I desire you would consider what you did, before you ordered *Captain Porter* to go on with his Evidence, and did agree you would consider of it afterwards. Some are for reading this Paper, and others are indifferent whether it be read or no; and those that are against reading of it, are against reading of it, because 'tis no Evidence: But that is no Reason why you should not read it; for it is at most but doing a vain Thing.

I think you have been told already, if it was insisted on below, it must be read; and the other Side must demurr. The Court might say, 'tis not material, but it must be read before they can demurr: So that the Question, Whether it is Evidence? must come afterwards; and if you go according to the Rigour of Law, with Submission, it must be read.

Mr. Price. I did not design to trouble you in this Matter; but the Doctrine laid down by some Men of our Gown, surprizes me: 'Tis only an Argument, that the Court below ought to admit this Paper to be read; but there is no Precedent shewed, nor convincing Reason given, why the Courts should admit it. The Question is, Whether an Information taken before a Justice of Peace, ought to be read here? If it be to introduce a new Law, and make a new Crime, then you make a new Sort of Evidence: But if this be a Crime against an Act of Parliament, or Law in being, then you must take the Evidence the Law doth afford you, in the Nature of the Crime. The Charge here is a Charge of Treason against a known Law: But the great Argument is, this is an extraordinary Offence; that *Sir John Fenwick*, or his Lady, had a Hand in sending *Goodman* away: 'Tis a Mistake; and offering one Thing that is not Evidence, brings us to another; the Evidence of *Clancy's* tampering with him: *Captain Porter* does not say, that *Sir*

John Fenwick employed him; only, that *Clancy* said so, which is but a Hearsay, and that is no Evidence, unless *Clancy* was at the Bar, and would say it.

In the next Place, it is said, That there was a rampering by a Solicitor: What is that? Is it not natural for a Solicitor to say, is there any Objections to such a Witness? Is it not natural for him to lessen his Reputation if he can? Now you would have a Copy of an Information to be Evidence. 'Tis said, 'tis tantamount: If so, then the Courts of *Westminster* ought to intermeddle with it, and not this House. A noble Lord mentioned to you the Law of Nature, the Law of Nations, and the Law of God; but he forgot one Law, which, was most material, and that is Martial Law; which if he had said, does justify the taking away a Man's Life upon extraordinary Evidence, he had said right.

Mr. Speaker. The Question is this, That the Information of *Cordel Goodman*, taken upon Oath, 24th of *April*, 1696. be read.

Which Question being put, the House divided.

Yeas, 218. Noes, 145.

So it passed in the Affirmative; and Sir *John Fenwick*, and the Counsel, and Solicitors on both Sides, were called in again.

Mr. Speaker. Gentlemen, since you withdrew, the House have considered of the Matter, upon which you did withdraw, and they have thought fit, that the Information of *Cordel Goodman*, taken upon Oath, before Mr. *Vernon*, 24th of *April*, 1696. be read.—Clerk, read it.

Clerk of the House of Commons reads——This is signed, *Cordel Goodman*, and sworn 24th of *April*, 1696. before *James Vernon*.

ABOUT some two Years since, or better, I understood Col. *Parker* was Resident here, in order to engage several People for the Service of King *James*; and Captain *Porter* told me, he had a Mind to see me, which he accordingly did; where he told me, there would be an Invasion, and King *James* would be restored; and that in order to it he had Commission to levy Men, and to grant out subordinate Commissions for a Regiment of Horse, and did ask if I would accept of one, which I accordingly did. He likewise said, he would see me as often as he could; and that Captain *Porter* and I should receive Directions from him, from Time to Time, upon several Meetings; and having received my Commission, I understood what Captains were to be in the Regiment; which were Captain *Porter*, Sir *William Parkyns*, Mr. *Charnock*, Sir *Hugh Smithson*, Mr. *Higgins*, and myself; and one Mr. *Witberington*, to be Lieutenant-Colonel.

The Commissions were to be Blank when they were to be delivered, and to be filled up by the Captains, &c. I then came acquainted with Mr. *Charnock* and Sir *William Parkyns*; and by them and *Parker*, Captain *Porter* and I were informed, that there was a great Body of Horse to be ready in the North; but though I asked, yet they never named any Persons to me, but said, it was sufficient, I should receive Orders, and a Roll to March, to Rendezvous upon Occasion; and indeed I did not much press it, because I did gather there were a great many concerned; and at this Time Captain *Porter* and I took a House in the *Chase*, with Stables and Barns, fit for hold-

ing Horses, and as a fit Place to meet, upon Orders given us to March, which were then daily expected.

Some Time after this Colonel *Parker* was taken, and being committed to the *Tower*, he made his Escape; and after that I saw him, and then he told me, he would be sure to correspond with me and *Porter*; and I should receive his Letters of Mr. *Charnock* or Mr. *Johnson*, and he accordingly did; and in his Letters he still gave us Hopes, and said, he would certainly send us notice to be in readiness Time enough, to be serviceable to the Design of the Invasion.

The last Letters I received from *Parker*, gave me Advice, That he doubted not, but the Cause would come to a Hearing as this *Easter Term*; and he should write no more, but bring the Orders himself: Upon which I went to *Charnock*, and he told me he did expect him here in a short time: But always, or most commonly, in his Letters, he told me, for a Sign, That when the *Thou-lon Fleet* should join the *Brest Fleet*, I might certainly depend, that we should be invaded here.

During these Transactions, Captain *Porter* complained, that something he was sending to *Lancashire*, had miscarried; he desired me to set by two Boxes, which I looked not into, but supposed them to be Arms, and I did set them by for him: I had not bought any Arms, but had bespoke some of one *Perry*, a Gunsmith, who said, I should have them at a Week's Warning.

After *Parker's* having made his Escape, and getting into *France*, Mr. *Charnock* came to me, some Time before the King's going to *Flanders*, and said, he had something to propose to me; and desired me to go along with him, which I did; and he brought me to one Mr. *Waugh*, who said, he expected a Commission from King *James*, to seize King *William*; accordingly we went to the *Chocolate-House* in *St. James's-street*; and after some Discourse about the Commission he said he expected, we appointed another Meeting at that Place, and adjourned from thence to my House in *Brownloe-street*, where was present, Mr. *Charnock*, Mr. *Porter*, Mr. *Waugh*, Major *Matthews*, and Mr. *Donlagh*. The Subject of our Discourse was, about the Surprizing and Seizing the King, as he came from *Richmond*; and after several Ways proposed to that Purpose, I particularly asked; Suppose that the King were in our Power, what then? For we ought to have regard to some End or other in such an Undertaking; for I was not willing to offer any thing to his Person. Mr. *Waugh* said, we might have a Coach and convey him away; and he said, he was assured of a Fort to be delivered to him, and put into his Hands (to the best of my Remembrance it was *Deal*) which might give us Shelter till we might find Opportunity to carry him into *France* by Shipping. I must confess, I did see very little probability in what he said; neither did I believe, that he would receive any such Commission, as he said he expected: (For about two Years since, I remember I saw Sir *George Berkeley*, with Col. *Fountain*, and Mr. *Porter*; Sir *George* was then going over to *France*, and it was the only Time that ever I saw him; and then Captain *Porter* and I did desire, that if King *James* designed any such thing as seizing King *William*, he would send over a Commission, and a Pardon withal

withal in Case of an Accident; which Message Sir *George* carried over, and King *James* refused to send it.) However, we had another Meeting after that at my House, by which Time, he said, he would shew us the Commission, and facilitate the Design; it was at a House behind the *Temple*, where the aforesaid Company met, and Mr. *Waugh* brought with him one Mr. *Hays*, who, he said, could furnish us with a Ship which would be ready to transport us after we had seized the King; but upon Discourse with Mr. *Hays* we found that the Demands were so exorbitant, and not in possibility of being complied withal; and besides, no Order nor Commission being produced, we did desist then; for Captain *Porter* and Major *Matthews*, and I, did declare we would not meddle without sight of the Commission. After this, Captain *Porter* and I talked of having a Vessel, and sending *Le Rue* and *Charnock* about it. We met at the *Fountain* by the *Temple-Gate*, and Sir *William Parkyns* was there; and during the Time of our being there, one called Sir *William* out, and Sir *William* called out *Porter*, who came in, and said, there was a Gentleman that could help us in this Affair; who he was I know not; I believe Captain *Porter* may, for I saw him not: But all this proved ineffectual, for the King went away suddenly, and no Commission ever came. And by Letters from *France* I understood King *James* was angry, that they used his Name to what he had not promised; and *Porter* and I wrote over, by his Order, the Truth of the whole Matter.

Some Time after this, Captain *Porter*, the Earl of *Aylesbury*, Sir *John Freind*, Sir *William Parkyns*, and Sir *John Fenwick*, and others, met about sending over some Proposals to King *James*, to expedite an Invasion; and likewise Captain *Porter* said, it was proper I should be there, for he had engaged for me. I told him I would come; and at the *King's Head* in *Leaden-ball-street*, I found the Persons above-named, together with my Lord *Montgomery*, and one Mr. *Cok*.

The Effect of their Consultation was, the sending Mr. *Charnock* with a Message to this Purpose; That if the King of *France* could spare such a Number of Foot, and so many Dragoons, amounting to about 12 or 15000, or thereabouts in all, that then upon Notice given, that every particular Man there, was to furnish such a Number of Horse, some more, some less, to be ready to succour the Forces from *France* when landed. Mr. *Charnock* went and returned with a Refusal, that Forces could not be spared: Sir *John Freind* and my Lord *Aylesbury* were of Opinion, that if King *James* would venture hither with some small Retinue, he had Friends enough to appear for him, without any foreign Forces; but that was held in doubt.

I used afterwards to see my Lord *Aylesbury*; I always asked, what News he heard? He said, when he received any Orders, he should know; for he having been in *France* (as he did not deny) I supposed him not to be ignorant of what was intended.

And to the better facilitating an Invasion, Sir *John Fenwick* used to send over a List of the Forces, and how they were quartered, and what were in Garrison, and what otherways disposed of: He having made a Mistake in the Account, *Parker* did by Letter desire me to try if I could procure such an Account; which I accordingly

did of one *Gibson*, a Clerk in the Office, and sent it over frequently.

After the Escape of *Parker* out of the *Tower*, Sir *John Fenwick*, when I asked him how he got away, and how much Money was given? he said, 200*l.* promised, and 300*l.* given; for when a Person came in and told him, he had brought him Liberty, and was to have 200*l.* he replied, you shall have 300*l.* and it was made good to him afterwards.

Cordell Goodman.

Much about the same Time, I used now and then, with Captain *Porter*, to be with Sir *John Fenwick*, and it was agreed, that if *Parker* should not bring us timely Orders, that what Forces we could bring in, (*viz.*) *Porter* and I, we were to take Orders from Sir *John Fenwick*; this we offered him, and he kindly accepted: And then he said, That he believed most of my Lord *Oxford's* Regiment would go to King *James*; when I told Mr. *Paradise* had promised to bring in 7 or 8 to me, and that Mr. *Aynsworth* was to bring in 20, and *Parker* had said, if I made it 30, it was sufficient for me.

As to keeping the Horses, Sir *John* said, it was dangerous, and they would certainly be seized; but the best Way was to have a List of what Horses were in and about the *London Stables*.

Captain *Porter* and I sent accordingly to view the Stables. I sent Mr. *Reyboagh*, and Captain *Porter* sent *Cranborn*, and they took an Account.

Cordell Goodman.

Jurat. 24 April, 1696.

Coram me, Ja. Vernon.

Mr. Serjeant *Gould*. Now Mr. Speaker, if you please, we will call some of the Grand Jury that will give you an Account what Evidence they found the Bill upon. — Mr. *Gracedue*, you were one of the Grand Jury that found this Bill?

Mr. *Gracedue*. Yes, Sir.

Sir *Thomas Powys*. This is so far from being Evidence, that I think 'tis the Oath of the Grand Jury, That they shall not disclose or discover the King's Secrets. The Bill of Indictment is but an Accusation. A Bill of Indictment cannot be given in Evidence against a Man for the least Crime soever. It can't be given in Evidence to be credited, because 'tis but an Accusation; and by Consequence, whatever any Witness says at that time, can go no farther. When a Person comes upon his Trial, they can't so much as resort to any thing that is sworn before the Grand Jury, nor make use of it.

Sir *Bartholomew Shower*. We humbly oppose this Evidence; because the Gentlemen can give no Instance in their Reading or Observation, that the Testimony that hath been given before a Grand Jury, hath been given in Evidence to a Petit Jury: And 'tis Part of the Oath of a Grand Jury-Man, that it should not be disclosed. We do not say, it will bind your House; but I hope it will be Evidence to you, that 'tis not agreeable to the Rules of Law.

Members. Go on, go on.

Mr. *Speaker*. Mr. *Gracedue*, will you give the House an Account, who were the Witnesses before you upon finding the Bill?

Mr. *Gracedue*. The Witnesses before us, were Captain *Porter*, and Mr. *Goodman*.

Mr. *Speaker*. Can you remember so well, as to give an Account to this House of what Evidence Mr. *Goodman* gave?

Mr. *Gracedue*. Yes, I think I can. When he came before us, he told us, That he was at a Meeting at the *King's-Head* in *Leaden-ball-street*, where there was Sir *John Fenwick*, my Lord *Montgomery*, Captain *Porter*, Mr. *Charnock* and others; and the Business was to send Mr. *Charnock* over to *France*, to procure Men to invade this Kingdom; and 8000 Foot, and 2000 Horse was proposed. He told us, the Result of that Consult was, that if *France* would supply 8000 Foot, and 2000 Horse, it would be a sufficient Power to come over; and that they would supply 2000 Horse among themselves. Upon which *Charnock* replied, Gentlemen, you send me over upon Uncertainties; you say, you will supply 2000 Horse, but unless you give me some Assurance, I can't, nor will I go. And the Question was proposed to all of them, if they would make good their Proportion; and they promised singly. Says I, Did Sir *John Fenwick* promise? And he said, Yes. Says I, Did my Lord *Montgomery*? And he said, Yes. He was asked, Who else? But, says he, 'tis not a Question for you to ask us; and for that he referred himself to me: For, he said, he was not bound to answer further, having proved the Indictment.

Mr. *Serjeant Lovel*. We desire Mr. *Joshua Meade* may be asked to the like Purpose. Were you one of the Jury that found the Bill against Sir *John Fenwick*?

Mr. *Meade*. Yes.

Mr. *Speaker*. Pray, who were the Witnesses before you upon finding of the Bill?

Mr. *Meade*. There was Captain *Porter*, and Mr. *Goodman*, Sir.

Mr. *Speaker*. Can you remember what Mr. *Goodman* testified then?

Mr. *Meade*. Mr. *Goodman* did then testify, That Sir *John Fenwick*, my Lord *Montgomery*, &c. were at the *King's Head* Tavern in *Leaden-ball-street*; and *Charnock*, and the rest there did consult how to bring in their old Master; as to *Charnock*, That they agreed to send him over to King *James*, to know whether the *French* King could furnish them with 8000 Foot, and 2000 Horse, and that they would endeavour to meet him with 2000 Horse. Hereupon *Charnock* (*Goodman* said) put it to every Man of them, to know if they were all of one Mind? and they all said they were. This he did prove, and this is all I can remember.

Mr. *Serjeant Lovel*. We have many more to the same Purpose, if the House think fit to hear them.

Members. No, no.

Mr. *Serjeant Gould*. We will go thus much further; That upon the Trial of Mr. *Cook*, wherein there was Evidence given by this Gentleman, and in that this Gentleman that is the Prisoner at the Bar was particularly named to be concerned, we will call them that were present there at the giving of the Evidence: But first, we desire to read the Record of *Cook's* Conviction.

Thereupon a Motion was made for the Counsel to withdraw; and being withdrawn, a Motion was made for Candles, which passed in the Affirmative without a Division, in regard it being dark without Candles, there could be no Motion made for adjourning the Debate, or remanding the Prisoner.

Afterwards a Motion being made for adjourning the House 'till to Morrow Morning, the House divided.

Ayes, 141.

Noes, 163.

And so it passed in the Negative; and Sir *John Fenwick*, and the Counsel, and Solicitors, were brought in again to the Bar.

Mr. *Speaker*. Mr. *Serjeant Gould*, the last Evidence you were about to offer was, that of the Record of Mr. *Cook*.

Sir *Thomas Powys*. Mr. *Speaker*, we oppose that being offered as Evidence; as I understand it, they are going to give in Evidence against Sir *John Fenwick* what was sworn against Mr. *Cook*; that is not admitted in the Courts below; for, according to that Method, the Trial of one in the Company would be the Trial of all the rest. This was never allowed in any other Case, and I hope you will not allow it here.

Sir *Bartholomew Shower*. The Indictment is, that they did consult together, but their Crimes are several; if they had been mentioned in one Indictment, and one had been tried at one Time, and the other at another, it would not have been allowed that they should give in Evidence against the one, what had been sworn against the other; for though their Charge is by the same Witness, and for a Fact done at the same time, yet the Defence of the Parties may be different; and it cannot be expected, that we, on the behalf of Sir *John Fenwick*, are prepared to give an Answer, in regard of any thing that was sworn against Mr. *Cook*.

Mr. *Speaker*. Mr. *Serjeant Gould*, you hear the Exception.

Mr. *Serjeant Gould*. We hope in this Case we shall go on with our Evidence, as offered and proposed to this House. These Gentlemen have made their Objections, as if they were below in the interior Courts; but we are here now before you in a parliamentary Way; and what is that which brings us here, but because there is a Witness withdrawn by Artifice, so that we cannot produce him? And therefore we come, and humbly apply our selves to this honourable House. Now, Sir, you are Judges of the Method of coming at the Truth, and supplying that Defect: If we could produce him, there would be an End of the Matter; but in this Case we are in the Judgment of this honourable House, Whether we shall not give such Evidence as he hath given upon his Oath, though in other Cases it is not admitted.

Mr. *Serjeant Lovel*. When we produced the Record of Conviction, we only produced it to shew you there was such a Trial; and by that means to let us in, to shew you what was sworn by Mr. *Goodman* at that Trial.

Then upon the Motion of Colonel *Granville* and Sir *Richard Temple*, Sir *John Fenwick*, and the Counsel, and Solicitors, withdrew.

Sir *Richard Temple*. If I did not believe what is now offered, is what was never offered before, and of dangerous Consequence to every one here, I would not have troubled you at this time of Night. There has nothing been offered that this hath ever been done. They say, It hath not been done in inferior Courts: Pray let us see if ever it hath been done in Parliament, That what was given in Evidence at another Trial, should

be given in Evidence against another Person here, when this Person was not by, and had no Opportunity to defend himself against it; I am sure it was never done yet.

Sir Thomas Mompesson. This Gentleman complains this was never done. When the Duke of *Monmouth* was impeached, the Bill was read three times in one Day, and that Gentleman moved for the Impeachment.

Sir Richard Temple. Here were three Witnesses that did declare they saw him in actual Rebellion, at the Head of an Army; but I hope I am not to answer for all the Proceedings then.

