EDMUND BURKE

THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE, VOL. 11 (OF 12)

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Содержание

Конец ознакомительного фрагмента.

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The Works of the Right Honourable Edmund Burke, Vol. 11 (of 12)

REPORT FROM THE COMMITTEE OF THE HOUSE OF COMMONS, APPOINTED TO INSPECT THE LORDS' JOURNALS IN RELATION TO THEIR PROCEEDINGS ON THE TRIAL OF WARREN HASTINGS, ESQUIRE. WITH AN APPENDIX. ALSO, REMARKS IN VINDICATION OF THE SAME FROM THE ANIMADVERSIONS OF LORD THURLOW. 1794

NOTE.

In the sixth article Mr. Burke was supported, on the 16th of February, 1790, by Mr. Anstruther, who opened the remaining part of this article and part of the seventh article, and the evidence was summed up and enforced by him. The rest of the evidence upon the sixth, and on part of the seventh, eighth, and fourteenth articles, were respectively opened and enforced by Mr. Fox and other of the Managers, on the 7th and 9th of June, in the same session. On the 23d May, 1791, Mr. St. John opened the fourth article of charge; and evidence was heard in support of the same. In the following sessions of 1792, Mr. Hastings's counsel were heard in his defence, which was continued through the whole of the sessions of 1793.

On the 5th of March, 1794, a select committee was appointed by the House of Commons to inspect the Lords' Journals, in relation to their proceeding on the trial of Warren Hastings, Esquire, and to report what they found therein to the House, (which committee were the managers appointed to make good the articles of impeachment against the said Warren Hastings, Esquire,) and who were afterwards instructed to report the several matters which had occurred since the commencement of the prosecution, and which had, in their opinion, contributed to the duration thereof to that time, with their observations thereupon. On the 30th of April, the following Report, written by Mr. Burke, and adopted by the Committee, was presented to the House of Commons, and ordered by the House to be

printed.

REPORT

Made on the 30th April, 1794, from the Committee of the House of Commons, appointed to inspect the Lords' Journals, in relation to their proceeding on the trial of Warren Hastings, Esquire, and to report what they find therein to the House (which committee were the managers appointed to make good the articles of impeachment against the said Warren Hastings, Esquire); and who were afterwards instructed to report the several matters which have occurred since the commencement of the said prosecution, and which have, in their opinion, contributed to the duration thereof to the present time, with their observations thereupon.

Your Committee has received two powers from the House:—The first, on the 5th of March, 1794, to inspect the Lords' Journals, in relation to their proceedings on the trial of Warren Hastings, Esquire, and to report what they find therein to the House. The second is an instruction, given on the 17th day of the same month of March, to this effect: That your Committee do report to this House the several matters which have occurred since the commencement of the said prosecution, and which have, in their opinion, contributed to the duration thereof to the present time, with their observations thereupon.

Your Committee is sensible that the duration of the said trial, and the causes of that duration, as well as the matters which

have therein occurred, do well merit the attentive consideration of this House. We have therefore endeavored with all diligence to employ the powers that have been granted and to execute the orders that have been given to us, and to report thereon as speedily as possible, and as fully as the time would admit.

Your Committee has considered, first, the mere fact of the duration of the trial, which they find to have commenced on the 13th day of February, 1788, and to have continued, by various adjournments, to the said 17th of March. During that period the sittings of the Court have occupied one hundred and eighteen days, or about one third of a year. The distribution of the sitting days in each year is as follows.

		D
In the year	1788, the Court sat	
	1789,	
	1790,	
	1791,	
	1792,	
	1793,	
	1794, to the 1st of March, inclusive	
	Total	

Your Committee then proceeded to consider the causes of this duration, with regard to time as measured by the calendar, and also as measured by the number of days occupied in actual sitting. They find, on examining the duration of the trial with reference to the number of years which it has lasted, that it has been owing to several prorogations and to one dissolution of Parliament; to discussions which are supposed to have arisen in the House of Peers on the legality of the continuance of

impeachments from Parliament to Parliament; that it has been owing to the number and length of the adjournments of the Court, particularly the adjournments on account of the Circuit, which adjournments were interposed in the middle of the session, and the most proper time for business; that it has been owing to one adjournment made in consequence of a complaint of the prisoner against one of your Managers, which took up a space of ten days; that two days' adjournments were made on account of the illness of certain of the Managers; and, as far as your Committee can judge, two sitting days were prevented by the sudden and unexpected dereliction of the defence of the prisoner at the close of the last session, your Managers not having been then ready to produce their evidence in reply, nor to make their observations on the evidence produced by the prisoner's counsel, as they expected the whole to have been gone through before they were called on for their reply. In this session your Committee computes that the trial was delayed about a week or ten days. The Lords waited for the recovery of the Marquis Cornwallis, the prisoner wishing to avail himself of the testimony of that noble person.

With regard to the one hundred and eighteen days employed in actual sitting, the distribution of the business was in the manner following.

There were spent,—

In reading the articles of impeachment, and the defe
Opening speeches, and summing up by the Manage
Documentary and oral evidence by the Managers
Opening speeches and summing up by the defendar
Documentary and oral evidence on the part of the d

The other head, namely, that the trial has occupied one hundred and eighteen days, or nearly one third of a year. This your Committee conceives to have arisen from the following immediate causes. First, the nature and extent of the matter to be tried. Secondly, the general nature and quality of the evidence produced: it was principally documentary evidence, contained in papers of great length, the whole of which was often required to be read when brought to prove a single short fact. Under the head of evidence must be taken into consideration the number and description of the witnesses examined and cross-examined. Thirdly, and principally, the duration of the trial is

to be attributed to objections taken by the prisoner's counsel to the admissibility of several documents and persons offered as evidence on the part of the prosecution. These objections amounted to sixty-two: they gave rise to several debates, and to twelve references from the Court to the Judges. On the part of the Managers, the number of objections was small; the debates upon, them were short; there was not upon them any reference to the Judges; and the Lords did not even retire upon any of them to the Chamber of Parliament.

This last cause of the number of sitting days your Committee considers as far more important than all the rest. The questions upon the admissibility of evidence, the manner in which these questions were stated and were decided, the modes of proceeding, the great uncertainty of the principle upon which evidence in that court is to be admitted or rejected,—all these appear to your Committee materially to affect the constitution of the House of Peers as a court of judicature, as well as its powers, and the purposes it was intended to answer in the state. The Peers have a valuable interest in the conservation of their own lawful privileges. But this interest is not confined to the Lords. The Commons ought to partake in the advantage of the judicial rights and privileges of that high court. Courts are made for the suitors, and not the suitors for the court. The conservation of all other parts of the law, the whole indeed of the rights and liberties of the subject, ultimately depends upon the preservation of the Law of Parliament in its original force and authority.

Your Committee had reason to entertain apprehensions that certain proceedings in this trial may possibly limit and weaken the means of carrying on any future impeachment of the Commons. As your Committee felt these apprehensions strongly, they thought it their duty to begin with humbly submitting facts and observations on the proceedings concerning evidence to the consideration of this House, before they proceed to state the other matters which come within the scope of the directions which they have received.

To enable your Committee the better to execute the task imposed upon them in carrying on the impeachment of this House, and to find some principle on which they were to order and regulate their conduct therein, they found it necessary to look attentively to the jurisdiction of the court in which they were to act for this House, and into its laws and rules of proceeding, as well as into the rights and powers of the House of Commons in their impeachments.