Colonel Granville. When I saw them going on to make use of that as Evidence, which was never allowed in any Court, I thought I ought to move for them to withdraw. I shall not give my Consent to have it read, 'till some Body satisfies me 'tis good Evidence against *Sir John Fenwick*: I can't see how you can admit this for Evidence: Are we to read all the Trials that are upon this Plot? Therefore I desire you will bid them produce what is Evidence against *Sir John Fenwick*, and not to trifle with you.

Sir Thomas Littleton. If you proceed in this manner I know not when you will have done. They do not tell you, they produce this as Evidence against *Sir John Fenwick*; nor do I take this to be the only Evidence to prove him guilty. If nothing but exact Proof would have satisfied, this Bill would not have been brought in: But this is to make as good Proof as the Nature of the Thing will bear. You have heard several Things before, in relation to *Goodman*, that possibly might strictly be no more Evidence against *Sir John Fenwick* than this; as *Goodman's* being withdrawn. First, they offered to prove that he was gone; that it was suspicious that *Sir John Fenwick* was privy to his going: Why did you admit the Evidence of what he said to the Grand-Jury? What is this, but to give Evidence of what he said to the Petit-Jury, wherein the Grand-Jury and Petit-Jury have both believed him.

Mr. Harley. I think if you had come to one Determination before you had entered upon this Matter, you had very much shortned your Business; that is, that you would not expect such Proof as is necessary at Law; and it may be if you would come to it now, it would save you Time: For I find by the Counsel, that what is sworn against another Man, at another time, would not be Evidence at Law against the Prisoner; and I believe if he should except to a Jury-Man, because he was upon *Cook's* Trial, it would not be allowed as a good Exception, and he would be told, he was no way concerned in another's Trial.

Mr. Howe. 'Tis a strange sort of Evidence that is offered here, and 'tis a strange Way of bringing it in. The House made nothing lately of Hear-say, and yet now Hear-say must be taken for Evidence. I have heard that the Grand-Jury take an Oath not to discover what was sworn before them; this, since the Grand-Jury have subjected themselves to (yet you have brought them here as Witnesses to give an Account of what was sworn before them, which I am afraid is a Breach of their Oath) it shall make me give less Credit to what they say. We are here to attain a Man, but we must not talk of Proof; that is a strange Thing! I am sure, if you do not find it with

Proof, it would be against Proof. Shall I be plain with you? I question, if this House had heard what *Goodman* swore at that Trial, and what was alledged against it, whether this House would have been of that Jury's Mind: For I have heard that two or three did swear, he was not at the Place at the Time he swore he was, as plain as a Negative could be sworn.

Mr. Harcourt. If you please to let the King's Counsel go on upon this, you will save a great deal of Time, and prevent any Exception to any Evidence afterwards: For 'tis not in the Power of Man to offer any thing more absurd. I don't believe that ever any Man heard of such a Thing offered, That a Record should be given in Evidence against a Man, that is no manner of Party to the Record: I am sure never any such Thing was attempted before. As for the other Things, you had something offered that made it seem doubtful how far you should give Credit to them. Upon those Matters, the Counsel at the Bar for the King told you, That there was some Pretence that it was Law, and practised below, and a Book was produced to justify it: But in this Case, if there be Book, Practice, Precedent, or any thing to justify it, I will sit down. The Answer made it ten times worse: The Gentleman said, he would not have the Record read, but upon that Record to prove what was sworn at the Trial: Why, does that concern any Person in the World but *Cook*?

Lord Cutts. If the worthy Gentleman that spake last had made out all his Propositions with Clearness, equal to the Assurance with which he asserted them, they would have more Weight: But I will say, that which he hath asserted does not appear to me so. I take this to be the same Thing in some measure debated over again. It hath been told you, That this House are to give their Judgment in a Matter of great Importance; and therefore I think 'tis fit that all the whole Matter should be laid before them; when that is done, they only are the Judges of what Weight it is.

Mr. Sloane. I go along with those Gentlemen, That this is no sort of Evidence against *Sir John Fenwick*: But our Question is about a Witness that is withdrawn, and to know what he said, and how he was believed when he was here. How he is gone, we have seen already; and therefore though I think the Verdict against *Cook*, nor nothing of that can be given in Evidence against *Sir John Fenwick*; yet if he hath withdrawn the Witness, and the Credit of him is at Stake, as you have heard Evidence of what he said upon Oath before the Trial came on, by the same Reason you may hear what he said at the Trial.

Mr. Pelham. I think it would shorten our Debates, if we were truly satisfied about what we are a doing, that we are trying *Sir John Fenwick*, as we are told at the Bar; he called it a Trial, and 'tis a Trial. I must confess I was in hopes I should never sit in the House of Commons to try any Body; I did not think it the Business of us; if I had, I would not have come hither: But since we are come into it, is any thing more natural, than to examine whether this Evidence be proper, or such Evidence as any Court would allow of?

Sir William Williams. I suppose there is no Gentleman of our Profession that hath seen any Record,

cord will say, that this hath been offered in any Court of Law: I believe, if he was upon his Trial upon the Indictment, no Body will say it would be read against him. Let us consider how many Judgments, that have been given hastily in the late Reigns, have been reversed. What is the Reason that is given for it? It is for receiving that for Evidence, which was not Evidence in the Law: Your Bill of Right takes notice of it.

Mr. *Solicitor General*. I did not think this Matter would have held you a quarter of an Hour; but if Gentlemen will debate upon the same Matter that hath been over-ruled twice before, all that is to be proved by this Record is, that one *Peter Cook* was attainted for High-Treason: If the Counsel on the other Side would have owned *Peter Cook* to have been attainted, you had not been troubled to have the Record brought to the Table. But as to what they say, that Sir *John Fenwick* was no Party to the Record, and therefore it can be no Evidence against him; I suppose it would be Evidence for him. Suppose *Goodman* had sworn he never had been at the *King's-Head Tavern*, would not the Prisoner have produced a Witness to prove what he had sworn? Then I would put you in mind of a Case, because there is a Nicety in this Matter without any Reason; it was in the Trial of Alderman *Cornish*; he was indicted and tried, and the great Fact was in the House of one *Shepherd*; there was a Witness against him, one *Rumsey*, who swore, &c. Says Mr. *Cornish*, He was a Witness at my Lord *Ruffel's* Trial, and he did not name me to be one; and it went so far, that when *Shepherd* said, I was in the Room; he stood up and said, No, it was read before I came in. Mr. *Cornish* would have produced a Witness to have proved what *Rumsey* said: Says the Court, We cannot admit of that; for it does not appear to us, that my Lord *Ruffel* was ever tried for High-Treason; and there, upon that Slip, was that Gentleman destroyed. I pray it may be read; I have given no Opinion of what Force it is, but I think it depends upon the same Reason; nay, you have more Reason to do it, than any thing you have read to Day.

Mr. *Price*. 'Tis very much pressed, that you should read that, which, when read, they say, is not Evidence, but only to introduce another Matter. If it be not Evidence, upon what Account shall they read it? But if it introduce other Evidence, this is an Ingredient and Part of that Evidence. Now suppose the Record should be produced, and they should bring Witness to say what *Goodman* swore at that Trial: would that be Evidence? No sure, for no Body ever pretends that this hath been admitted either at Law, or in Parliament. By what Law? By what Rule? By what Measure of Reason are we to proceed in this House? If you would permit to be produced a Record of Conviction against a third Person, and this to be Evidence against one that is not present, I think you may as well admit to be produced a Record of the Conviction of any other concerned in the Assassination. But I stood up principally upon the Observation made at the Bar, and he put you that which he takes to be a sinister Case; for says he, suppose Sir *John Fenwick* had brought this Record, and made use of it to take off *Goodman's* Testimony, should it not be Evidence? Yes, no doubt of it; and there is the Distinction. 'Tis one

thing, where you are to give in a Record to convict and attain a Person, and another thing, where it is to prove a Man perjured, and to invalidate his Testimony; for when Evidence is brought against a Prisoner, he hath no way to lessen his Evidence but what is collateral; if it be upon a Trial when another is concerned, if the Witness gave a contrary Evidence, or the Party was acquitted, then the Record may be made use of against the Witness: But it differs very much, where you bring Evidence to take off the Credit of a Witness, and where you bring it to convict or attain a Person. The Case of *Cornish*, that turns upon the same Reason, and it was only to be used to take off the Testimony of *Rumsey*; but if this Record of the Conviction of *Cook* be brought to any purpose now, 'tis to satisfy your Consciences, that *Goodman* gave a good Testimony at that Trial; and I wonder the Serjeants should offer it, who are sworn to offer nothing in Violation of the Law.

Dr. *Oxenden*. If I did not think this Question had been determined before, I should not trouble you in this Debate; for did not we receive what *Goodman* deposed upon Oath before a Justice of Peace? Was it read because it was taken in Writing, or because it was his Evidence? Now they offer you an Evidence of his, that was not put into Writing, but they will prove by Witness; what is the Difference? If it had been taken down in Writing, it must have been admitted as the same was before.

Sir *Marmaduke Wyvell*. That worthy Gentleman desired to know the Difference, &c. That Deposition was against Sir *John Fenwick*, but this Evidence, that they offer now, was given against *Peter Cook*.

Mr. *Att. General*. You are now upon a Debate, Whether you shall read the Conviction of *Peter Cook*: I do agree with those Gentlemen that have spoke of this Matter, that the Conviction of *Cook*, nor any Evidence upon his Conviction, can be Evidence against Sir *John Fenwick*. I don't pretend that this is; nor don't believe that this is offered upon any such Consideration; but 'tis one of the Allegations of the Bill, that several of these Gentlemen were present at this Consult, of which Sir *John Fenwick* is accused; therefore I suppose the Counsel for the Bill did offer this Record to make good that Allegation, and so think it may be properly offered: Unless it be admitted: I don't see how it can be made good further; I do not think it proper to examine to what *Goodman* swore at *Cook's* Trial.

Sir *William Williamson*. I speak only to shew my Concurrence with the Attorney General; Mr. Attorney hath stated it right no doubt, as to the Conviction of this Person; as Mr. Attorney offers it, it may be proper enough.

Members. Call them in, call them in.

Sir *Christopher Musgrave*, I hear Gentlemen say, Call them in: Do you intend when you call them in to read this Record? I think the learned Gentleman hath stated it, that it ought not to be read as Evidence. Now the Counsel for Sir *John Fenwick* said, they hoped you would not suffer it to be read as Evidence against the Prisoner: I never heard the Counsel say, that *Cook* was not attainted, nor ever heard that any Man did doubt it; then if it be no Controversy between the Counsel, to what End is it brought hither? Do you think that the Steps that are urged to be taken in this Case,

will not be a Precedent for Posterity? I take it that there is a great deal of Difference between the Paper you have read and this Record; and therefore if you call in the Counsel, I hope you will not gratify them in reading of it.

Mr. *Edward Harley*. Before you call the Counsel in, I humbly propose it to you to consider to what Purpose this Record should be read; if as Evidence, you overthrow all the Course of Proof that is settled by the Common Law, and Statute Law; for it hath been in all Trials opposed, to give in Evidence that which is improper, because it should not influence the Jury. I would not have it said, that under the Reign of King *William*, any thing was done contrary to the Law and Constitution of the Nation. There hath been an Instance given of the Trial of Mr. *Cornish*, tho' that Case does not come up to it: But we know what was done in those Reigns hath been justly reflected upon; and I hope you will not make a Precedent here, to encourage Judges to do what is against Law.

Mr. *Speaker*. Gentlemen, This is your Question, That the Record of the Conviction of *Peter Cook* shall be read.

Which Question being put, the House divided.

Ayes, 181

Noes, 110.

So it passed in the Affirmative.

Mr. *Speaker*. Gentlemen, You have had another Question that hath been the Subject of your Debate, That the Counsel for the Bill be admitted to give Evidence, as to what *Goodman* swore against *Peter Cook*.

Mr. *Robert Harley*. The learned Gentleman did tell you, That what *Goodman* said at that Trial, ought not to be given in Evidence; and therefore, I think, Gentlemen won't insist upon that, that is carrying it too far; and, I think, he opened it, that it was only to prove that *Cook* was attainted, and to make use of it no further.

Mr. *Speaker*. Is it then your Pleasure, that Sir *John Fenwick* and his Counsel be called in?

[Which Question being put, it passed in the Affirmative, and accordingly they were called in.]

Mr. *Speaker*. Sir *Thomas Powys*, the House hath determined to have this Record read, not as Evidence against Sir *John Fenwick*, but to prove the Allegations in the Bill, and that *Cook* was attainted.

Read the Record.

[Accordingly that Record was read by the Clerk.]

Sir *Barthol. Shower*. We are sure the Record does not prove that he was convicted upon *Goodman's* Evidence.

Mr. *Serj. Lovel*. Look upon the Indictment.

Sir *Thomas Powys*. It appears by that, that *Goodman* was a Witness upon the Indictment; but it does not prove by that, that he was a Witness upon the Trial.

Mr. *Serj. Gould*. May it please you then, Mr. *Speaker*, thus far 'tis agreed, that here is a Record of the Conviction of *Cook*; and 'tis agreed, and the Record speaks it, that *Goodman* was a Witness, for it is indorsed upon the Indictment.

Now the main Dispute is, Whether *Goodman's* Evidence did prevail to convict *Cook* upon that Indictment? And for that we shall apply our selves. Call our Evidence, some of the Jury, and some that were then Witnesses, and they will give you an Account upon what Evidence that Conviction was.

Sir *Thomas Powys*. In what you were pleased to acquaint us at our last coming in, you were pleased to give such a Reason in relation to the reading of this Record, that if we had heard it before, we would not have troubled you to have withdrawn; for it was proper to make out the Allegations of the Bill, and that *Cook* was convicted; but, we apprehend, they can carry it no further than what they have applied it to. But I perceive from hence, the Gentlemen of the other Side are encouraged to proceed to another Piece of Evidence, such they call it; they are going to call the Witnesses to prove what was sworn at the Trial of *Cook*, where Sir *John Fenwick*, nor no Person on his behalf, was present, either to hear, or observe, or cross examine, or offer any thing to their Credit, which possibly he might be furnished with, tho' *Cook* was not: I hope that will be no more allowed of as Evidence here, than in any other Place.

Sir *Barthol. Shower*. We humbly oppose their calling of Witnesses to give this Account of the Evidence given at *Cook's* Trial. And we submit it to your Consideration, whether you will think it just, that the Evidence that is given with respect to one Man only, shall conclude another Person that stands at the Bar in Defence of his Life, or that it shall be given against him. Every Man's Defence is several; and we opposed the reading of the Record before, and so do now the calling of any Witnesses to this Purpose, for the same Reason.

Mr. *Serj. Lovel*. We call these Witnesses for no other Purpose, but to prove, that *Goodman*, what he did inform by that Paper, he did swear before a Jury.

Mr. *Speaker*. Gentlemen, you must withdraw.

[Accordingly they withdrew.]

Mr. *Manley*. I thank God I have that regard for the Laws of *England*, and to every *Englishman's* Life, that when I see any thing attempted against it, I must give my Testimony against it: I did not believe they would have insisted on it, for there was a Gentleman that sat near to you, who in the Close of his Debate, I thought, had satisfied every Body, that this was a Thing that ought not to be read; if they should do it, it would be a Thing of dreadful Consequence; if you should admit of every thing these Gentlemen, that come in for the Bill, offer, I know not where it will end. How will it appear that upon *Goodman's* Evidence the Jury found *Cook* guilty? For they might find *Cook* guilty, and yet give no Credit to *Goodman*; for he was contradicted materially, and there might be other Evidence upon which they might find him guilty, and yet lay aside the Evidence given by *Goodman*; but whether one Way or the other, we can't tell. They tell us, We are not to be guided by the Rules of *Westminster-Hall*; but we are to be governed by the Rules of Justice; and we are not at this Time to seek a Way to the King's Favour, by voting against a Criminal for High-Treason.

Mr.

Mr. *Sloane*. There is no manner of doubt of it, That that Gentleman is in the right, who tells you, If this Indictment and Conviction of *Peter Cook* stood singly, as to Sir *John Fenwick*, 'tis no Evidence; and if they will produce *Goodman* now, it shall be no Evidence against them; but take the Case as it is, here is a Witness, who hath given me Satisfaction, that 'tis one of Sir *John Fenwick's* Friends or Agents (which is the same Thing as if done by himself) by whose Means this Witness is withdrawn: Now the Question is, What could this Witness say, when he was here? What did he say? 'Tis not Conclusive, but 'tis Material for you to hear what he did say, when he was upon his Oath.

Sir *Christopher Musgrave*. The Gentleman of the Long Robe that spake last, was pleased to tell you, It is very reasonable that you should hear those Persons, as to what *Goodman* swore at *Cook's* Trial; I confess, I think this is harder than all the rest, because what you have hitherto admitted was in Writing; one was an Examination before a Justice of Peace, the other a Record; but for any Man to say, he can exactly repeat what any Man swore at the Trial, to me is wonderful: Why, in his Evidence, the least Mistake of a Word alters the Nature of the Thing, and therefore this would be a bold Undertaking for any Man; for if he wavers in the least Circumstance, 'tis not true that he swore so: Then this Gentleman was no ways concern'd in that Trial; and to what Purpose is it read, if not to the Prejudice of Sir *John Fenwick*? I do not know but by the same Rule, you may hear Evidence of what any Man hath sworn upon all the Trials this three quarters of a Year.

Mr. *Sloane*. I have been called upon to know in what Cases Testimony hath been given, that Witnesses have sworn so and so at a former Trial. 'Tis every Day's Practice between Party and Party, that where a Witness doth die, between the same Parties (I will state the Case fairly) 'tis given in Evidence, that such a Witness, at such a Trial, did swear so and so; sometimes they take it in Short-Hand, and then they can tell the Words of it; otherwise they repeat it upon their Memories; but I will not strain it: But I put it with a farther Reason upon it; for we do not desire to hear it as conclusive Evidence upon the Prisoner, but only in this Sense; here is a Witness supposed to be carry'd away by the Prisoner's Means; and therefore, is it not necessary to hear what he said before he was deluded and carried away? Not that after it is heard, it is any conclusive Evidence; but it is reasonable we would come at the Truth, *omnibus viis & modis, quibus melius fieri poterit*.

Sir *Thomas Littleton*. A Gentleman says, to what Purpose should it be read, if it be not to the Prejudice of Sir *John Fenwick*? On the other Side, we may say, 'tis for his Benefit; that is only supposing one Way or another: I will hear any Body to his Benefit, and any Body to his Prejudice. Says a worthy Gentleman, it is not done in criminal Cases: Why, in this Case you have heard the Grand Jury, what he swore before them already; and what Objection is there more against hearing what he swore in another Case, than against hearing what he swore upon the Indictment? The main Inducement for you to hear it, is because he is gone away, and cannot be heard *viva voce*, and with Suspicion that it was by Contrivance of the Party.

Mr. *Grey*. I would speak but one Word as to what the Gentleman that spake last but one, said, and that is, as to the Courts below, That one Man is allow'd very often to give in Evidence what another swore; it hath been so, and 'tis at the Peril of any Person that swears that he swears Truth; for he may be prosecuted, if he does not swear Truth; but I would ask him, what Remedy there is here, if he do not say the Truth? We have no Remedy against him, if he takes away this Man's Life by what he says here.

Mr. *Smith*. Truly, Sir, if I must give my Opinion, I do think 'tis very reasonable that Bills of Attainder should be only upon extraordinary Occasions; I think that, take it at best, if there was not a Place where the Witnesses are to be sworn, and more particularly examined, I know not whether I should give my Consent for the passing of this Bill through your House; for the Witnesses against the Prisoner are not sworn, nor the Witnesses brought against them; so that we can only give our Opinion upon the Probability of the Matter; for what that Gentleman says, weighs with me, That 'tis a difficult Thing for any Man to charge himself with what was sworn at a former Trial; for the Mistake of a Word may alter the Sense very much. We are told by a worthy Gentleman, That there was two or three Witnesses that did give such Evidence against the Testimony of *Goodman*, that 'tis a Wonder almost how *Cook* could be found guilty: It is our Misfortune that *Goodman* is not here; it would have been worth our while to have heard what *Goodman* could have said in his own Defence; but since there are such Witnesses like to be offer'd against *Goodman's* Testimony, Is it not reasonable that we should hear what *Goodman* said for himself?

Mr. *How*. Sir, I always thought it very reasonable that you should hear any Evidence that might tend to your Information; but I think 'tis plain, that nothing can tend to your Information that is alledged by any Person that is not to be believed; that is to say, is not to be believed from the Nature of the Evidence, though from the most credible Person in the World. I know not whether these Witnesses are to be brought or no; but I have heard that *Cook*, after he was condemned to die, without any Apprehension of his being saved, did, upon the Sacrament, declare, That *Goodman* was not upon the Place at that Time he swore himself to be there. I have heard since, that the same Divine that gave him the Sacrament, Dr. *Wake*, when he had confessed it, after he had made such a Declaration, had such an Abhorrence of it, that he would go to him no more; but I cannot think we can have Information from these Persons, that I suppose did not think of giving Evidence in this Trial, and therefore did not take Notice so particularly of what he said; and if so, 'tis losing your Time to hear it.

Mr. *Speaker*. Gentlemen, the Question is this, That the Council against Sir *John Fenwick* be allowed to examine Witnesses, as to what *Goodman* swore at the Trial of *Peter Cook*.

Sir *Godfrey Copley*. I must confess it would weigh with me, if it had been made appear, that Sir *John Fenwick* had taken off any Evidence, and I should be ready to apply it as well as I could; but I must needs take Notice of what was said in this Debate, That we had done as much as this comes to already; this makes me a little more apprehensive, and to take Care what we do now, since what this

House does, hath so quick an Operation. We are citing Precedents of this very Day already, and make one Thing a Hand to draw on another; and so they may easily be made use of in after Parliaments.

Sir Henry-Dutton Colt. I believe no one Gentleman doubts, that *Cook* was convicted upon the Evidence of *Goodman*; if they do, I would know the Reason of it; for upon the last Act, there are to be two Evidences to the same Treason: There were but two positive Witnesses against him for Treason, and they were *Porter* and *Goodman*: I think, therefore, he was convicted upon the Evidence of *Goodman*; what then needs any Person to remember any Particulars that passed at the Trial, if they remember in the whole, that he was convicted by the Evidence of *Porter* and *Goodman*?

Mr. Speaker. As many as are of Opinion, that the Counsel against *Sir John Fenwick* be allowed to examine Witnesses, as to what *Goodman* swore at the Trial of *Cook*, say, Aye.

Ayes 180. Noes 102.

[*Afterwards the Question of Adjournment was put, and it passed in the Negative; and several Gentlemen that were against the Bill, to about Forty, went away together in a Body; some of them having declared, that their Health would not give them leave to stay there longer.*]

And *Sir John Fenwick*, and the Counsel, were brought in again.

Mr. Speaker. *Mr. Serjeant Gould*, the House do allow you to examine Witnesses as to what *Goodman* swore at the Trial of *Cook*; pray go on with your Evidence.

Mr. Serjeant Lovel. We call *Mr. Collins*, Sir.

Who was brought to the Bar.

Mr. Speaker. Was he a Jury-Man?

Mr. Serjeant Lovel. He was one of the Petit-Jury, Sir.

Mr. Speaker. *Mr. Collins*, can you give the House an Account of what was sworn by *Goodman* upon the Trial of *Cook*?

Mr. Collins. To the best of my Memory, I will give the best Account I can. *Goodman* did depose, That he came to the *King's-Head* in *Leadenball-street*, and enquired for *Captain Porter*, according as the Captain had order'd him; and the Captain came down and carry'd him up into the Room where the Gentlemen were. There was *Sir John Friend*, *Sir William Parkyns*, *Mr. Charnock*, *Mr. Cook*, and *Sir John Fenwick*; there was two others, if you please to have me name them.

Members. Yes, yes.

Mr. Collins. My Lord *Aylesbury* and my Lord *Montgomery*: This was what he deposed.

Mr. Speaker. Go on, Sir; you have named those that were at the Meeting.

Mr. Serjeant Lovel. Did he give you an Account of what was agreed on at that Meeting?

Mr. Collins. I think it was about sending *Charnock* to *France*.

Mr. Speaker. Sir, you should repeat all the Particulars, what *Charnock* was to do.

Mr. Collins. I can't remember any Thing further than what I have told you.

Mr. Serjeant Gould. If you please that *Mr. Cooper* may be asked to this?

Mr. Speaker. Was you of the Petit-Jury that convicted *Mr. Cook*?

Mr. Cooper. Yes.

Mr. Speaker. Can you give the House an Account what Evidence *Goodman* gave to you for Conviction of *Cook*, and what he said in that Evidence?

Mr. Cooper. *Mr. Goodman* did declare upon his Evidence, That he was at the *Old King's-Head* in *Leadenball-street*, where he did meet with divers Persons that were in Consultation; he named *Charnock*, *Sir John Fenwick*, *Sir John Friend*, and divers others.

Mr. Speaker. What was the Consultation?

Mr. Cooper. It was about sending *Charnock* over into *France*.

Mr. Speaker. To what Purpose?

Mr. Cooper. To bring over Forces, or encourage the Bringing over of Forces: That was the Purport of his Message.

Mr. Speaker. Will you produce any other Evidence to this Point?

Mr. Serjeant Gould. We desire this Gentleman may be asked to the same Purpose.

Mr. Speaker. Was you one of the Petit-Jury.

Another Witness. There was *Captain Porter*, and *Mr. Goodman*, that were the two Evidences; and *Goodman* did say, That he had been at the *Old King's-Head* in *Leadenball-street*, one *Coxe's*, and *Sir John Fenwick* was there, and several other Gentlemen, consulting of an Affair to send over into *France* for some Forces to be brought over into *England*; and that *Charnock* was the Person, and they all agreed he should go over.

Mr. Speaker. But did he give you an Account of what *Cook* and the others did agree to, upon which you found *Mr. Cook* guilty?

The same. We did apprehend that *Cook* did consent that *Charnock* should go over to *France*, and acquaint *King James*, That there had been a Meeting of several Gentlemen, and that they had made several Offers of Soldiers and People that were to be raised here, and to acquaint *King James* with it; and he declared, That *Sir John Fenwick* was there at the same Time.

Mr. Speaker. Pray, can you give this House an Account of what Exception was taken to *Goodman's* Credit, and how it was answered?

The same. There was Exception taken, That he was guilty of a great many Crimes, and that he had his Pardon; and the Fines were levy'd upon him; but it was said then, that he had paid his Fine, and that he was a very good Evidence in the Case.

Mr. Speaker. *Mr. Serjeant Gould*, have you any other Evidence to produce?

Mr. Serjeant Lovel. If you please, *Mr. Speaker*, here is *Mr. Tanner*, the Clerk of the Arraignments, that best knows the Nature of these Things; that as to these Objections that were made, it appeared to the Court to be a Contrivance, for he was never bailed, but discharged without any more to do. If you please that he may be asked, What Objections were made to *Goodman's* Reputation, and what Answer was made to it?

Mr. Speaker. I did ask the Juryman that; and I suppose you need not labour this Point, unless the Credit of *Goodman* comes in question here.

Mr.

Mr. Serjeant *Gould*. Then may it please you, Mr. Speaker, we have one other Piece of Evidence against Sir *John Fenwick*, which we are humbly to offer to your Consideration, and I think 'tis very material; and 'tis some of the Evidence which I did open in stating of the Case, wherein Sir *John Fenwick* hath, in a manner, given a Verdict against himself; for while Sir *John Fenwick* was working of his Escape to go beyond Sea, at that very Time there was a Letter written by him, directed to his Lady, and delivered into the Hands of one Mr. *Fowler*, who was to cause it to be delivered to his Lady, by one *Webber*, who was taken up when Sir *John Fenwick* was. This Letter imports, That Sir *John Fenwick* look'd upon himself, as having no Defence, but depended only upon a Contrivance with the Jury; they were to work with some Persons of the Jury, who were to stand it out, and to starve the rest; and so by that Means to save him. Our Evidence of this will be, that it fell out that *Webber* (we have him not here now, but have endeavour'd it as much as was possible, but he is gone too out of the Way) that he was taken at the same Time that Sir *John Fenwick* was; but by reason of the protracting of Sir *John's* Trial, he comes, and is delivered, there being no Charge against him; and he is since his Deliverance, upon his *Habeas Corpus*, gone out of the Way; but we shall, in the Method of our Evidence, produce you Mr. *Fowler*, the Person to whom this Letter was handed, who will give you an Account of this Letter; and then will produce this Letter: To which End, we must humbly beg the Favour of a worthy Member of this House, Mr. *Vernon*, who hath this Letter, that it may be produced, and shewed to Mr. *Fowler*.

Mr. *Vernon*. Sir, I receiv'd your Order to bring the Letter that Sir *John Fenwick* wrote, while in Custody at *Rumney*, which was sent up to me by Mr. *Masfall*, who had it of Mr. *Fowler*; and, if you please, I am ready to deliver it.

Mr. *Speaker*. Who sent it to you?

Mr. *Vernon*. One Mr. *Masfall*, a Justice of Peace of *Rumney*.

Sir *Thomas Powys*. I hope now we shall make an Objection to this Letter with good Authority. Surely for them to produce a Letter, as Sir *John Fenwick's*, is not to be allow'd as Evidence, unless it was prov'd that he wrote it, because that sort of Evidence was particularly taken Notice of by Parliament: And Judgment given upon that sort of Evidence, by Comparison of Hands, in the Case of Mr. *Sidney*, and the Act of Reversal of his Attainder, does allow it to be illegal Evidence. This is such an Authority as, I hope, will bear no Dispute: And the Courts of *Westminster-Hall* have since thought it so; they did so in the Case of *Crosby*, who was tried the other Day in *Westminster-Hall*.

Sir *Barth. Shower*. In this Objection we have the Opinion of inferior Courts, and the Parliament too; for the particular Evidence Mr. *Sidney* was convicted upon, was upon a Paper which was found, and proved by some who pretended to know his Hand; and I am sure that is more than they can pretend to, and more than they have yet opened. We do therefore humbly oppose this Evidence, it being in the Case of the Life of a Man; and the King, Lords and Commons, having declared, That this sort of Evidence ought not to be allowed: And therefore, I hope, you will not allow it in this Case. And in *Crosby's* Case, upon

reading the Act of Parliament, this Evidence was not allowed, and *Crosby* was acquitted.

Sir *Thomas Powys*. I have a Copy of the Bill for reversing the Attainder in my Hand; and it says, The producing a Paper found in the Closet of Mr. *Sidney*, which was not proved by any Witness to be his Hand-writing, &c. And, we hope, if in the Judgment of the Parliament that was not thought reasonable Evidence to Attaint him, this will not be thought reasonable in Parliament to Attaint this Gentleman.

Mr. Serj. *Gould*. As this Case is, we hope this may be a concurring Evidence: It will be plain, upon the Evidence we shall give, that *Webber* was with Sir *John*, and taken with him; and at that Time this Letter was handed by him over to *Fowler*, to be carried to my Lady. Now, Sir, we humbly offer it to your Consideration, How far it is available, and what Operation it will have? Whether, in a Case of this Nature, these two being taken together, and *Webber* delivers this Letter to *Fowler* to deliver it to Sir *John Fenwick's* Lady, and the Import of the Letter concerns Sir *John Fenwick* for his Acquittal; you will not suffer it to be read? 'Tis not to charge him with a Treason, for that is the Case of *Algernon Sidney*: 'Tis not to prove a Crime upon him; but we will prove that Sir *John Fenwick* handed this Letter over, that it might come to his Lady; by which he desired his Lady so far to work the Matter, that some Jury-man might be found to starve the rest, and stand out for him: If we could produce *Webber*, we would; 'tis plain, *Webber* corresponded with Sir *John*, and was with him.

Mr. Serj. *Lovel*. I humbly beg one Word in this Matter: The Counsel on the other Side do very well know, the constant Practice is, That in the Case of a Deed or Will, let the Value of the Estate be what it will, if the Witnesses cannot be produced, or are gone beyond Sea, they always admit Evidence by Comparison of Hands. But for the Case of *Algernon Sidney*, there is no Doubt but his Attainder ought to be reversed, because that Attainder was upon no other Evidence; for there was no other Proof, but a Paper, that he himself did say, was only for the Exercising of his own Ingenuity and Parts; and it was said to be written for no other Purpose, and proved only by the Comparison of Hands: Had there been any other Witness to corroborate, it had alter'd the Case. But in our Case, we do produce the Letter, not for the convicting of the Prisoner at the Bar; but we are humbly to lay before you all the Matter of Fact. It will be worthy of your Consideration, what you will think fit to take, and what to reject; that is a Matter for your own Judgment. We produce this Letter for this Purpose, to shew you, that after Sir *John Fenwick* was taken, he apprehended his Case to be so desperate, that he used these indirect Means.

Mr. *Speaker*. What mean you by that? This Letter came from Mr. *Fowler*.

Mr. Serj. *Lovel*. Here is Mr. *Fowler* that receiv'd it from *Webber*, when Sir *John Fenwick* was by, in the Presence of Sir *John Fenwick*.

Mr. *Speaker*. Shew Mr. *Fowler* the Letter.

Accordingly the Clerk went down to the Bar, and shew'd Mr. *Fowler* the Letter.

Mr. *Speaker*. Do you know that Paper?

Mr. *Fowler*. Yes, Sir.

Mr. *Speaker*. Where have you seen it before?

Mr. *Fowler*. I had it from one *Webber*, that was at *Rumney*, about the Third of *June*, as I remember.

Mr. *Speaker*. Was that the Time that Sir *John Fenwick* was seiz'd?

Mr. *Fowler*. He was then at *Rumney*. Mr. *Webber*, I was told, had some Acquaintance with me, and desired to speak with me. I went to him; and he was rising; and when up, says he, Mr. *Fowler*, I would desire you to put a Letter into the Post; says he, There is no Hurt in it; it is directed to Mrs. *Frances Farrer*, at the Countess of *Carlisle's* in *Soho-Square*; and when I had deliver'd it, he desired me to come to him again.

Mr. *Speaker*. Did you come to him again?

Mr. *Fowler*. Mr. *Mascall* of *Rumney* sent for me to his House, and told me, That he had heard that I had received some Letter from Mr. *Webber*; and when he had open'd it, and saw what it was, he thought fit to send it up to the Secretary of State; and I made my Mark upon it, that I might know it again.

Mr. *Speaker*. Have you made your Mark upon it?

Mr. *Fowler*. Yes, Sir.

Mr. *Serj. Lovel*. I desire he may be asked, Whether Sir *John Fenwick* was not in the same Room when *Webber* delivered it?

Mr. *Fowler*. Yes: But I question whether he saw Mr. *Webber* give it; for he deliver'd it privately, as I thought.

Mr. *Speaker*. Was Sir *John* in the Room then?

Mr. *Fowler*. Yes, Sir.

Mr. *Speaker*. Can you say any thing more of Sir *John Fenwick's* Knowledge of that Paper?

Mr. *Fowler*. No, I know no more.

Mr. *Serj. Gould*. If you please then, Mr. *Speaker*, because perhaps there may be some Objections, that we should give an Account of *Webber*, we will call a Witness, that we have done our utmost to find him out.

Members. No, no.

Sir *Thomas Powys*. That which I was going to offer is, That this Proof is short; if that which in the Act of Reversal of the Attainder of Mr. *Sidney*, is admitted to be no Proof against him; for the Act recites that Letter was found in his Closet, and proved by Comparison of Hands, and yet for all that, this sort of Evidence is condemn'd by this Act of Reversal, as illegal Evidence. This Case before you comes short of that; for here is no Proof by Comparison of Hands, nor that it was in the Possession of Sir *John Fenwick*: But only

that a Person in the Room, without the Privity of Sir *John Fenwick*, delivered it to another; and the Witness says, he did it in a private Manner.

Sir *Bartholomew Shower*. With Submission, this Letter could not be read in any Place whatsoever against Sir *John Fenwick*, in a Civil Cause; for even in that Case, they must prove it to be his Hand-writing by Comparison of Hands.

Mr. *Serjeant Gould*. I think not to insist upon it*: But that we shall desire is this; we have now done with our Evidence, only we shall desire the worthy Member, Mr. *Vernon*, to give an Account what was the Reason why Sir *John* hath not been tried; for indeed, he hath very much trifled with the Government, pretending still to make a free and ingenuous Confession.

Sir *Thomas Powys*. I am of Counsel for this Gentleman at the Bar; for his Life, for his Fortune, for All that he hath in the World. 'Tis not only this Gentleman's Case, but 'tis a Case that may be of great Consequence in all future Times. I have, as 'twas my Duty, attended for at least these twelve Hours, either in opening the Matter, or by producing such Evidence as, we hoped, we did fairly object to. Sir, there are several Things offer'd on their Parts, which I confess we little expected, and which will require something to be said to; and I have a great deal to offer on the Behalf of Sir *John Fenwick*, both as to this Method that is taken, and what is alledged in the Bill, and what is contained in the Indictment, upon which the Bill is founded, wherein I desire to be heard; and since you have been pleased to allow us to be Counsel for him, I am sure we shall have a fair and favourable Hearing. We have a great deal to offer to you, both as to the Matter of the Indictment, and the Manner of it: And I hope to shew you, That the Indictment, as it is laid, does not contain a sufficient Charge of Treason. We have likewise a great deal to say, as to the Evidence they have offer'd, at least what they call so: But I must make it my Request, That we may have Liberty 'till to Morrow Morning to make our Observations, and answer what hath been said by the Counsel on the other Side. I am not in a very good Condition by this long Attendance, and by attending my Duty in the Courts in *Westminster-hall*; and I am afraid I am not now in a Condition to do my Duty, as may be expected from me. I must own it, I am not prepared as I ought to be; and I hope when there is so great a Stake, you will allow us 'till to Morrow Morning.