RELATION OF THE JUDGES, ETC., TO THE COURT OF PARLIAMENT

Upon examining into the course of proceeding in the House of Lords, and into the relation which exists between the Peers, on the one hand, and their attendants and assistants, the Judges of the Realm, Barons of the Exchequer of the Coif, the King's learned counsel, and the Civilians Masters of the Chancery,

on the other, it appears to your Committee that these Judges, and other persons learned in the Common and Civil Laws, are no integrant and necessary part of that court. Their writs of summons are essentially different; and it does not appear that they or any of them have, or of right ought to have, a deliberative voice, either actually or virtually, in the judgments given in the High Court of Parliament. Their attendance in that court is solely ministerial; and their answers to questions put to them are not to be regarded as declaratory of the Law of Parliament, but are merely consultory responses, in order to furnish such matter (to be submitted to the judgment of the Peers) as may be useful in reasoning by analogy, so far as the nature of the rules in the respective courts of the learned persons consulted shall appear to the House to be applicable to the nature and circumstances of the case before them, and no otherwise.[1]

JURISDICTION OF THE LORDS

Your Committee finds, that, in all impeachments of the Commons of Great Britain for high crimes and misdemeanors before the Peers in the High Court of Parliament, the Peers are not triers or jurors only, but, by the ancient laws and constitution of this kingdom, known by constant usage, are judges both of law and fact; and we conceive that the Lords are bound not to act in such a manner as to give rise to an opinion that they have

[1] 4 Inst. p. 4.

virtually submitted to a division of their legal powers, or that, putting themselves into the situation of mere triers or jurors, they may suffer the evidence in the cause to be produced or not produced before them, according to the discretion of the judges of the inferior courts.

LAW OF PARLIAMENT

Your Committee finds that the Lords, in matter of appeal or impeachment in Parliament, are not of right obliged to proceed according to the course or rules of the Roman Civil Law, or by those of the law or usage of any of the inferior courts in Westminster Hall, but by the law and usage of Parliament. And your Committee finds that this has been declared in the most clear and explicit manner by the House of Lords, in the year of our Lord 1387 and 1388, in the 11th year of King Richard II.

Upon an appeal in Parliament then depending against certain great persons, peers and commoners, the said appeal was referred to the Justices, and other learned persons of the law. "At which time," it is said in the record, that "the Justices and Serjeants, and others the learned in the Law Civil, were charged, by order of the King our sovereign aforesaid, to give their faithful counsel to the Lords of the Parliament concerning the due proceedings in the cause of the appeal aforesaid. The which Justices, Serjeants, and the learned in the law of the kingdom, and also the learned in the Law Civil, have taken the same into deliberation, and have

answered to the said Lords of Parliament, that they had seen and well considered the tenor of the said appeal; and they say that the same appeal was neither made nor pleaded according to the order which the one law or the other requires. Upon which the said Lords of Parliament have taken the same into deliberation and consultation, and by the assent of our said Lord the King, and of their common agreement, it was declared, that, in so high a crime as that which is charged in this appeal, which touches the person of our lord the King, and the state of the whole kingdom, perpetrated by persons who are peers of the kingdom, along with others, the cause shall not be tried in any other place but in Parliament, nor by any other law than the law and course of Parliament; and that it belongeth to the Lords of Parliament, and to their franchise and liberty by the ancient custom of the Parliament, to be judges in such cases, and in these cases to judge by the assent of the King; and thus it shall be done in this case, by the award of Parliament: because the realm of England has not been heretofore, nor is it the intention of our said lord the King and the Lords of Parliament that it ever should be governed by the Law Civil; and also, it is their resolution not to rule or govern so high a cause as this appeal is, which cannot be tried anywhere but in Parliament, as hath been said before, by the course, process, and order used in any courts or place inferior in the same kingdom; which courts and places are not more than the executors of the ancient laws and customs of the kingdom, and of the ordinances and establishments of Parliament. It was

determined by the said Lords of Parliament, by the assent of our said lord the King, that this appeal was made and pleaded well and sufficiently, and that the process upon it is good and effectual, according to the law and course of Parliament; and for such they decree and adjudge it."[2]