Sir *Bartholomew Shower*. I beg your Favour in the same Manner, and to the same Effect as Sir

* This Letter was wrote with a Black-Lead Pencil, and was as follows:

“ **W**HAT I fear'd is at last happen'd; had I gone alone I had done it; but the other was betray'd from *London*. It is God's Will, so we must submit. I know nothing can save my Life, but my Lord *Carlisle's* going over to him [meaning King William] back'd by the rest of the Family of the *Howards*, to beg it, and offering, that I will be Abroad all his Time, where I cannot hurt him; and that I will never draw Sword against him. I must leave it to you what else to say. All Friends must be made. My Lord *Devonshire* my perhaps, by my Lady; my Lord *Godolphin* and my Lord *Pembroke*, by my Lady *Montgomery*; Mr. *Nelson* by the Bishop of *Canterbury*. My Lord *Arran* might engage his Brother *Selkirk* to use his Interest with *Keppel*. I believe, if my Lord *Carlisle* would go, it were best before my Trial, or else they will cut me short for want of Time; if he can prevail with him for a Pardon, he will procure it as well before my Trial as after, at least he may prevail for a Reprieve, 'till some can come over to him. My Lord also will have an Opportunity to engage *Bentinck* [the Earl of *Portland*] and get my Lord *Essex* to join with him. I cannot think what else to say; but the great Care must be the Jury, if two or three could be got that would starve the rest; that or nothing can save me. Money, I know, would do it; but alas! that is not to be had, nor shall I get enough for Counsel. I beg of you not to think of being shut up with me; I know it will kill you, and besides, I have no such Friend as you to take Care of my Business: Though it would be the Comfort of my Life, the little Time it lasts, to have you with me: And I have this only Comfort now left, that my Death will make you easy. My dearest Life, grieve not for me, but resign me to God's Will. You will hear, as soon as they bring me to Town, where they put me, and then I would have a Servant, or somebody with me. I am interrupted, so can say no more now. Engage Sir *John Lowther*, the new Lord, who has more Interest than any body. Let my Lord *Scarfdale* engage *Jermaine* to engage *Overkirk* for me. Speak to my Lady *Arlington*. If my Trial could be put off 'till the King comes back, there would be more Opportunity to solicit him.

Thomas

Thomas Powys hath done. It is to be acknowledged there are several Things offered in Evidence, which is new to us Lawyers. We do not desire to trifle: We do not desire it on behalf of the Prisoner by way of Delay, but on behalf of the Length of the Proceedings, that you will give us a fair Hearing, as you have allowed it to the King's Serjeants; and that we may make that Defence that is incumbent upon us in discharge of our Duty to the Prisoner.

Mr. Speaker. Gentlemen, you must withdraw.

And being withdrawn.

Mr. Smith. I would not give an Opportunity to any Man to practise with Witnesses, to hinder the Truth of the Matter from appearing, after they have heard the Evidence for the Bill. I would know what List of these Witnesses Sir John Fenwick hath given in?

Mr. Speaker. You did make an Order, That Sir John Fenwick should deliver in a List of his Witnesses; but I believe he did not send in a List to any Body upon that Account, for I have made no Order for any.

Lord Coningsby. I am convinc'd that you are obliged to sit so long as to hear the Witnesses on both Sides; and therefore my Motion is, to call in the Counsel, and ask them, if they have any Evidence to produce; but I do not desire the Counsel should go on to make their Observations to Night.

Sir Walter Young. I think you are rightly moved by that noble Lord that spoke last. I think if Sir John Fenwick hath any Evidence to produce, he ought to produce it now; and that you ought not to give him Time till to morrow Morning to produce that.

Mr. Speaker. Is it your Pleasure that Sir John Fenwick and the Counsel be called in, and told, That the House do expect, if they have any Witnesses, that they do examine them to Night; but as to their Observations, the House will give them Time till to morrow Morning?

Which was generally consented to, and they were brought in again.

Mr. Speaker. Sir Thomas Powys, the House have consider'd of what you said, when you went out, and they are inclin'd to allow you Time for making your Observations; but they have commanded me to ask you, Whether you have any Witnesses to produce? And to let you know, That if you have any Witnesses to produce, they expect you would produce and examine them to Night.

Sir Thomas Powys. Sir, I would acquaint you with all the Openness that becomes me on this Occasion. I must confess we have not any Witnesses that we propose to call; but when we come to speak to the Matter, we hope to give you some Satisfaction as to that; but at present we have no Evidence to produce, unless it be a Copy of a Record.

Mr. Speaker. Sir, if you please to withdraw, you shall know the Sense of the House.

Accordingly they withdrew.

Mr. Chancellor of the Exchequer. I suppose, since the Gentlemen have no living Witnesses to produce to Night, you will not think fit to receive

them at any other Time, for 'tis giving them too much Advantage; and the whole Meaning of the Chicanry of the Counsel, is only to get Time to reply, Mr. Dighton having heard the Evidence. And now I have mentioned him, give me leave to tell you, That I think you can't rise without taking some Notice of him. I think there is as plain a Subornation prov'd in Dighton, as can be, by one Roe; and when you have heard such a Character of a Man, and there is no other Evidence that he can solicit, I think you ought to take care that he be forth-coming; and that he should be taken into Custody. I think you may give the Counsel further Time, as to the Record; that can't well be falsified, tho' I believe, in a Matter of this moment, where the Government is concern'd, there never was such a Proceeding by the Counsel, as this has been, to entertain us six or eight Hours together, by Delays.

Mr. Smith. I suppose before you hear any Thing as to Dighton, you will do something as to the putting this Cause off to another Day; I humbly propose that you will go on this again on Wednesday.

Sir H. Hobart. When 'tis proper to go upon Ways and Means, I shall come into it: But while this is upon your Hands, I believe you will never get heartily into other Business: And therefore I humbly move you, that you will go upon this to morrow Morning.

Thereupon the House came to these Resolutions.

Resolved, That this House will proceed further in relation to this Business of Sir John Fenwick to morrow at Twelve a-clock.

Ordered, That Sir John Fenwick be remanded to Newgate.

Ordered, That the Bill be read a second Time to morrow Morning.

Mr. Ruffel. I am unwilling to trouble Gentlemen at this Time of Night; But I would know, Whether, when Sir John Fenwick is called in, you will ask him any Questions upon that Paper?

Members. No, no.

The Counsel were called in, and withdrawn again.

Resolved, That this House being informed that the Counsel for Sir John Fenwick have no living Witnesses to produce, except to prove a Record, that this House will not bear any Witnesses, except to prove the said Record.

Ordered, That Mr. Dighton do attend to morrow Morning.

Adjourned till to morrow Morning at Twelve a-clock. [Memorandum, It was half an Hour after Ten, at the Time of Adjournment.]

Martis 17 die Novembris, 1696.

Sir John Fenwick and the Counsel on both Sides were called in.

Mr. Speaker. Sir Thomas Powys, you that are of Counsel for Sir John Fenwick, the House agreed last Night, to give you Time till to Day to make your Defence, your Observations upon the Evidence that hath been given.

Sir Thomas Powys. Mr. Speaker, I am of Counsel for Sir John Fenwick, who now stands before you

upon the greatest Concern he can have in this World; and as you have been pleased to assign us to be of Counsel for him, and I must own have very favourably heard us hitherto, so I shall think my self very unfortunate, if I should let fall any Expression in his Defence, that should seem indecent, and give Offence to this House; for I am sure I have no Intention to do it, but on the contrary, to behave my self with all the Deference that is possible, in a Case of this Nature.

The Thing I shall insist upon, will be upon three Heads.

First, The Manner of Proceeding, and Method that hath been taken in this Prosecution.

Secondly, I shall take notice of those Things that are alledged against him in the Bill, upon which he is to make his Defence.

In the *Third* Place, I shall beg your Favour, to observe what sort of Proofs they have offered on the other Side, and which they call Evidence.

As to the *first* Matter, I must intreat the Favour of you to be thus understood; That when I say any Thing in relation to the Manner of Proceeding, I do not speak in Opposition to the Power of Parliaments; for I know very well, that our Lives and Estates, and all that we have, are subject to Acts of Parliament; but I hope you will permit me to offer some Reasons, which (I hope) may be of Weight, in Opposition to the exercising of that Power in the Way you are now going. No Body can say, but when an Act of Parliament is passed, though the Party concerned may think it was upon hard Terms; yet when it is become a Law, it is not to be opposed. I can't say but those Persons, who in the last Sessions of Parliament were imprisoned by an Act *ex post facto*, and subsequent to the Fact complained of; yet when it was passed into a Law, they were legally detained: But, I hope, I may so far take notice of their Case, as some kind of Reason against this, to the End that those Laws may not grow familiar, that they may not easily be obtained; because Precedents generally grow; and as that Law *ex post facto*, extended to Liberty, so this extends to Life: One Precedent is apt to beget another; and therefore, sure you will be careful how you give Precedents, especially in Case of Life.

The first Thing I observe, is obvious; that is, the Person who is to be sentenced by this Bill, is forth-coming, in order to be tried in the ordinary Method of Justice. He is not only indicted, and actually under Process; but he hath pleaded, and he is ready, when his Majesty, in the Course of Justice, shall call upon him, to undergo his Trial; and either there is sufficient Evidence, legal Evidence against him, as the King's Serjeant insisted there was; and if there be so, then, under Favour, there is no Reason but he should have the Benefit of an ordinary Trial, which is the Birth-right of all the King's Subjects: Or there is not sufficient Evidence against him; and if there be not, it will be a good Reason against making a particular Law for taking away his Life: For, we think, nothing can be said for this Law, but want of Evidence; and that, to my Understanding, is a very odd Reason.

Sir, I would not spend Time in taking notice, That the meanest Subject in the Kingdom is entitled, by being born in this Kingdom, to be tried by a Jury, where there are those just

Advantages that can't be had in another Case: There is a Liberty of challenging 35, without shewing any Reason, and as many more, as he can any way object to with Reason. The Witnesses are upon Oath, and all the Proceedings are by certain known Rules and Methods, and not only by the Statute of *Magna Charta*, but by the Common Law of *England*, much more ancient than that Statute; and though the Proceedings therein are such as a Criminal may sometimes escape, yet the just Advantages are so much beyond any Thing of that Nature, that I hope we shall never complain of that ancient Course of Proceeding by Jury: I am sure it is the Honour of our Government, the Mark of our Freedom, and Envy of our Neighbours; and I hope, that Method of Trial shall never be laid aside, though sometimes it may not have the Effect that is desired by it.

I would take notice to you, that in a Case of the greatest Crime, and most Notoriety of Fact, yet the Persons concerned in it were brought to their Trial. The Regicides, who did not fly, but were found upon the Restauration of K. *Charles II.* though their Treason had the worst Effect, even in the Murder of the King; yet, notwithstanding, though the Fact was so notorious, those that were found upon the Place were admitted to their Trials in the ordinary Course of Justice; although at the same time there was a Bill of Attainder against some that fled, and some that were dead, and so could not be tried.

I would, with your Favour, likewise observe, That the Parliaments of *England* have been so far from depriving Persons from their ordinary Trials, that whereas the Common Law of *England* says, that Persons Out-law'd for Treason and Felony, if taken, shall be put to Death without Trial; yet the Parliament, in the Reign of *Edward VI.* made a Law, providing, That Criminals that returned within a Year, according to that Law, should be admitted to their ordinary Trials.

Sir, all along the Statutes run in favour of Trials; there are no less than two Acts of Parliament in the Reign of *Edward VI.* in the first and fifth Year of his Reign, that say, there shall not be less than two Witnesses against any Person for Treason: And I hope I shall never see a Law made so much in Opposition to those Acts, as that a Person shall be sentenced to Death without so much as one Witness, as I shall shew by and by.

Perhaps it might be thought extraordinary, That in the same Parliament that passed a Bill for regulating Trials in Cases of High-Treason, requiring two Witnesses with great Strictness, and giving further Advantages to the Criminal than ever were before allowed, an Act should pass, to put a Person to Death, without any Trial at all. And let any one compare the Preamble of that Act with this Bill.

Sir, I take it, with humble Submission, that the present Case is not at all to be likened to most of those Bills of Attainder that may be cited; those, when they come to be looked into, will be found either to have passed against such Persons as fled from Justice; and therein they only pursued the Rules of the Common Law, which allowed them to be Out-lawed, and by Consequence to be attainted: And the Parliament therefore, in attainting them, did but the same Thing; and there-

in, there was nothing done extraordinary. True it is, that where Persons have been forth coming, there have been some few Bills of Attainder: But I will presume to say, they are never mentioned without heavy Censures, and a great Complaint against them.

This Cause is not like the late Instance of the Bill of Attainder against the Duke of *Monmouth*; for he was present in the Kingdom: yet he was in direct Opposition to any Method of Trial; he was in Defiance to all Courts of Justice: But here is a Person who submits himself, and hath pleaded, and stands ready to be tried; and I hope, I may take Notice, to take off all Prejudice that may be raised, That this Gentleman, though he was of the Parliament that passed that Bill, yet he was not in Town, 'till at least a Month after the Bill was passed.

I do agree, there are some Cases where Persons have been attainted without being admitted to be tried. In the Beginning of the Reign of *Edward III.* *Roger Mortimer* was attainted and executed, without being tried; but 28 *Ed. III.* it was reversed, because he was not brought to Judgment according to the Law of the Land, 1 *Ed. III.* The like in the Case of *Edmund Earl of Arundel*: But 4 *Ed. III.* *Richard* his Son, petitioned in Parliament, setting forth the Proceedings to be against the *Great Charter*, and insisting, that there ought to have been due Process of Law, and he was then restored in Part; but 28 *Ed. III.* there was an Act of Reversal, declaring, That it clearly appeared, that the said *Edmund* was unduly put to Death; and that the Statute by which he was attainted, was void, erroneous, and null. There is an Instance in 32 *H. VIII. Col. 4. Inst. fol. 37.* of *Thomas Cromwell Earl of Essex*, who, though he was in Custody in the *Tower*, yet he was attainted without being tried: But the Words of my Lord *Coke*, are as follow, *Auferat oblivio, si potest, si non utrumq; silentium tegat*: For the more high and absolute the Jurisdiction of the Court is, the more just and honourable ought it to be in its Proceedings, and to give Examples of Justice to inferior Courts. And he adds further, to the End, as I apprehend, that the Reversal of this Attainder may be of no ill Use: I am, says he, confidently perswaded, such worthy and honourable Members, shall from Time to Time be of both Houses of Parliament, as never any Attainder, when the Person is forth-coming, shall be had hereafter, without hearing of him; which I understand to be, without trying of him: And 'tis memorable, what my Lord *Coke* recites, That he who thus died, attempted the like against another.

There is another Case, of *Thomas Seymour*, Admiral of *England*, who likewise was attainted by Act of Parliament; and as it appears, without Execution: You have an Account thereof in the second Part of the *History of the Reformation*, Fol. 98, 99, 100, whither I will refer you, only to read the Sentence of the learned Author, there pronounced against him. That latter Case is, that of my Lord *Strafford*, which every Body knows. I shall, as the best Account of that Matter, crave leave to read the Words of the Parliament in the Act of the Reversal. I will not trouble you with reciting the Whole, but only read the Beginning, and some Part thereof in another Place. *Whereas Thomas, late Earl of Strafford, was impeached of High-Treason, upon Pretence of endeavouring to sub-*

vert the fundamental Laws, and called to a publick and solemn Arraignment and Trial, before the Peers in Parliament, where he made a particular Defence to every Article objected against him; insomuch, that the Turbulent Party then seeing no Hopes to effect their unjust Designs, by an ordinary Way and Method of Proceedings, did at last resolve to attempt the Destruction and Attainder of the Earl, by an Act of Parliament, to be therefore purposely made to condemn him upon Accumulative Treason — And then it goes on to shew, it was carry'd by the Tumult of the People, and then follows — *And to the End that Right be done to the Memory of the deceased Earl of Strafford aforesaid: Be it further enacted, That all Records and Proceedings of Parliament relating to the said Attainder, be wholly cancelled and taken off the File, or otherwise defaced and obliterated, to the Intent the same may not be visible in after Ages, or brought into Example to the Prejudice of any Person whatsoever.* So that the Parliament that enacted that Reversal, did consider those Proceedings as very evil and unjust, and was not willing there should be any Remains of such an Example to future Ages.

Sir, having made these Observations as to the Manner of Proceeding, I come now to that which is the subject Matter of the Bill at present before you, and which we take to be the Charge against Sir *John Fenwick*: I must crave leave to observe, that in all Courts of Justice, where any Person is accused, he is to make his Defence *secundum allegata & probata*: 'Tis not enough that a Matter is proved, if it be not alledged; nor that it is alledged, if it be not proved; but if it be both alledged and proved, then it is a full Charge, and requires an Answer. It is not only the Law of *England*, but I believe all Nations, and wherever any Person is to make his Defence, especially in Capital Crimes; that to which he is to answer must be alledged against him; from whence I shall observe what is alledged against Sir *John Fenwick*; for, I hope, we are not concerned to defend him further than as to what at this Time he is charged with. This Bill of Attainder, as it is drawn, and now stands before you, doth not so much as alledge, or say, That Sir *John Fenwick* is guilty of the Treason whereof he was indicted; and that hath prevented us from producing Witnesses to that, and several Matters which the King's Counsel have enter'd upon: For though you have permitted them to examine Witnesses to several Things quite out of the Bill; yet, I hope, you are not come to any Resolution, That these Matters shall be thought fatal to Sir *John Fenwick*, that are not so much as alledged against him. We do not therefore think we are bound, or ought to follow them in those Things that are totally out of the Bill; and therefore his being guilty, is not now the Question, because 'tis not a Charge upon him.

The first Thing that is alledged in the Bill is, That Sir *John Fenwick* was indicted at the Sessions, for that which is laid in the Indictment to be Treason (which by and by I shall crave leave to be heard to) and, I think, no Body will say this alone does require any Answer, further than to own the Fact or to deny it: And we do admit that he was so indicted. I need not labour much to clear him of the Consequence of that alone; for very often innocent Persons have been indicted and accused (for an Indictment is no more than an Accusation;) and this Bill, as I have observed,

served, doth not say he is guilty. When the Bill hath recited that Matter, it proceeds to take Notice, That they, by some unfair Prevarications (for so I agree they were, if the Facts alledged in the Bill are true, which by the way hath not been yet proved, by producing any one Witness) did obtain the King's Clemency to put off his Trial, in Expectation of an ingenuous Confession, which the Bill takes for granted he hath prevaricated in, by charging several Persons of Honour and Fidelity with Matters of a high Nature, only by hearsay; and by using other unfair Artifices to put off his Trial. How far it is made out, that I must submit to you; we think at present there is no Proof of it, and by Consequence we are not concerned to answer it: But had they proved it as fully as it is laid (though far be it from me to excuse such a Behaviour;) yet when a Criminal is to be tried for that which will be of fatal Consequence to him if he be convicted, no Body can say it comes near Treason, by unfair Means, to contrive to put off his Trial.

The next thing the Bill recites is, That one of the Witnesses, who might have been produced against him upon his Trial, if it had proceeded as was intended, is since withdrawn. I cannot say, but *Goodman* is withdrawn: But as the Bill does not so much as alledge, that it was by the Means or Procurement, no nor Privy, of Sir *John Fenwick*; so from thence that Part of the Bill charges no Offence home to Sir *John Fenwick*: For in case the same Witness had happen'd to have died by the Act of God, it would not have been said to have been a good Reason for this Bill of Attainder against Sir *John Fenwick*, unless he had contributed to it.

From these Premises follows the enacting Part, That Sir *John Fenwick* be attainted of High-Treason; and in future Times the Act must be supposed to be grounded upon the Inducement to it. And I humbly submit it to you, Whether this Bill condemning him for High-Treason, upon such Recitals, will be thought to be reasonable?

These being the Allegations of the Bill, I will now, with your Favour, come to that, which they on the other Side do call Proofs; and I must humbly observe to you, and submit it to your Judgment, Whether in the Case where a Man's Life is to be taken away, by a subsequent Law made on Purpose for him, the Proofs in that Case ought not to be much more evident, than if he were to be tried by a Law already in being? In my poor Apprehension (I speak it with all Submission to you, Sir,) it would be too much at once, to make a subsequent Law to condemn a Man to Death, and to do it upon doubtful and uncertain Evidence, or rather upon no Proof at all. Nothing could excuse such a Law, but an undeniable Proof of the Fact. And therefore surely the Position we find of Mr. *St. John's*, in my Lord *Strafford's* Case, is of most dangerous Consequence. I am afraid none are safe, if that be admitted, That a subsequent Law may take away a Man's Life without any Evidence, other than the private Opinion or Conscience of every particular Law-maker. He is pleased so to assert, That it may be done, as in *Rushworth's* History of that Trial, fol. 677. I am sure if this be so, no Man knows how long his Life is his own: I hope this Doctrine shall never be followed or approved. Sir, we have the Happiness to live under an Estab-

lishment that every Man does, or may know the Law he is to go by: Every one is bound at his Peril to take Notice of the Laws, and to act accordingly, because they may be known: But at this Rate none but Prophets can live amongst us.

In the next Place, I would observe what Course they have taken in their Evidence who are the King's Counsel.

First, They have betaken themselves to that which is not alledged in the Bill; and we think that this is not agreeable to a Course of Justice.

In the next Place, to make out what they insist on, they have produced but one Person that comes hither *viva voce* to speak to it; and I must take Notice to you, That he is not upon Oath. I know very well it is not your Course in this House to administer an Oath; but I know very well, though it is not your Course in this House to administer an Oath, yet, I hope, that is so far from being a Reason why this Bill should pass here without an Oath, that it is a good Reason why such a Bill should not begin here: There is no Place in the World, where a Person is sentenced to Death without an Oath. In the Case of my Lord *Strafford*, the Proceeding first was by way of Impeachment, and the Witnesses had been first examined upon Oath in the House of Peers; and that Bill of Attainder takes notice of it, reciting that it had been fully proved; and, by Consequence, we may suppose, that they would not otherwise have passed it, that being the Ground of their Proceeding upon that Bill of Attainder: But for the Bill to begin originally in this Place, to form such a Judgment, the heaviest that can be pronounced against a Man, a Judgment of Death, corrupting of his Blood, and forfeiting all he has in the World; and this upon bare Allegations, without so much as the Sanction of an Oath, is extremely hard. Mr. *Porter* is such a Person, that I know not how he hath gained so much Credit, that this Act should pass upon his Parole to take away the Life of a Man. He was lately of that horrid Conspiracy of the Assassination of the King; and shall that Man, who was so lately of that villainous Disposition, to be engaged in a Crime of that black Nature, and not convicted by his own Conscience, but by the Danger he had run himself into, not so much as pardoned his Crime, but at this time, if I may without Offence use that Expression, Drudging for his Pardon; I say, shall this Person's Life be taken away by his Parole?

Sir, The next Thing I would go to, is that (which likewise they call Evidence) which is an Examination, as they term it, of *Goodman*, taken before a Justice of Peace: But he was not examined, and I must insist upon it, that though you permitted it to be read, yet I did observe you did not declare it to be Evidence; but you were, I presume, willing to hear all Things, and then judge what would be the Evidence. And, I think, the King's Counsel did not press it further. Sir, as this is not Evidence that would be allowed in an inferiour Court, so, I hope, you will not allow it to be Evidence here; for then it is like to be followed by other Courts, who observe the Proceedings here as their great Rule. 'Tis only what Mr. *Goodman* thought fit to write down without being examined.

Sir, the next Thing they resort to is, What *Goodman* swore upon his Examination in another Cause, where Sir *John Fenwick* was neither Party nor present. Sir, there are, I suppose, such Reasons against that sort of Evidence from natural Justice, that it is not admitted in any Court; because there may be a weak Defence, or the Person that swears it against one, perhaps may not, when Face to Face, have the Confidence to persist in it, in Case it be false against another; or at least that Person, who was not a Party before, when he comes upon his Trial, may think of such Questions as may go a great way to discover the Truth, may produce such Evidence against his Credit as may overthrow it.

But if what is sworn at one Time against one Man must be always taken for Truth against all others, the Trial of one of the Company is the Trial and Condemnation of all the rest: And how contrary is this to a fundamental Rule in our Law, That no Evidence shall be given against a Man, when he is upon Trial for his Life, but in the Presence of the Prisoner; because he may cross-examine him who gives such Evidence; and that is due to every Man in justice.

But I would with Submission inquire, how they are sure that *Goodman* would have swore this Matter again, if he was now forth-coming? Because he did swear so in *Cook's* Cause, is it necessary that he would swear so again now, if Face to Face, with Sir *John Fenwick*? No Body can say so positively and absolutely; they only can imagine it, because he once swore it, therefore it is possible that he would do so again: Whereas we may as well say, he did then swear to save his own Life; and having done that, and found an Opportunity to get out of the Way, his own Conscience might put him upon flight, to prevent his doing of it again; and that might be the Reason for the withdrawing of himself. However, I insist upon it, That there is no Proof that it was by the Procurement of Sir *John Fenwick*: The Bill does not alledge it, and the Proofs do not come up to it: Nay, there is nothing offered to such Purpose, save only that Mr. *Porter* was pleased to say, That another Man told him, that the 300 Guineas he was offered, and 300 more he was to have received, were to have come from Sir *John Fenwick*: But hearsay Evidence is to be rejected, especially against a Man for his Life; because every Man is at liberty to talk at large: But God forbid that that should be allowed for Evidence!

The next Thing they went upon was what Mr. *Roe* said; That Mr. *Dighton*, who by your Permission is Solicitor for Sir *John Fenwick*, was inquiring of him what he could say to take off *Goodman's* Evidence: The Words I think he used were, What he could say to discredit *Goodman's* Evidence; and, I hope, that does no way affect Sir *John Fenwick*: For it does not appear that he had any Authority from him; but 'tis only suspected, because he is now Solicitor for him, which he was admitted to after the Time spoken of. But I take the Word, to be nothing relating to *Goodman's* withdrawing of himself; but to inquire what he could say to discredit his Testimony, which supposeth he would appear, and imports the quite contrary of withdrawing himself: And if he had gone no further, I think, there had been no fault in that; for any Solicitor may enquire up and down for the Advantage of his Client; and the Word *Solicitor* imports his Employment.

As to the Offer Mr. *Roe* says he made him of a very great Recompence, how far he is guilty of that, I suppose, he can give some Account, if you should please to enter into an Examination of it; and as I find he does not doubt to clear himself: So that Sir *John Fenwick* is in no sort proved to be privy to Mr. *Goodman's* withdrawing himself, much less to be proved to have had a Hand in it.

There is one Thing more I would offer, and that is grounded upon the Bill of Indictment preferred at the *Old-Bailey* against Sir *John Fenwick*; That the Matter in the very Indictment that they have read on the other Side, as it is there laid, and as far as it hath been offered to be here proved, does not amount to Treason; or, at least, it hath been made a very great doubt, and by some within these Walls: But this I offer, with all Submission; I have the Author in my Hand, who is a Person of Note of the King's Counsel; he hath furnished me with such Arguments as, I hope, I may be admitted to put you in mind of without Offence.

The Indictment lays, That there was a Conspiracy and Agreement to call in Foreign Power, and to that Purpose to send *Charnock* to France; but the Indictment does not say, That *Charnock* was sent, only that there was a Meeting, and an Agreement, and a Conspiracy, to send him: So the Indictment does not lay it as a Thing done, nor does the Bill charge it so; but only takes Notice, That he, I mean Sir *John Fenwick*, was indicted for Conspiring, and Agreeing to call in a foreign Force; so that this Bill does not say that *Charnock* was sent. And I appeal to you, Whether it be proved that he was sent: For Mr. *Porter* says no more, but that there was a Meeting at the *King's Head*, and he named Sir *John Fenwick* to be one who was present; and there it was, he says, agreed, That *Charnock* should be sent into France. Now, if there was nothing more than an Agreement and Conspiracy to do it, and no further Act, but such a Meeting to do it, but the Person was not actually sent, or, at least, not proved to be sent; then, from this learned Author's Opinion; I insist upon it, that this is not a sufficient Overt-Act of Treason. In the late Case of my Lord *Ruffel*, whose Innocency is vindicated by this Author, he takes notice, That a Conspiracy or Agreement to levy War is not Treason, without actual levying War; and of that Opinion was my Lord *Coke*, and my Lord Chief-Justice *Hales*. A Conspiracy or Agreement to call in foreign Forces, unless actually done, or a Person, at least, actually sent, or something more than a bare Agreement for that Purpose, is the same as a Conspiracy to levy War. And in the Case of my Lord *Ruffel*, the Proof being only, That he, and others, met together, and agreed to seize upon the Guards, and levy War which he never actually did, it is insisted upon by this Author, that that was not Treason; for that Indictment went no further. And therefore my Author says, 'Show me
' where such an Accusation was ever agreed to be
' more than a Conspiracy to levy War; and that
' such a Conspiracy was ever agreed to be Treason
' within the Statute of *Edward III.* till within these
' few Years.

Sir, now I must humbly submit it to you, whether this be any thing more: And for the Purpose you will please to consider, What this present Bill, and what that Bill of Indictment is: For it

is not, for that *Charnock* was sent into *France* to solicit foreign Forces; but only that *Sir John Fenwick* was at a Meeting, where they did agree so to do. Calling in foreign Forces is levying War, but Conspiracy to levy War is not Treason, unless it be actually done: A Conspiracy to call in foreign Forces is nothing more. And therefore I humbly insist upon it, That neither by this Bill, or by the Indictment recited in it, or the Proofs offered before you, any thing is charged, but only an Agreement at that Meeting mentioned by *Captain Porter*, a single Person, and he not upon Oath, to call in foreign Forces. For he only says, That *Charnock* told him he had been in *France*. I shall not trouble you any further; we have not thought fit to produce Witnesses, for the Reasons I have offered: For that we do not find, that *Sir John Fenwick* throughout the Bill is charged with being guilty of Treason; and we are not willing to enter upon the Defence of a Matter not charged upon him. I hope, Sir, you will not make a Precedent, That where a Person is indicted, and ready to abide his Trial, in the ordinary Course of Justice, as *Sir John Fenwick* now is, that he might be taken out of the Hands of the ordinary Judges, and be brought to this Bar, to receive his Trial here.

A Matter of this Nature may be of very great Consequence: We know at present upon what Ground we stand; for by the Statute of *Edward III.* we know what is Treason; by the two Statutes of *Edward VI.* and the late Act of Treason, we know what is Proof; by the Statute of *Magna Charta*, we know how we are to be tried, *per legem terræ & per judicium parium*; That is, a Peer by his Peers, and a Commoner by a Jury: But if Bills of Attainder come into Fashion, we shall neither know what is Treason, what is Evidence, nor how, nor where we are to be tried. Sir, I submit it to you, and hope this Bill shall not pass.

Sir Bartholomew Shower. Mr. Speaker, I am of Counsel for *Sir John Fenwick*, the Prisoner at the Bar; and first, I am humbly for to thank you for your Candour, of which I have had frequent Experience; and humbly beg for my self, That if I offer any Words that are indecent, or unfit for me, that you will interrupt me; for it is furthest from my Intention so to do.

The Bill that is brought into this House against *Sir John Fenwick*, is that whereby every one of you (with Submission) are to declare and pronounce, *That he shall be drawn, hanged, and quartered, as a Traitor.* And the Question before you is, Whether you will do this in this Case?

Sir, I shall not pretend to question, nor enter into any Debate or Argument in this Thing concerning the Power of Parliaments: No question, but in all Governments, there is some supreme Power; and by our Constitution, it is lodged in the King, Lords and Commons.

There are Precedents of Attainders, and that many; but can they shew me, where there hath been any Attainder by Parliament, for High-Treason, upon one single Act, which if Treason, was determinable at Common Law; there have been Bills of Attainder for flagrant Treasons, and for great Ministers of State; some topping Sinners, who have been above Judges and Jury, and whom inferior Courts could not tell what to say to: But I believe I may say this, That for a single Consult or Agreement between four or five pri-

ivate Gentlemen, in a private Room, in which there was no Danger, but by the Consequence of the Resolution, if it was put in Practice, no Man can shew any Precedent for attainting any Person in Parliament.

If you please to observe, the 25 *Edw. III.* reserves the Power to Parliament, to proceed in Treason nor expressed within the Statute; but as to the Compassing the King's Death, Adhering to the King's Enemies, and those Things that are there particularly specified, it seems the Sense of the Parliament to leave them to the Rules of the Common Law. So 1 *Hen. IV. No. 144.* upon the Roll it is at large complained of Accusations in Parliament for Treasons and Felonies, and declares for the future, they should be determined in the inferior Courts.

1. This was occasioned by *Sir Raw. Harray*; *Cotton's Abridgment*, 189.

There is a melancholy Precedent or two of single Acts of Attainder; but they are most of them reversed. *Sir Thomas Haxey* in *Richard the II's* Time, was Attainted for bringing in a Bill into the Commons House against the Prerogative; but 1 *Hen. IV.* it was reversed with great Censure, *Cott. Abridg.* 362, 363. There are others in *Hen. VIII.* Time, but they were for Acts in that Reign, which were questionable, whether or no within the Statute of *Edw. III.* and were for such Actions, as perhaps were not for the Honour of the Prince, or Good of the Government, to disclose by publick Trial, as the Attainder of the Queen, and others concerned.

I beg leave to repeat the Words of a great Author, the Bishop of *Salisbury*, in the *History of the Reformation*, which I crave leave rather to do, because it hath been approved of by this House, for he had Thanks of the Parliament for it; *Fol.* 359, 360. where speaking of these sort of Attainders, he says, *After these Executions, followed the Parliament in 1439. in which these Attainders were not only confirmed, but divers others were made of Persons in Custody, without bringing them to Trial; (and he says) which can't be enough condemned as a Breach of the most sacred and unalterable Rules of Justice.*

That of the Marchioness of *Exeter*, &c. I shall make no Paraphrase upon it: There is no question but you will agree, and I must admit, *Salus Populi* to be *Suprema Lex*; but for an Act, not the last of *May*, but last *May* was twelve Months, the Danger passed, the Persons executed that were concerned in the great Treason, and all Danger that might have been from that Act gone, and no Fear now concerning it; I hope you will not use the extraordinary Power of the Legislative to punish for that Fact which may be punished by the ordinary Rules of Law.

The Reason suggested in the Bill is, That 'tis impossible to have this Gentleman tried by the Rules of the Common Law; for otherwise there is none: For you will not waste your Time; and if the Doctrine that was broached here Yesterday be true, there is no Occasion to trouble you now; for according to their Doctrine, there is legal Evidence, and there is no need of a Bill of Attainder; but taking that for granted, that we must do; otherwise there is no Reason for this Bill. Then the Bill says, That *Goodman* was an Evidence, and that he is withdrawn; which I must observe, is neither laid, nor proved to be by the Privy, Consent, or Procurement of *Sir John Fenwick*. There

is no Pretence of it in the Bill; no Insinuation of it, nor any Evidence to that Purpose. Then suppose *Goodman* is withdrawn, we may presume you will not pass a Bill to put Sir *John Fenwick* in a worse Condition than if *Goodman* was present, if he had been ready to have sworn the same Thing.

In case you do pass this Bill, you do put Sir *John Fenwick* in a worse Condition than he would have been if *Goodman* were here: Perhaps it might have been reasonable to have an Act passed, that *Goodman's* Depositions should be read at the Trial, if *Goodman* was withdrawn; but we hope it can't be a Reason to condemn Sir *John Fenwick* of High-Treason without Trial; for the Consequence of this is (if it were by his Means) that he is punished greater than the Thing requires. For if *Goodman* was here, Sir *John Fenwick* would have had his Trial by a Jury, the Benefit of challenges, Exceptions to the Array, might have challenged upon Account of Favour, if any of the Grand-Jury had been impanelled, had his legal Exceptions to the Testimony of the Witnesses, might have these Witnesses examined upon Oath, might give Evidence upon Oath to it; and all this he is deprived of: So that now he is in a worse Condition, by *Goodman's* Absence, than if he was present. We insist upon it therefore, and submit it to you, whether any Punishment can be imposed by the Legislative Power, but only to supply that Defect, and put the Case in the same Circumstances it would have been, if such a Miscarriage had not been committed. But this Bill is to condemn him to Death upon the Oath of one Witness, though there was your Act of Parliament last Year requires two. With submission to their Judgment, it was the Law of the Land before that; and in all Cases, where Trials are *per Testes*; and 'tis the Law of God, and the Law of the whole World; and no Law allows a Man to be condemned but by two Witnesses; and the Reason that here one Witness is admitted, is, because he hath the Benefit of a Jury, and Challenges to them, who the Law supposes are privy to the Fact, and therefore are to come from the *Vicinage*, from the Neighbourhood of the Place where the Party dwells; and for that Reason, in Cases of Felony, where no Statute interposes, the Law allows but one Witness. Natural Reason requires two Witnesses in case of so great Crimes, because that one Witness can be no Rule to guide your Judgments; one affirms, the other denies, this is equal; and Presumption ought to be on the Side of Innocency, rather than otherwise; but we hope, in this Case, it will not be thought reasonable to pass the Bill to condemn Sir *John Fenwick* for Treason, and to condemn him to the basest of Executions, upon the Testimony, nay, upon the Parole of one Witness. And 'tis no more than if *Goodman* had been dead, then you would not have done it. If *Goodman* and *Porter* had both come to this Bar, you would not have done it, but have referred him to his Trial at the Common Law. Now what is there pretended by them to induce you to judge the contrary, or at least without so much as an Allegation in the Bill, that Sir *John Fenwick* procured his withdrawing. I propose it to your Consideration, Whether there be any Proof that *Goodman* is withdrawn? He was once in Custody, let out upon Bail, the Prosecutors approved the Bail, he never yet called upon his Recognizance; nay, there is not one tittle of Evidence, but that *Good-*

man may be in the same Lodging where he was: And then, suppose when you have passed this Bill, *Goodman* should appear again, and contradict his Testimony he has given before; then it may be too late for you to do Right to Sir *John Fenwick*. 'Tis not so much as offered that *Goodman* could not be found; they offered a printed Proclamation, which I am sure the King's Serjeant will not allow to be any Evidence. Whether it passed the Great-Seal before it was printed, or whether it passed it at all, *non constat*; for it was not read; they waved it. It does not appear Sir *John Fenwick* consented, or procured *Goodman's* withdrawing; he could not procure it, for he was a Prisoner, and so not likely to affect it, being a Prisoner, especially for his Life.