And your Committee finds, that toward the close of the same Parliament the same right was again claimed and admitted as the special privilege of the Peers, in the following manner:—"In this Parliament, all the Lords then present, Spiritual as well as Temporal, claimed as their franchise, that the weighty matters moved in this Parliament, and which shall be moved in other Parliaments in future times, touching the peers of the land, shall be managed, adjudged, and discussed by the course of Parliament, and in no sort by the Law Civil, or by the common law of the land, used in the other lower courts of the kingdom; which claim, liberty, and franchise the King graciously allowed and granted to them in full Parliament."[3]

Your Committee finds that the Commons, having at that time considered the appeal above mentioned, approved the proceedings in it, and, as far as in them lay, added the sanction of their accusation against the persons who were the objects of the appeal. They also, immediately afterwards, impeached all the Judges of the Common Pleas, the Chief Baron of the Exchequer, and other learned and eminent persons, both peers

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[2] Rol. Parl. Vol. III. p. 244, § 7.

[3] Rol. Parl. Vol. III. p. 244, § 7.

and commoners; upon the conclusion of which impeachments it was that the second claim was entered. In all the transactions aforesaid the Commons were acting parties; yet neither then nor ever since have they made any objection or protestation, that the rule laid down by the Lords in the beginning of the session of 1388 ought not to be applied to the impeachments of commoners as well as peers. In many cases they have claimed the benefit of this rule; and in all cases they have acted, and the Peers have determined, upon the same general principles. The Peers have always supported the same franchises; nor are there any precedents upon the records of Parliament subverting either the general rule or the particular privilege, so far as the same relates either to the course of proceeding or to the rule of law by which the Lords are to judge.

Your Committee observes also, that, in the commissions to the several Lords High Stewards who have been appointed on the trials of peers impeached by the Commons, the proceedings are directed to be had according to the law and custom of the kingdom, *and the custom of Parliament*: which words are not to be found in the commissions for trying upon indictments.

"As every court of justice," says Lord Coke, "hath laws and customs for its direction, some by the Common Law, some by the Civil and Canon Law, some by peculiar laws and customs, &c., so the High Court of Parliament *suis propriis legibus et consuetudinibus subsistit*. It is by the *Lex et Consuetudo Parliamenti*, that all weighty matters in any Parliament moved,

concerning the peers of the realm, or Commons in Parliament assembled, ought to be determined, adjudged, and discussed, by the course of the Parliament, and not by the Civil Law, nor yet by the common laws of this realm used in more inferior courts." And after founding himself on this very precedent of the 11th of Richard II., he adds, *"This is the reason that Judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws, but secundum Legem et Consuetudinem Parliamenti: and so the Judges in divers Parliaments have confessed!"*[4]

RULE OF PLEADING

Your Committee do not find that any rules of pleading, as observed in the inferior courts, have ever obtained in the proceedings of the High Court of Parliament, in a cause or matter in which the whole procedure has been within their original jurisdiction. Nor does your Committee find that any demurrer or exception, as of false or erroneous pleading, hath been ever admitted to any impeachment in Parliament, as not coming within the form of the pleading; and although a reservation or protest is made by the defendant (matter of form, as we conceive) "to the generality, uncertainty, and insufficiency of the articles of impeachment," yet no objections have in fact been ever made in any part of the record; and when verbally they have been made,

[4] 4 Inst. p. 15.

(until this trial,) they have constantly been overruled.

The trial of Lord Strafford[5] is one of the most important eras in the history of Parliamentary judicature. In that trial, and in the dispositions made preparatory to it, the process on impeachments was, on great consideration, research, and selection of precedents, brought very nearly to the form which it retains at this day; and great and important parts of Parliamentary Law were then laid down. The Commons at that time made new charges or amended the old as they saw occasion. Upon an application from the Commons to the Lords, that the examinations taken by their Lordships, at their request, might be delivered to them, for the purpose of a more exact specification of the charge they had made, on delivering the message of the Commons, Mr. Pym, amongst other things, said, as it is entered in the Lords' Journals, "According to the clause of reservation in the conclusion of their charge, they [the Commons] will add to the charges, not to the matter in respect of comprehension, extent, or kind, but only to reduce them to more particularities, that the Earl of Strafford might answer with the more clearness and expedition: *not that they are bound by this way of SPECIAL charge; and therefore they have taken care in their House, upon protestation, that this shall be no prejudice to bind them from proceeding in GENERAL in other cases, and that they are not to be ruled by proceedings in other courts, which protestation they have made for the preservation of the power of Parliament;*