As for my Lady *Fenwick*, whether she did so or not, I am sure you'll be of Opinion, it ought not to affect Sir *John Fenwick*: Suppose *Clancy* a Stranger to Sir *John Fenwick*, and in Truth he never saw him: Or suppose him a Friend, and he officiously did what he did; he ought to answer for it, and I think he hath undergone the Punishment the Law thought fit to inflict in that Case; 'tis his own Crime, and by the Rules of Justice, no Man's Crime ought to tend to the Punishment or Misfortune of another Man: The Act of one Criminal, thought to be a Party, or Acquaintance, or a Friend of Sir *John Fenwick's*, ought not to affect him, nor no Body but the Actor; 'tis he that hath suffered for it.

And what hath been said in that Matter ought not to influence your Judgments; for 'tis not improbable, but what *Clancy* told *Porter* is false; you will never allow Hearsay, not permit your Judgment to be governed by any Thing but what is certain, and hath all the moral Rules of Perswasion: Hearsay was never, by any Law in any Court of the World, allowed, nor indeed believed in private Conversation.

As to my Lady *Fenwick*, there is this further, That Husband and Wife, in respect of Crimes, are distinct Persons; and what one does cannot affect the other, no more than she deserves to be executed for what Sir *John Fenwick* did: And as to what *Porter* says concerning it, it only relates to himself; it proves no Suggestion of the Bill, which is, That *Goodman* is withdrawn, because a Stranger to Sir *John Fenwick*, (and it must be so in Construction of Law) made an Attempt upon Captain *Porter*; therefore *Goodman* being withdrawn, there was an Attempt upon him, and by the same Person, and by the same Means: This is no Evidence; it carries no Logick in it, and won't prevail upon your Judgment.

We offer another Thing to your Consideration: 'Tis said, that one *Roe* was spoke to by a Solicitor of Sir *John Fenwick's*, Whether or no he could say any Thing to the Discredit of *Goodman*, as to his Robbing or Clipping. The asking of that Question was lawful; and to desire him to testify it was lawful: I must agree, to offer too great a Sum of Money, may subject him to an Information in the *King's Bench*; (but Mr. Attorney knows that best) but God forbid it should affect Sir *John Fenwick*! Mr. *Dighton* was not his Solicitor at that Time, not appointed, nor had any Liberty to come to him; besides, it can't be an Evidence, nor can't induce you to believe, That the same Person was instrumental to get away *Goodman*, because he asked *Roe* if he knew *Goodman* to be guilty of those Crimes; for there is no Evidence, that

that he asked him to persuade him to withdraw himself.

There's another Thing we could offer to you : There's no Proof of that, which, upon the first Reading of this Bill, was aimed at, to be punished with greater Pains than the Common Law inflicts, and that is, the giving of false Papers and Accusations against great Persons ; they have not attempted any Thing like it ; so that That is to be taken as if there was no such Thing. Neither is there any Proof of protracting his Trial, by any Promises of Confession or Discovery ; they opened it, but did not attempt the Proof of it, but waved it.

But take it to be so ; I hope you will not pass an Act to attain a Man for making a false Accusation, which only incurs an Action of *Scandalum Magnatum*, or Fine and Imprisonment upon an Indictment ; and, I hope, you'll not condemn him to a greater Punishment, when, at the Time he did it, he had no Notice of that Punishment. The Design of the Law, is to influence Men by Fear of Penalty ; and how can that be, when Penalties are not known at the Time the Fact was committed ? I speak with Submission still ; it seems not just, that I should forbear with so much Caution, from an Action that exposes me to the Penalty of 20*l.* as from an Action for which the Law says, I shall forfeit my Life : Now, Sir, in this Case it might be expected that he should incur the Penalty of Fine, Pillory, and Imprisonment ; but not that he could incur the Penalty of Death.

Then, Sir, as to the protracting of his Trial by such Promises of Confession. Certainly the putting off his Trial, in it self, is so far from being a Crime, that it can't be thought but lawful : 'tis every Man's Duty, upon the Principle of Self-preservation ; and it was at the Liberty of the Government and Ministers, to do as they thought fit in it.

In the next place we do insist, That there is no Treason alledged nor proved in this Case : There is no Pretence of Truth nor Charge, in respect of the Assassination ; nor of buying of Arms or Horses, though mentioned in the Indictment : And if Sir *John Fenwick* had been to have been tried upon this Indictment, and they had had both these Witnesses there, all that could have been proved, must be of the Consult ; as to the rest, he must have been found not guilty : And I believe 'tis most notorious, that the whole Company there, could not have raised what was talked of. Now as to this single Act, it hath been said, that a Conspiracy to levy War is not Treason : My Lord *Ruffel* was attainted for it, and that Attainder was reversed upon this very Account, and the Act declares the Reason of it, he being deny'd his lawful Challenges, and by strained Construction of Treasons he was unlawfully convicted of Treason. Now the Overt-Act in the Indictment was this, That my Lord *Ruffel*, and others, did consult and conspire to seize the King's Guards : The Proof of it went further, That they sent Sir *Thomas Armstrong* to view them and seize them : But then the Question is, Whether the Consulting to send a Man to invite foreign Forces, is any more than a Consult to seize the King's Guards ? We say each are levying of War, and 'tis not within the Clause of adhering to the King's Enemies ; for they must be either present aiding and abetting of them, or sending them Money, Arms, and Ammunition, and the like ; and I think, for that, I may appeal to

your Act made against corresponding with the King's Enemies ; which, I suppose, if the Law before was otherwise, it needed not to have been made. Now here is only a Consult and Agreement to do this Act.

It hath been questioned, Whether *Scribere et agere*. But here it is only *mittere* ; nay, it is not so much, 'tis only *agere mittere* ; six Men had between them a little private Discourse, and at last one of them did agree to send *Charnock* to France : The Question is, Whether the Law of the Land will warrant this to be Treason ? And if not, then you must not pass this Act upon such a single Point. Dr. *Story's* Case is deny'd to be Law ; this Case is no more than that in my Lord *Dyer*, for writing a Letter to invite the *Spanish* King to invade England ; and it was a Time of great Fear of them, as it is of the *French* King now ; and he was attainted upon that, but that Judgment hath been questioned and deny'd to be Law. My Lord *Hales* expressly, in his Pleas of the Crown, says, That a Conspiracy to levy War, is not an Overt-Act of the King's Death ; and that attempting to levy War, is not Treason. Now the Sorts of Treasons are these Three ; Compassing the King's Death ; Levying War ; or, Adhering to the King's Enemies. Now for compassing or agreeing to levy War, to apply that to be an Overt-Act of compassing the King's Death, hath been always complained of as a Strain of the Law.

Upon these Reasons, we think this would not have been an Act of compassing the King's Death, as laid in the Indictment ; and then if it be but a Question, Whether it be or no ? We hope you will not proceed in your Legislative, especially when he is deprived of the Advantage of insisting on this at his Trial at Common Law : Witnesses are there upon their Oaths ; he might have had a Challenge to the Jury ; he might move in Arrest of Judgment. Now the Question is, Whether you will pronounce Sentence of Death upon him for High-Treason, upon one single Act, a Year and a half ago, just after the Act of Parliament for regulating Trials in Cases of High-Treason ; and if we had had a Trial at Law, we should have canvassed these Things, if we had Witnesses upon their Oaths ; for the Pardon reached the 29th of *April*, they could swear no new Discourse but just in *May* ; and now they say it was in the Middle of *May* ; if it had been before, the King's Grace would have exempted Sir *John Fenwick* from Punishment ; and these Things we should have had the Advantage of, if we had had the Liberty of a Trial.

There's another Consideration ; Sir *John Fenwick* hath pleaded, and hath so pleaded to Issue, and Issue is joined, and a *Venire Facias* is awarded. Now we submit it to you, whether you will think fit to take it out of the Hands of the Common Law, when there is no extraordinary Necessity ? And the Consideration we have to offer to you, if you do not cast out this Bill, if we should have the good Fortune, as we hope for in another Place, Sir *John Fenwick* stands still liable, and must submit to his Trial, if the King's Counsel think fit to prosecute him, and we think it hard to undergo your Censure, to be condemned in this Place ; and if (perhaps) he be acquitted here, to undergo the like Danger in another, and then to be tried in a Third : And for these Reasons, we hope, you will reject this Bill.

Mr. Serj. Gould. May it please you, Mr. Speaker, I have hearkened to what these Gentlemen have objected, and could not be aware of all they have said: They have enlarged upon several Topicks; I shall recollect them as well as I can, and answer them in the Method they have taken. I never did think, that the Parliament would take Things out of the ordinary Course of Justice, nor attain any of Treason, unless in Cases extraordinary; and these Gentlemen have agreed, That in Cases extraordinary they have done it. They likewise have agreed, and Sir *Bartholomew Shower* has told you, That there are some Treasons, by the Statute of 25 *Edw. III.* reserved by that Act, to be declared by Parliament. Sir *Thomas Powys* says, This is taken out of the ordinary Course of Justice: So says Sir *Bartholomew Shower*; says he, Here is an Indictment before you, the Party hath pleaded not Guilty; and they say he may be tried in the ordinary Course of the Law; and therefore they look upon it as improper to bring it here.

The Gentlemen are mistaken very much, to think that I did say, That the Examination that I said was Evidence here, would be allowed below. If I had thought so, I should have thought at the same Time, this House would not have meddled with it: But I do disagree with them in this; and take it, That where a Case is extraordinary, you will come and meddle with the Matter. Here is an abominable Treason, that is agreed on all Hands. Here is Plot upon Plot; here hath been a Plot now to take away the King's Evidence; there was two Witnesses in the beginning, and 'tis very plain that one of them is not here; for that here was a Proclamation produced, and I did look upon that Matter as taken for granted, That *Goodman* was withdrawn, and for that Matter they may be easily satisfied. They say, we have not proved the Suggestions of the Bill; but we think we have: For first of all, Captain *Porter* hath here sworn it expressly; it is not a Thing of loose, bare talking, but he hath proved a deliberate and formed Conspiracy; he hath proved, that it was actually agreed upon, a first, and at a second Time; and that *Charnock* was sent in order to the Execution of it: And what was it for? It was plainly to depose the King. He tells you, for that Purpose, they had desired 8000 Foot, 1000 Horse, and 1000 Dragoons from the *French King*; and these Gentlemen agreed to join them. Now, can there be a greater Evidence of deposing the King, and consequently of imagining his Death? 'Tis an Evidence of the Imagination of the Death of the King, as well as of the Rebellion; it being so in the necessary Consequence of it. Now, I think, he hath fully proved that. Then we offer to you, how far you will allow of this Examination: Why? Because upon a second Contrivance here is a Witness withdrawn; and can we give you greater Evidence of that than we have given? We have proved that there was tampering, let the Thing run as far as it will. Captain *Porter* was dealt with, had 300 Guineas in Hand, and 300 more he was to have remitted to him; and was to have 300*l.* a Year, whereof Sir *John Fenwick* was to pay one. It does follow after, that he is withdrawn: We must leave it to this honourable House, what Construction you will make of that; Whether here is not a second Plot?

Now this Matter is brought before this honourable House, we have gone so far in it, as to produce *Goodman's* Examination that was taken before

a Justice of Peace: We have shewed you the Evidence that he hath given upon a former Trial; and now he is gone, sure no Body but must justly infer, 'tis by Sir *John Fenwick's* Means: So that here they have taken away the Evidence that is necessary in the ordinary Course of Proceedings. In such an extraordinary Case I think it hath been usual for the Parliament to interpose: Therefore, what they pretended, under Favour, that this should not be Evidence, is all taken off. For now we are in Parliament, you will make use of such Informations as can give you any Light into the Matter, and may obviate and cure the Distemper that is upon us; and you are Judges of your own Methods, and how far Sir *John Fenwick* hath been concerned upon the Instances we have given you, that is in your Judgments. As for what Sir *Thomas Powys* tells you; says he, This Power hath not been executed by Parliaments very frequently, but it hath generally been done where Persons are withdrawn from Justice, and can't be come at in the ordinary Course. Why, we are in the like Case; if so be we can't come at Justice in the ordinary Course, and that by our Evidence having been tampered with, and drawn away; then, Sir, under Favour, by their own Arguments, 'tis proper to come before this honourable House; so that notwithstanding what hath been said, we do think we have given you Evidence.

And as for what they said, That we have not given any Account that Sir *John Fenwick*, by giving Assurance of his Confession, had protracted his Trial; for that I did apply my self, That Mr. *Vernon* might give you an Account of it: So that upon the whole Matter, we must leave it to your Consideration, and hope we have given you good Satisfaction, that there hath been a great Plot against the Government; and there was no Evidence of any other Matter before the Judges, and they allowed it to be High-Treason. Here is the same Evidence, only we have not one of them *vivâ voce*.

Mr. Serj. *Lovel*. Mr. Speaker, I shall not trouble you nor the House very long; but I humbly hope, with a little Pains, to satisfy the House, that most that hath been said on the other Side is, not much to the Purpose. Sir, I will consider, with the Leave of this House, what the Common Law was before 25 *Edw. III.* and how the Law does now stand; and draw some Consequences from thence, and the Necessity of this Case.

The Statute of 25 *Edw. III.* I must observe it, is not an enacting Law, it is only a Law declaratory; for all those particular Instances of Treasons that are mentioned there, were Treasons before that Law was made; and so, by the Preamble of it, plainly appears: But the Judges had a greater Liberty upon constructive Treason, and upon accumulative Treasons; and that was left too much at the Discretion and Liberty of the Judges below, and the executive Power of the Law. Then that Statute comes and restrains the Judges in that Point; and says, That they shall not give Judgment in any Cases of Treason, but only in these Cases particularly mentioned there: And that Statute says, That if any other Matter which shall be thought Treason, should come before them, they shall not proceed to Judgment, but acquaint the King in Parliament with it. I only make use of it, to prove how Treasons stood before that Act, and how it comes to be altered from the Common Law: And I am sure it is not to be denied, but that one Witness was sufficient at the

Common Law: But then comes 1 *Edw.* VI. c. 12. and that, for the Security of the Subject, does ordain, That in Cases of High-Treason there shall be two Witnesses of the Fact: But that Statute does not alter, but was made for the more Security of the Subject in Point of Proof. But in that Statute of 1 *Edw.* VI. c. 12. that does provide there shall be two Witnesses in Cases of High-Treason, there is an Exception of Treason for counterfeiting and forging of the Coin; and that is the Reason that the Law is taken now, that though there must be two Witnesses in the Cases of other Treasons, yet in the Case of Coining, there needs but one. The Offence or Crime is never the greater, because there are to be two Witnesses to prove it. In this Case that is here before you, we come to desire your Help, because one of the Witnesses is by Art and fraudulent Means withdrawn: Does that purge the Crime at all, or lessen it? No Man will say the Crime is less, but it does prevent a regular Trial before the Courts below; and that is the Reason why we did come here; and we hope this Defect shall be supplied by a special Law. But, say they, 'tis very hard a Law should be made *ex post facto* to take away a Man's Life. It would be very hard, if the Case was as they have stated it, to make a Crime *ex post facto*, that was not so before: But I do not take it to be hard for a Law to be made to repeal another, to make a Matter triable that was not triable before.

Suppose a Law should be made, That all Treasons from and after such a Time, suppose from a Time before the Fact is here supposed to be committed, as *May* was twelve Months, should be triable as at the Common Law; no doubt the Parliament may repeal a Law in part, or in all. No Man can say but Sir *John Fenwick* might be tried at the Common Law by one Witness, before the Statute of 1 *Edw.* VI. so that I do observe, and humbly submit it to you, That this Law, by the Act, is not changed as to the Crime; the Crime is as it was before, it is only changed as to the Number of Witnesses. The Instances that have been observed on the other Side, with humble Submission, I think, do not reach our Case. We do not insist that there are two legal Witnesses; we do confess the Information that hath been read is not a legal Proof; but this House, in their legislative Capacity, is not to be confined to the Evidence that a Jury must have below. This House may take what Ways and Methods they please to satisfy themselves. Say they, Here is the Life of a Gentleman that is concerned. I know all good Men will be tender of the Life of a Man; but here is the Life of the King, and the Safety of the Kingdom, the Peace and Safety of us all, that is concerned in the same Case; and let them put these Things into the Balance, and consider which ought to weigh most.

You have a Record before you of the Conviction of *Peter Cook*, who was indicted by the same Witnesses.

A learned Gentleman, that is of Counsel for the Prisoner at the Bar, did make the same Objections, as are made now, at the *Old Bailey*; (it may be there are some other Particulars now) and after all the Debates and Arguments that could be used at that Time, it was unanimously resolved, That the Crime was High-Treason: And if it was High-Treason in *Peter Cook*, 'tis no less in Sir *John Fenwick*, who was present at the same Time, and engaged in the same Business:

For what was a Crime in one, was the same in both.

I think 'tis too diminutive an Expression, to say, This was nothing but a little Twittle-Twattle. They did there meet upon a solemn Consultation; and not only once, but they did meet a second time; and what was it to do? It was to invite a foreign Power to invade this Land, and to make War with the King and Kingdom; and they did promise, and solemnly engage to assist them with armed Forces; and it was proved, That they did agree with *Charnock* to go into *France*; and *Charnock* was not willing to go the first Time he was desired, 'till he found they were stanch and steady in their Resolutions; and upon a second Meeting, they were all found so, and then he would go: I think that is an Overt-Act of Treason, if there be any. And when he came back, he said, he had been in *France*, and brought an Answer to the Message he went about: This is all now laid before you. But, say they, this is an extraordinary Case: I do agree it; but because it is an extraordinary Case, and for the Safety of the King and Kingdom, it is fit there should be an extraordinary Remedy.

They ask, What Mischief it would be if this Gentleman should be left to the ordinary Course of Law? It hath been the Wisdom of all Ages to make a Law, to punish such as by their Artifice would evade the Law. Here is this Gentleman, as we say, guilty of High-Treason; but that we submit to you.

This Gentleman was in the Prosecution of the Law, and might have been tried in the regular Way, and had the Witnesses upon their Oaths; (the Grand Jury have found *Billa Vera* upon their Oaths;) but we must appeal to a worthy Member of the House (who because he was a Member we did not call upon him) to give you an Account how he did delay and protract his Trial; and now they know he can't be tried at all, they pretend he is willing to be tried: And because he can't be tried, they would have it as an Argument that he should not be punished by any other Means.

Sir, If so notorious a Crime as this is, should be committed against the Body of a Nation, and go unpunished, either in the common Course, or by some extraordinary Methods, the Nation would be in a doubtful and dangerous Case.

When this House hath passed their Judgments in this Matter, it will go to another Place, where it will have another Examination; and it will have that regular Consideration that all other Acts have. We are in an extraordinary Case, and do think, That this extraordinary Case does deserve an extraordinary Punishment.

Sir *Barth. Shower*. I beg Pardon but for one Word: No Man does abhor such Consults more than my self; but I do not think, that Discourses are such an Overt-Act of High-Treason, as deserves the Punishment of Death.

Sir John Fenwick and the Counsel withdrew. And being withdrawn.

Admiral *Ruffel*. I think this may be a proper Time to ask Questions: If so, I think my self enough concerned to trouble you with one or two. I think in the Paper that hath been read, I am mentioned twice. These are the

Meaning Fenwick's Informations.