[5] 16 Ch. I. 1640.

and they desire that the like care may be had in your Lordships' House."[6] This protestation is entered on the Lords' Journals. Thus careful were the Commons that no exactness used by them for a temporary accommodation, should become an example derogatory to the larger rights of Parliamentary process.

At length the question of their being obliged to conform to any of the rules below came to a formal judgment. In the trial of Dr. Sacheverell, March 10th, 1709, the Lord Nottingham "desired their Lordships' opinion, whether he might propose a question to the Judges *here* [in Westminster Hall]. Thereupon the Lords, being moved to adjourn, adjourned to the House of Lords, and on debate," as appears by a note, "it was agreed that the question should be proposed in Westminster Hall."[7] Accordingly, when the Lords returned the same day into the Hall, the question was put by Lord Nottingham, and stated to the Judges by the Lord Chancellor: "Whether, by the *law of England*, and constant practice in all prosecutions by *indictment and information* for crimes and misdemeanors by writing or speaking, the particular words supposed to be written or spoken must not be expressly specified in the indictment or information?" On this question the Judges, *seriatim*, and in open court, delivered their opinion: the substance of which was, "That, by the laws of England, and the constant practice in Westminster Hall, the words ought to be expressly specified in the indictment or information." Then the

[6] Lords' Journals, Vol. IV. p. 133.

[7] Id. Vol. XIX. p. 98.

Lords adjourned, and did not come into the Hall until the 20th. In the intermediate time they came to resolutions on the matter of the question put to the Judges. Dr. Sacheverell, being found guilty, moved in arrest of judgment upon two points. The first, which he grounded on the opinion of the Judges, and which your Committee thinks most to the present purpose, was, "That no entire clause, or sentence, or expression, in either of his sermons or dedications, is particularly set forth in his impeachment, which he has already heard the Judges declare to be necessary in all cases of indictments or informations."[8] On this head of objection, the Lord Chancellor, on the 23d of March, agreeably to the resolutions of the Lords of the 14th and 16th of March, acquainted Dr. Sacheverell, "That, on occasion of the question before put to the Judges *in Westminster Hall*, and their answer thereto, their Lordships had fully debated and considered of that matter, and had come to the following resolution: 'That this House will proceed to the determination of the impeachment of Dr. Henry Sacheverell, according to the *law of the land, and the law and usage of Parliament*.' And afterwards to this resolution: 'That, by *the law and usage of Parliament* in prosecutions for high crimes and misdemeanors by writing or speaking, the particular words supposed to be criminal are *not necessary* to be expressly specified in such impeachment.' So that, in their Lordships' opinion, the law and usage of the High Court of Parliament being *a part of the law of the land*, and that usage not requiring that

[8] Lords' Journals, Vol. XIX. p. 116.

words should be exactly specified in impeachments, the answer of the Judges, which related only to the course of *indictments and informations*, does not in the least affect your case."[9]

On this solemn judgment concerning the law and usage of Parliament, it is to be remarked: First, that the impeachment itself is not to be presumed inartificially drawn. It appears to have been the work of some of the greatest lawyers of the time, who were perfectly versed in the manner of pleading in the courts below, and would naturally have imitated their course, if they had not been justly fearful of setting an example which might hereafter subject the plainness and simplicity of a Parliamentary proceeding to the technical subtilties of the inferior courts. Secondly, that the question put to the Judges, and their answer, were strictly confined to the law and practice below; and that nothing in either had a tendency to their delivering an opinion concerning Parliament, its laws, its usages, its course of proceeding, or its powers. Thirdly, that the motion in arrest of judgment, grounded on the opinion of the Judges, was made only by Dr. Sacheverell himself, and not by his counsel, men of great skill and learning, who, if they thought the objections had any weight, would undoubtedly have made and argued them.