Questions I desire to have asked, What Proof he hath of this? Whether ever he saw— And, what Proof he has that I sent Captain *Lloyd* over, and that I gave him a List of the Ships? And that I said, we could not fit out thirty Ships in *May*? And whether or no, since this Revolution, he hath had any Conversation with me?

Colonel Crawford. What that honourable Person says, calls me up; my Name is mentioned in Sir *John Fenwick's* Paper; I desire you would ask him, Why he mentioned me in his Paper, as he hath done? And that you would require him to make Proof of what he says in relation to me.

Colonel Godfrey. I desire some Questions may be asked him in relation to a noble Lord, my Lord *Marlborough*: If he be guilty, I would have it known, and I would as willingly have it known if he be innocent, as I believe it will so appear. I would have him asked, Whether, since the Beginning of this War, or from the Time of this King's Landing, Sir *John Fenwick* did ever speak to him, in publick or private? Or ever did write to him, or receive any Message by Word of Mouth, or Letter, from my Lord *Marlborough*? He says, That some Service he had promised King *James*, inclined him to promise him his Pardon: I would know what that Service was? And in relation to his sending *Lloyd* into *France*, Whether he can, by any Body else, make that appear?

Colonel Crawford. That Gentleman hath put me in mind of one short Question; Whether ever he conversed or spake with me in his Life?

Mr. Bridges. Whether Sir *John Fenwick* hath any Body but himself, to support the Hearsay he hath given an Account of? And I desire a Question may be asked him on behalf of the Duke of *Sbrevsbury*; What Proof he has that the Duke of *Sbrevsbury* came into the Office of Secretary of State again, by the Operation and Consent of King *James*?

Mr. Vernon. I desire a Question may be asked previous to that, because 'tis so in Time; How he knows that noble Lord was in Treaty with King *James*, before he went out of the Secretary's Office, when he first came there?

Colonel Granvil. I desire he may be asked, What Proof he can give, that my Lord *Bath* was to betray *Plymouth* into the Hands of King *James*, or the King of *France*; and whatever else my Father is accused of in that Paper?

Mr. Harley. I humbly propose it to you for the Method of your Proceedings, since you take this Method, Whether it will save you Time for you to look upon that Paper, and ask him as to the several Parts of it, what Proof he can make of it.

Mr. How. I do not oppose Sir *John Fenwick's* being examined to this Paper; but it might have been more to your Credit, if you had examined him before your Vote: But here

Al' State made a little before, by which that Paper was condemned.

are a great many Gentlemen rise, to ask a Man to that which he does not pretend to any Proof of. The best Way for saving your Time is, I conceive, to have the several Parts of the Paper that does concern these Gentlemen read to him: and to ask him upon what Grounds he gave the King that Information. This will lead him into all that he knows of the Matter.

Mr. Boscorven. I am not against the Question that is proposed last; but you may ask him that at last. But there is a noble Lord that is reflect-

ed on in that Paper, and that is, my Lord *Godolphin*; I desire you would please to ask the same Questions as to him.

Lord Coningsby. I did intend to take care of my Lord *Godolphin*; there is a hard Reflection upon that noble Person; but under favour, you must, I think, let him know you have such a Paper; and then ask him in general, What Proof he has to the Particulars of that Paper? And then you will do Injustice to no body.

Mr. Norris. There have been several Questions moved by several worthy Members; and, I think, the Questions ought to be asked: But, I think, there is one previous Question to all these; and that is, when you tell him that you have such a Paper, I think the first Question should be, Whether ever he delivered those Papers to the King?

Sir R. Delaval. I find I am named in that Paper that Sir *John Fenwick* hath given; I desire that Part that relates to me may be read to him; and that he may give a Reason why he hath said so of me and Mr. *Killigrew*.

Lord Walden. There is another mentioned, and that is *Commiffary Crawford*; I desire he may be asked, What Proof he hath, that he gave Mr. — a List of the Army?

Mr. Chan. of the Exchequer. I can't blame Gentlemen for asking Questions that concern them or their Friends: Some are for reading of it to him, I am against that: But yet I would have you to enquire into this Paper. And being you intended to do it, it might have been as well enquired into before Mr. *Dighton* came last to him. I think you may put your self into an easy Method, and avoid all leading Questions; and ask him upon every Name in that Paper, as you come to it, What he knows of that Gentleman? And ask him no other Question.

Mr. Smith. I was standing up to the same Purpose: I would not have you to put Words into his Mouth, nor let him know by any Question what Answer he is to make.

Mr. Speaker. Gentlemen, I am willing to do you any Service I can: but here are long Informations, and I never read them, nor know the Contents of them, but as they were read at the Table.

Mr. Att. Gen. I think the Method lately proposed will save you a great deal of Time, and is proper for the Discovery of the Truth; that you will name the Persons to him in order as they are in the Paper, and ask him in general, What he knows of those Persons? But when you call him in, I am not for asking him to the particular Things he hath said against them in that Paper; because that Paper, though it is under his own Hand, is not his own; and if he knew it then, he knows it still.

Colonel Mordaunt. I won't pretend to propose any Thing, only for the shortning of your Time: If after you have informed him there is such a Paper, that you should ask him, Whether he will own it? And then, What Sort of Proof he will bring to prove it? You will find he will either tell you, he will advise with Counsel, or whether he will give any Answer at all.

Lord Cutts. I have only one Question to be ask'd Sir *John Fenwick*; 'tis not a Question that relates to any Person named in that Paper. I think there is no one Person that he hath named, but is eminently known or believed to be in the Interest of this Government; and none but what are in some Post of Trust, and Employment in it. Then, I

think it highly necessary to know, How it comes to pass that he hath had so much Conversation with Persons of that Character, and none with those People that he hath been seen daily to converse with? And if he hath, Why he hath not discovered them, as he hath done the rest?

Mr. *Speaker*. Is it your Pleasure I inform him we have the Informations?

Mr. *Palmer*. If I am not mistaken, when you first called Sir *John Fenwick* before you, he referred himself to what he had informed the King; and referred himself to that Paper, as often as you asked him any Questions. And if you ask him general Questions, I presume he will give you the same Answer: Therefore, I think, it may be proper to ask him, Whether this is the Paper that he delivered in, or not? Or otherwise, I doubt, he will tell you, He knows nothing but what is in that Paper. Now, if he refers to that Paper, you may ask him, if he knows it again, if it be shewed to him?

Mr. *Sloane*. What this Gentleman has said, has partly interrupted what I was going to offer; but as to what he says, That when he was here before, he referred to his Confession delivered in to the King; we did not tell him we knew of that: But he put it further, That he was not bound to accuse himself, and that what he said might be given in Evidence against him; and so far he was in the Right: For if he knew of any Body that was concerned in a Conspiracy against the Government, that was Misprision of Treason at least in him. I don't question but it was a very mischievous Contrivance; but if he should confess it, without some Assurance of being indemnified, he proves himself to be guilty of it.

Mr. *Vice-Chamberlain*. You are now upon the Method of your Proceedings. There is great Suspicion whether this Paper be Sir *John Fenwick's* own or no. If you will tell Sir *John Fenwick*, that in the Paper in your Hand he hath laid Things to the Charge of Persons of Trust, whom this House hath a good Opinion of; and that this House desires to know, What Ground he hath for it? If he does not think fit to give you an Account of it, there is an End of your Enquiry.

Mr. *James Montagu*. The House seems to agree, that they will have Sir *John Fenwick* sent for in: I suppose you will not have the Counsel, nor Solicitor by; and when he withdraws, I desire he may be kept private, from his Counsel and Solicitor.

Lord *Cutts*. By Sir *John Fenwick's* Behaviour, when he first appeared at the Bar, and by what he said then, I believe Sir *John Fenwick* did tell you to this Sense, That he had Assurance from a noble Person, that what he then said, should not rise against him in Judgment; and I think he was told, If he dealt ingenuously, he might expect Favour, or to that Effect. I do, for the saving of Time, mention it to you, to consider how far the House may give him Security, that what he here says shall not rise up in Judgment against him; and that if he dealt ingenuously he might expect some Favour from this House.

Mr. *Harley*. You are upon the nicest Thing, in its Nature, that possibly can come before you. I think before you call him in, it ought to be understood that the Questions be very plain.

Mr. *Manley*. I think you have been well moved from the other Side, That we should not read this Paper to Sir *John Fenwick*: And I am of that Opini-

on from this Consideration, besides what hath been mentioned: We are here in a Judicial Capacity as well as a Legislative; and this Paper I take to be an Examination made upon Sir *John Fenwick*; and as my Memory serves me, some Things he speaks of as Matters of Fact, which he does positively assert; which being contained in the same Paper with other Matters of Hearsay, if you should read that Paper to him, and ask him a Question, Whether that be his Paper? That, I doubt will be contrary to the Rules of Law: For it will be asking, Whether this Information against himself be true or false? And I think it does not become the Dignity and Honour of this great Assembly, to ask him any Questions that may make him accuse himself.

Mr. *Vernon*. I would observe to you, that he has not considered these two Papers: The first of these Papers I think the Bill refers to, and that is under Sir *John Fenwick's* Hand: and there he does charge nothing at all upon himself, but it is an Accusation upon the Persons named. In the first Paper he does say, There was a select Number to manage the Affairs of King *James*, and — was sent over, but they are not named; and afterwards he went about to explain it in the second; and the Bill referring only to the first, I suppose you will confine your selves only to the first Paper.

Mr. *Chancellor of the Exchequer*. I would think of some Way to reconcile these Things you are going upon: For though Gentlemen are in the Right to press for these Questions; yet I do not think it the Business before you. Therefore I think you should acquaint Sir *John Fenwick*, that this Paper hath been presented to you, which this House hath thought false and scandalous: But before he goes away, this House has a Mind to hear what he would say to it; and let him say what he would upon that, then you would not lead him by any Question. The first Person that is named I have a great Respect for, and am as willing he should be vindicated as any. The first Question that you ask him is, What he knows of my Lord *Godolphin*? But that you should literally ask him Questions, as the Paper states it, I don't think it proper for this Assembly to ask; for there are Facts beyond the Act of Indemnity, many of them. After you have done with the Paper, I have some Questions to ask him: I take these Matters to be false; but I shall have some Questions to ask him which I believe will prove true.

Mr. *Bridges*. Before you call in Sir *John Fenwick*, I would offer one Thing to your Consideration: I think that Paper you are upon is written with Sir *John Fenwick's* own Hand. Why may it not be fit for you to ask Sir *John Fenwick*, if that be his Hand?

Members. No, no.

Mr. *Speaker*. Is it your Pleasure that Sir *John Fenwick* be called in?

Which Question being put, it passed in the Affirmative. And he was brought in without his Counsel.

Mr. *Speaker*. Sir *John Fenwick*, this House does understand that you have given in Informations against several Persons of great Quality, that have been in the Government; and they do expect from you, that you should deal clearly and candidly with them, and give them an Account of

what you know in relation to those Persons. I am commanded in the first Place, to ask you, What you know of my Lord *Godolphin*, in relation to this Matter?

Sir John Fenwick. I am under a double Prosecution for my Life: I know not but what I say may turn to my own Prejudice: I hope the House will not think it Obstinacy in me; and since this House have done me the Favour to hear me by my Counsel, I hope they will please to consider what they have said.

Mr. Speaker. No doubt the House will consider what you have said by your Counsel, that is, in reference to your own Defence; but they do expect from you, as I told you before, That you do deal candidly with them in what you know of this Matter.

Sir John Fenwick. Sir, I am under Prosecution for my Life: and, I hope, the House will please to consider, That I know not what Inconveniency may come upon me by it; and, I hope, the House will excuse me, for I do it not out of Obstinacy, but for my own Preservation.

Mr. Speaker. You would do well to advise yourself well in this Matter; 'tis of great Concernment; the Favour of this House, if you deserve it, may be of great kindness to you. I have only in Command to tell you, what the House expect, and you are to consider how to answer it.

Sir John Fenwick. I hope the House will not put me upon any thing that will hurt my self: I should be sorry to incur the Displeasure of this House, but I hope they will consider my Condition; and I am sure the Justice and Honour of the House is such, That they will not press any Man to do any Thing that may hurt himself.

Mr. Speaker. Sir, if you please to withdraw.

Accordingly Sir John Fenwick withdrew.

Lord Cutts. I would humbly propose something to you to save your Time, and remove this Inconveniency. The House have heard what *Sir John Fenwick* says; I can't but say, that in Matters of Blood we can't be too tender; but that I would propose to you, if this House approve of it, is this; Suppose you wave the whole Matter to the last Moment of passing your Bill, and then I shall have something more to say to you in the Matter.

Mr. Clerk. Now I think it very proper for you to proceed in your legislative Capacity. I am glad the House have taken so much Pains in the Examination of the Matter; and it is no small Satisfaction to me, That the Gentleman was brought to the Bar upon this Enquiry; very probable, another Time may induce him more to comply than he does at present; though, if I may speak my Opinion, there is little hope of the Gentleman's answering your Expectation here: And I think the first thing you are to do now, is to Read your Bill.

Mr. Pultney. One of the Allegations of the Bill is, That his Trial was put off upon several repeated Pretences of making a Confession. The Counsel for the Prisoner took notice, That that Allegation was not proved: The Counsel for the Bill told you, They must refer to a worthy Member of this House, who could prove it; the worthy Member is *Mr. Vernon*. I suppose, before you enter into a Debate, as there will be after the second Reading of the Bill, Gentlemen will desire to have

all the Evidence. And I find your Orders is, That *Mr. Vernon* do give in his Evidence while *Sir John Fenwick* is at the Bar; and therefore I humbly move, That *Sir John Fenwick* may be called in while *Mr. Vernon* gives his Evidence.

Mr. Speaker. I suppose if *Mr. Vernon* gives Evidence, you will call in the Counsel.

Members. Yes, yes.

Mr. Speaker. Pray then hear the Motion that hath been made. Shall I put the Question, That *Sir John Fenwick* and the Counsel be called in, while *Mr. Vernon* does give his Evidence?

Which Question passed in the Affirmative; and Sir John Fenwick, and the Counsel on both Sides, were brought in.

Mr. Speaker. Gentlemen, you that are of Counsel of both Sides, the House, before they proceed any further, was willing to hear the Testimony of a worthy Member of this House, which has not yet been given; and they are willing that *Sir John Fenwick*, and you, should be present while it is given. *Mr. Vernon*, will you please to acquaint the House, &c.

Mr. Vernon. If I understand the Counsel for the Bill aright, that which they did appeal to me for, was about the protracting of *Sir John Fenwick's* Trial, and upon what Pretence it was. The Account, Sir, that I can give of it, is this: That *Sir John Fenwick's* Trial was put off, will appear best from the frequent Adjournments of the Sessions at the *Old-Bailey* for six or seven Weeks together. For when *Sir John Fenwick* was committed to the *Tower* (which was, as I take it) on the 19th of *June*, there was, I believe, a Sessions to be held soon after; for, as I remember it, the first Application that *Lady Mary Fenwick* made for putting off *Sir John Fenwick's* Trial was upon the 30th of *June*; and the Petition was, That he might have some Friends come to him to advise him how to make his Application to the King: On the 30th of *June*, or about that time, my *Lady Mary Fenwick* did first propose, That somebody should be sent over from *Sir John Fenwick* to the King upon some Matters of Importance, but did not declare what they were; but only that she was told there was such Matters, and she had a proper Person to send, and would acquaint the Lords Justices with the Man, if he might have leave to go to: But afterwards my *Lady Mary Fenwick* said she could not provide a Person so soon; and, I think, the 2d of *July*, she came and offered to go her self, and said, if it was not as much for the King's Service, as *Sir John Fenwick's* Benefit, she would not undertake the Journey. She had leave to go, and would have capitulated, that the Trial should be put off till she returned; but the Lords said, when she should return, would depend upon her Pleasure; but they would write to the King at the same time, and give notice of her Intention, and that the Trial should not go on till they had an Answer of their own Letter.

There was a Passage in the Transport-Ship going to *Holland*, and my *Lady Mary Fenwick* desired to speak with *Sir John* in private, in Order to her Journey; the same Night she came back again, and said, she had considered of it, and said, she would not go; and several Reasons she gave. Upon the 7th of *July* there was a noble Lord that was in the Commission for the Administration of the Government, said, he had had an Application made

made to him from another noble Peer, my Lord *Carlisle*, who desired that he would go to Sir *John Fenwick*, for he had been very earnest to speak with him. That noble Lord did acquaint the Lords Justices with it, who acquiesced in what he thought fit to do in the Matter.

He went the same Day to Sir *John Fenwick*, and the next Day the Lords Justices met again; he then told he had been with Sir *John Fenwick*, and that Sir *John Fenwick* had told him, he had sent to the King; for he did not allow it should be otherwise communicated. My Lords then thought it was fit to stay for the King's Answer. This was the 7th of *July*; and by what Accident I know not, but no manner of Account came till the 7th of *August*, that the Letter was received; but the 7th of *August*, the Letter was acknowledged to be received; and the Answer that then came to it, was, That the King had not received any great Satisfaction by the Message; (I know not what it was) but that Sir *John Fenwick* should be tried; but withal, that noble Lord acquainted my Lords Justices, That the King was pleased to write to him, That what Sir *John Fenwick* had to say should be sent him in Writing. It happened at that time, that the Judges were upon their Circuit: and there being the King's Directions to receive what Sir *John Fenwick* had to say in Writing; that noble Lord did undertake to go again to Sir *John Fenwick*; and, I suppose, he did receive something from Sir *John Fenwick*, which he sent to the King: When the Answer to that came it was in *September*, and that noble Lord was at the *Bath*; and so it required a little time—Why then it appeared, That the King's Direction was, That what Sir *John Fenwick* had sent to the King, he should prove it; and he should likewise shew his Ingenuity in Confessing what he knew of any other Designs against the Government: And the 10th of *September*, as I take it, I was directed to go to Sir *John Fenwick*, who was then in the *Tower*, and to acquaint him with this Message from my Lords Justices. Sir *John Fenwick*'s Answer was, That he had no more to say, or some words to that effect; and then he must prepare for his Defence as well as he could; but if he could speak with that noble Lord, he should be glad to do it; but he was not come from the *Bath*, and Direction was then given for his Trial. Again in the mean time that noble Lord did come, and he did go to Sir *John Fenwick*, and he brought an Account from him, That Sir *John Fenwick* would prove to the King, and make out what he had said; and was ready to give the Lords Justices Satisfaction: And upon that, I was sent to Sir *John Fenwick*; I carry'd the Message in Writing, which you may see when you please; and it was to ask him, Whether he was willing to make out by Proof, what he had already said to the King; and whether he was ready, in Compliance with the King's Directions, to give the Lords an Account of what he knew of any Design against the Government? I carry'd Sir *John Fenwick* this Message, and he returned an Answer in Writing, That he was ready to make out to the King what he said, and would acquaint the Lords with all the Matter, that he had not observed to the King; (his Arraignment was then to have come on the 17th) but he did dictate a Paper which was brought to the Lords, which they thought fit to be sent to the King; and the Trial was put off as to that time; And before an Answer from the King came, it was (I believe) the beginning of

October: And this is the Account I have to give you.

Mr. *Speaker*. Gentlemen, you consider that this Evidence is given, with Relation to that part of the Bill, that sets forth, how Sir *John Fenwick* had delay'd his Trial by Offers of Confession. You have heard what the Evidence is; if you have any thing to observe as to that Point, you may speak before you withdraw.

Sir *Tho. Powys*. As to this Matter, I can only say, That in it self at least, according to our Rules of Law, it is not, in any degree, Treason: What you will construe it to be, I can't tell. We think it is only what is very usual when Persons are under an Accusation; they will put off their Trial as long as they can: Perhaps their Witnesses may be out of the way, or something else may be the Reason of it, and it does not carry any Crime in it self; at least, not of the Nature that this Bill is of.

Sir *Barth. Shower*. We do think, with Submission, that, considering the Nature of the Bill, and the particular Case of Sir *John Fenwick*, will (in some measure) answer this Fact: I take this singly in it self, as it hath been observed, not to consist with Honour; but it does not import a Crime, for any Man to use little Insinuations to put off his Trial. But, suppose it was unlawful, or that which they call prevaricating; I hope it is far from making him guilty of High-Treason, which is the greatest Crime this Bill designs to pass Sentence for; and, I hope, you will consider, if it be an Offence, 'tis so at Common Law; and the same Evidence will prevail to bring Sir *John Fenwick* to condign Punishment by the common Methods. And if it be no Offence, I hope you will not by a Law make it an Offence, so as to inflict the greatest Punishment for this Artifice.

Mr. *Speaker*. Mr. Serjeant *Gould*, Have you any thing to say?

Mr. *Serj. Gould*. No, Mr. *Speaker*.

Mr. *Speaker*. Then withdraw.

And being withdrawn,

Mr. *Sloane*. I propose it to you, Whether, if the Paper be Evidence, it should not be read in the Presence of the Prisoner?

Members. No, no.

Then the Question was put for Carrels, which passed in the Affirmative, and they were brought in.

Ordered, That the Counsel be discharged any further Attendance at this time.

Mr. *Methuen*. There can be no Debate previous to the reading of your Bill. I desire the Order of the Day may be read.

Accordingly the Order of the Day for reading of the Bill a second Time, was read by the Clerk.

Then the Bill was read a second Time by the Clerk.

And being afterwards opened by Mr. Speaker, and Mr. Speaker having expected for some Time, and no Member rising up to speak:

Mr. *Speaker*. Shall I put you the Question of Commitment?

Sir

Sir *Tho. Dyke*. Sir, I hope you will not put the Question of Commitment 'till some Exception is made to the Bill; I am sure it is as liable to Exceptions as any Bill that hath been brought in a great while: 'Tis a tender Subject to speak of, the Pretence of the Bill being for the Preservation of the King and Government: And if I thought it was really so, I should be heartily for it; for I think there is no Comparison between the Value of the King's Life, and that of private Persons: But that hath been often said, but not proved; therefore, I think, I may tell you my Reasons why I am against the Bill. That the Parliament hath a Power to make such a Law, is agreed; but I think it ought not to be used but upon extraordinary Occasions, when Great Persons are concerned, that can't be otherwise brought to Justice, and when Crimes do not fall under the Denomination of the Law, which is not the present Case. This Case is, That a Gentleman is charged with Treason; and 'tis proved but by one Witness; though the Counsel did say, That a Consult to levy War was not Treason. Now either it will not be the Crime that is alledged, or it is not proved. Here you are Judges, Prosecutors, Witnesses and Jury: I would know in what Country it is so? Besides, the Witnesses are produced here, and not sworn; and upon the whole, there is but one Witness. Sir, I am against the Bill, and against it, as being of dangerous Consequence.

Mr. *Pultney*. This Matter before you is of such a Nature, that as a Debate is rising upon it, I hope all Gentlemen will hear one another with the greatest Attention that may be.

The worthy Member admits you have a Power to pass the Bill, and I do not find that contested by any Body; though (with Submission) the latter Part of what he said, contradicted what he admitted at first; but since that is so much agreed, I shall say but little to it, and that is this, That without such a Power as this, any Government would be imperfect, and would want a sufficient Power for its own Preservation, upon extraordinary Occasions. You have been told, this hath been an untrodden Path; but, I believe, Gentlemen are pretty well satisfied it hath not been so untrodden, and many Precedents of that kind have been quoted; and the Counsel against the Bill have admitted, That there have been frequent Precedents. An Objection hath been made to some of them, That they were made in ill Reigns; but I take it to be no Objection, That the Precedent was made at one Time or another, since 'tis agreed, that we have such a Power, and that that Power hath been executed.

The chief Matter before you is, Whether in the present Case, there is sufficient Ground for you to exert that Power? And upon that, give me leave to observe the Nature of the Crime of this Gentleman, and the Evidence that hath been brought to prove him guilty of that Crime. His Crime is High-Treason, the highest Crime in the Law: 'Tis for conspiring the Destruction of the King, and the Overthrowing of the Government. The Overt-Act which the Bill tells you (and which is mentioned in the Indictment) is his inviting in a *French* Force, in order to accomplish his Design. If this Crime would admit of Aggravation, some other Parts of the Bill would aggravate it; but I think it will admit of none. The Counsel at the Bar made a Doubt,

Whether or no, that which was laid in the Indictment, did amount to a sufficient Overt-Act of High-Treason; and his Argument he drew from a Book that hath been put out by a learned Gentleman of the House; but the Gentleman could easily have answered himself; and, I presume, did not speak his own Opinion. For that Gentleman did write a Book, called, *His Majesty and Government vindicated*: By which he endeavoured to overthrow the Arguments in the other Book of the other Gentleman.

As to the Proof before you, you have had the Testimony of Mr. *Porter*, whose Evidence hath been justified by the several Convictions grounded upon it; and by the Confession of several Gentlemen, that have owned the Fact at the very Time when they have been going out of the World: And there hath been no Evidence brought by the Prisoner at the Bar, that should invalidate the Testimony of this Gentleman. And so (with Submission) you have one undoubted Evidence, that does charge the Prisoner with the Fact mentioned in the Bill: You have other Proof that does not come up within the Letter of the Law; but you have strong circumstantial Proof, that every Gentleman will apply to his Conscience in the Judgment he shall give in this Matter. One of the Allegations in the Bill is, That he did, by repeated Promises of making a Confession, from Time to Time, gain a Delay of his Trial. It is a great Presumption, that That was in order to a Design that he had of seducing Mr. *Goodman*, that was one of the Witnesses; for it was observed to you, what Practice there was in the Case, with the other Evidence, Mr. *Porter*.

Sir, Gentlemen have objected the Consequences of making a Precedent: You were very well told by a worthy Gentleman that spoke the other Day, near the Place where I am, That in the Case of a good Parliament, 'tis not to be imagined that they will make use of this Precedent, but upon as good a Ground as you have now; and an ill Parliament, they will have the same Reason, for they will copy after the same Precedents that have been made before, and will not stick at doing of it.

Besides, let Gentlemen consider the Way of Arguing: I have a Power to do such a Thing, and yet if I have such a Ground as is sufficient, I shall not make use of it: To say you have a Power, but shall not exert it, is as good as to say, you have no Power at all.

There were some Precedents cited by a learned Gentleman that spoke against the Bill, and he particularly quoted that of my Lord *Strafford*; and the Act of Parliament that repeals that Attainder, was in Part read to you: But, Sir, the Reasons given in that Bill of Repeal of my Lord *Strafford's* Attainder, are, That it was obtained in a tumultuous Manner, which influenced the Parliament in doing of it; and that it passed in the House of Lords, when most of the Lords were absent: And at last, the King, when he gave his Consent, by Commission, to the Passing of the Bill, it was with great Reluctancy. 'Tis certain, all these are Reasons that are given; but there is not One that questions the Parliament's Power of doing it; though upon the Trial, Gentlemen may remember, there was a Doubt in the Law, Whether the Evidence was sufficient.

Sir, It hath been urged to you, of what ill Consequence it would be, and how much Injustice, to make a Law to punish a Man *ex post facto*; but that

that the Parliament may declare That to be a Crime, which was not so before, no Body doubts; and without that, the Clause in the 25th of *Edw.* III. signifies nothing; and I don't imagine it is a greater Injustice to supply in Point of Form, as to Matter of Evidence, when the Fact committed by the Prisoner, was against a known Law, at the Time when it was committed: And the rather, if I think that Defect of Form in the Courts below, was occasioned by the Prisoner. 'Tis a Matter of Blood, 'tis true; but I do not aim at this Gentleman's Life in it; but any Man must believe he must be concerned in great Matters, to bring to pass this great Design; therefore, all I propose by it, is to get his Confession, which in all Probability we might have had, if the other Witness had remained here.

Sir, upon the whole Matter, I do think we have Power to do this: I do think here is good Evidence (I speak with respect to my self) to think him guilty of this Crime. I do think, if this Bill does miscarry, there is the greatest Blow that can be given to your Constitution. And give me leave to use this Expression; I think, if this Bill miscarry, it not only turns this Plot upon you, but makes it impossible ever to come to the Depth of any other; and for these Reasons, I am for committing of this Bill.

Mr. *Newport*. Sir, I am unwilling to trouble you at any Time, but more especially at this Time, when I am afraid I am like to speak against the Opinion of the Majority of the House; for I see Gentlemen are in great haste for the Commitment of this Bill.

Sir, in this Matter I look upon my self, as every Gentleman here, to be a Judge; and therefore, I will in this Case, as in all others, go according to the Dictates of my own Conscience: I must be saved by my own Faith, and never will pin my Faith upon another Man's Sleeve: Perhaps it may be a Weakness in my Nature, that I am very tender in the Matter of Blood; but I hope Gentlemen will not be in so much haste to commit the Bill; for *De morte hominis, nulla est cunctatio longa*. A Gentleman below said, the other Day, it was possible in his own private Opinion, he might believe the Prisoner guilty; and some notice was taken of those Words: But, Sir, I would put a Case for Argument's sake, and would have it taken no otherwise; and I would go a little farther than that honourable Gentleman, and suppose that I knew, of my own private Knowledge, that Sir *John Fenwick* was guilty; yet, Sir, with humble Submission, as a Judge, I do not think it ought to weigh one Way or another with me; and will give you my Reason for it; for as a Judge, I am to go according to my judicial Knowledge, and not according to my private Knowledge. 'Tis a Maxim, *Nil refert quid notat Judex, si non nota forma judicii*; and it puts me in mind of a Case in *Hen.* IV's Reign: Two Men travelled together, and one killed the other, and the Judge saw it: Afterwards that Judge went the same Circuit, and an innocent Man came to be tried before him for it; and yet the Judge, in that Case, was obliged to go according to his judicial Knowledge; all the Judge could do (the Man being found guilty) in that Case, says the Book, was, to respite the Judgment and Execution, and to make Application to the King for the poor Man's Pardon.

The Evidence that is produced, is first a living

Witness; the next Evidence, was the Confession of *Goodman*, taken before a Justice of Peace; for that, truly I did not think Yesterday, it was a legal Evidence: I am sure in a Court of Law, it would not be admitted; but the House was pleased to read it, and Gentlemen, when they pressed it, told us, Read it, *valeat quantum valere potest*. Then if you strike this Paper out of the Case, with humble Submission, there is nothing left but the Testimony of Captain *Porter*; and so then in that Case, you have but one Witness. It would seem a little strange, that the Commons of *England*, that lately were so very careful of the Lives of the Subject, and were so desirous of passing a Bill, that did provide, That where there were two Species of Treason in one Indictment, and one Witness to one Species, and another Witness to another Species, that That should not be good Evidence to convict a Person of High-Treason; that they should be attainting a Man for Treason upon one single Evidence! Surely they will say, we have mightily changed our Opinions since last Sessions. I speak not this upon the Account of Sir *John Fenwick*; I know him not, though I am not a Stranger to his Character, and I hear that is none of the best: I speak it as it may be my Case, or any Man's whatsoever. God knows, we live in an unsettled Time, and how soon a Precedent of this Nature may turn upon any Man whatsoever.

Amongst the great Irregularities committed in the late Reign, I thought that of Mr. *Algernon Sidney*, one of the greatest Strains I saw in *Westminster-Hall*; for there was my Lord *Howard* a Witness against him, and the next Evidence was a Book that he had wrote against Sir *Robert Filmore*, which, I think, is printed since this Revolution, and I have it in my Study; and I hope, I shall not be hanged for it. That was construed to be calculated for a Treason that hath not been committed above two Months, and was the second Witness to convict him; but that Attainder was reversed, and it was fit it should be so; for I thought it a hard Strain to convict him upon that Evidence.

I am very sorry this Bill is brought into this House; nor can I imagine, after all that hath been said by the learned Gentleman, why this Man was not tried when there were two positive Witnesses against him. All the Reason this Gentleman has told you, is, That he promised to make an ingenuous Confession: But any Man might have easily seen through this Confession, That it was only an Artifice to abuse the King's best Friends; nay, the rather, when this Gentleman's Brother had served this very Government, but two or three Years ago, the same Trick. We know my Lord *Preston* was attainted of High-Treason, and then he must do something for his Pardon; and he made an ingenuous Confession, as he called it, whereby he accused most of the Great Men; and when he had a Pardon, though his Confession was under his own Hand, and delivered to the King, he denied every Word of it; and what he told, was to save his own Life. My Neighbour cited you several Precedents; I have looked into a great many of them, they are mentioned in *Rushworth's Collections*, in the great Argument that Mr. *St. John* made for passing the Bill against my Lord *Stratford*; and as to those Precedents, all I can say, is, I could not have come up to them, if I had lived in those Times. The last Precedent was of a Cook

Cook that put Poison into the Pot of the Bishop of *Rochester*: And what did they do? They did enact, that he should be boiled alive. I have a great Honour for the present Bishop; but if it had happened in his Family, I should hardly have consented to the like. *Judicandum est legibus non Exemplis*. I should be glad this Gentleman might suffer his due Punishment; but I am not, by any means, satisfied in the passing of this Bill: And as to what Gentlemen say is the Reason why this Man was not tried, because it was thought he would have made an ingenuous Confession; Sir, if they have made any Mistake, I will not help it by the passing this Bill of Attainder. I ask your Pardon for troubling you so long: I am a Judge in this Matter, and ought to deliver my Opinion. I hope no Man doubts but I am as zealous for this Government as any Man whatsoever; but let what will come of it, I can't give my Vote for passing of this Bill.

Mr. *Sol Gen*. This is a Bill for Attainting Sir *John Fenwick* of High-Treason: 'Tis the greatest Crime we know in the Law; and, I think, the greatest Crime known in a Government. It is much greater than Murder, or any thing else; because it subverts the Government, and the Law whereby these Crimes are punished; and Persons should be deterred from committing these Crimes.

It hath been made a Question by the Gentlemen at the Bar (I think Two of them) Whether this Matter that Sir *John Fenwick* is indicted and accused of, is High-Treason or not? I must confess I heard something of it without Doors; and that they would make it out, That if he was guilty of the Matter charged, it was not High-Treason. I thought it somewhat a bold Matter, but did not think they would have undertaken it in this Place, though they might have pretended some Flaw in the Indictment: But it seems they have the Authority of a good Lawyer in it; and they have quoted one learned Author, as they please to call him, though I take that for a great Compliment: I believe they may mean my self; and they have done me some Honour; for they say, my Lord Chief-Justice *Hales* was of the same Opinion; and then said something of *Dyer*. Now he hath read something at large out of that Author he speaks of, and challenges any one to shew any Opinion, That ever a Conspiracy to levy War was High-Treason within the Statute of 25 *Edw. III*. Now, I would give a Challenge on the other Side, That he would shew me any Opinion before that Time, or since, That a Design to depose the King is not High-Treason within that Statute. The Author that he speaks of, says that expressly in the Matter of my Lord *Ruffel*, and tells you particularly; and in *The Government vindicated*, which was only an Answer as to the Prosecution of my Lord *Ruffel*, there are several Cases cited, That a Design to depose the King was High-Treason, and agreed to by that very Person; and it always was agreed to be High-Treason. Then take the State of this Case, and that of my Lord *Ruffel*: The great Matter was, That he sent some Persons to view the Guards (it was said, in order to seize the King); this was Evidence against my Lord *Ruffel*, for a Conspiracy to levy War: But it was said, That this was not so much a Conspiracy to levy War against the King, as against the Guards. But this is of a quite different Nature: Captain *Porter* hath given you an Account of it, (and I think *Goodman's* Exami-

nation is to the same Purpose); That they met in *Leadenball-street*, and consulted how to bring King *James* back again; and the only Method they could think of, was to send *Charnock* over to King *James*, that he might prevail with the *French King* to send them 10000 Men, and they would meet him here with 2000 Horse: And for what Purpose was this? It was to bring back King *James* again. I would be glad to hear if those Gentlemen that were at the Bar, or any Body else, could say this was any thing else but a Design to depose King *William*: And they can't shew me one Lawyer's Opinion, but that designing to depose the King, was ever called imagining the Death of the King, within the Statute of 25 *Edw. III*. The first Resolution of this Matter was pretty early; I think it was *Hen. IVth's* Time, and that was pretending *Richard II.* was alive, and that he was the lawful King: So that the Matter is Treason, as it is charged in the Indictment.

Then, as to the Precedent, That'tis an ill Precedent; I must confess I am not afraid of a Precedent of this Kind: I should be glad if these Gentlemen should turn back, and see how many Attainers have been by Act of Parliament. But I dare say, there have been more Men destroy'd by the irregular Judgment of a Commission of *Oyer and Terminer*, than by all the Acts of Parliament, whether legal or illegal.

As to what they say of my Lord *Coke*, who mentions the Attainder of my Lord *Cromwell* and Sir *J. Mortimer*; the Gentleman pretends to repeat my Lord *Coke's* Words at large; but he did not deal so well as he ought to do by you; for he should have told you all my Lord *Coke* tells you; That *Cromwell* was never brought to answer, never permitted to say any thing for himself; neither in Parliament, nor where he was. Now, pray Sir, is this the present Case? Hath not Sir *John Fenwick* been heard by you? I would be glad that Gentleman, or any Body could shew me, that any Person hath so fair an Hearing before Commissioners of *Oyer and Terminer*, as Sir *John Fenwick* hath had before you. As to Sir *John Mortimer*, 'tis much of the same Nature: My Lord *Coke* says, there was a Jealousy of Sir *John Mortimer's* pretending to the Crown; and because they suspected him, they did give out, that he said, That the Earl of *March* was Heir to the Crown; and if he did not; he would pretend to it himself, &c. Now, says my Lord *Coke*, this was but a bare Pretence, and nothing else: He speaks as if he did not ever think him guilty of those Words, and says; having indicted him, they not being able to proceed that Way, they made it good by Act of Parliament, and he was condemned: So that what my Lord *Coke* complains of, is, That these Persons so condemned were never heard; and if this be the Truth of the Matter, these Precedents (with Submission) have no Affinity with yours. But I believe this may be said in this Case, Sir *John Fenwick* hath been heard, and that more than ever any one in Parliament was before, in a capital Matter.

As to the Case of my Lord *Strafford*, he had Counsel assigned him to stand by and hear, but not to prompt him. If there arose any Point of Law, he was to propose the Matter to the Lords, and the Counsel was to assist him by their Direction. And in the Case here before you, you have allowed Sir *John Fenwick* Counsel, not only to assist him in Point of Law, but to assist him in