Here, as in the case of the 11th King Richard II., the Judges declared unanimously, that such an objection would be fatal to such a pleading in any indictment or information; but the Lords, as on the former occasion, overruled this objection, and held the

[9] Lords' Journals, Vol. XIX. p. 121.

article to be good and valid, notwithstanding the report of the Judges concerning the mode of proceeding in the courts below.

Your Committee finds that a protest, with reasons at large, was entered by several lords against this determination of their court.[10] It is always an advantage to those who protest, that their reasons appear upon record; whilst the reasons of the majority, who determine the question, do not appear. This would be a disadvantage of such importance as greatly to impair, if not totally to destroy, the effect of precedent as authority, if the reasons which prevailed were not justly presumed to be more valid than those which have been obliged to give way: the former having governed the final and conclusive decision of a competent court. But your Committee, combining the fact of this decision with the early decision just quoted, and with the total absence of any precedent of an objection, before that time or since, allowed to pleading, or what has any relation to the rules and principles of pleading, as used in Westminster Hall, has no doubt that the House of Lords was governed in the 9th of Anne by the very same principles which it had solemnly declared in the 11th of Richard II.

But besides the presumption in favor of the reasons which must be supposed to have produced this solemn judgment of the Peers, contrary to the practice of the courts below, as declared by all the Judges, it is probable that the Lords were unwilling to take a step which might admit that anything in that practice

[10] Lords' Journals, Vol. XIX. p. 108.

should be received as their rule. It must be observed, however, that the reasons against the article alleged in the protest were by no means solely bottomed in the practice of the courts below, as if the main reliance of the protesters was upon that usage. The protesting minority maintained that it was not agreeable to *several precedents in Parliament*; of which they cited many in favor of their opinion. It appears by the Journals, that the clerks were ordered to search for precedents, and a committee of peers was appointed to inspect the said precedents, and to report upon them,—and that they did inspect and report accordingly. But the report is not entered on the Journals. It is, however, to be presumed that the greater number and the better precedents supported the judgment. Allowing, however, their utmost force to the precedents there cited, they could serve only to prove, that, in the case of *words*, (to which alone, and not the case of a *written* libel, the precedents extended,) such a special averment, according to the tenor of the words, had been used; but not that it was necessary, or that ever any plea had been rejected upon such an objection. As to the course of Parliament, resorted to for authority in this part of the protest, the argument seems rather to affirm than to deny the general proposition, that its own course, and not that of the inferior courts, had been the rule and law of Parliament.

As to the objection, taken in the protest, drawn from natural right, the Lords knew, and it appears in the course of the proceeding, that the whole of the libel had been read at length,

as appears from p. 655 to p. 666.[11] So that Dr. Sacheverell had *substantially* the same benefit of anything which could be alleged in the extenuation or exculpation as if his libellous sermons had been entered *verbatim* upon the recorded impeachment. It was adjudged sufficient to state the crime *generally* in the impeachment. The libels were given *in evidence*; and it was not then thought of, that nothing should be given in evidence which was not specially charged in the impeachment.

But whatever their reasons were, (great and grave they were, no doubt,) such as your Committee has stated it is the *judgment* of the Peers on the Law of Parliament, as a part of the law of the land. It is the more forcible as concurring with the judgment in the 11th of Richard II., and with the total silence of the Rolls and Journals concerning any objection to pleading ever being suffered to vitiate an impeachment, or to prevent evidence being given upon it, on account of its generality, or any other failure.

Your Committee do not think it probable, that, even before this adjudication, the rules of pleading below could ever have been adopted in a Parliamentary proceeding, when it is considered that the several statutes of Jeofails, not less than twelve in number,[12] have been made for the correction of an over-strictness in pleading, to the prejudice of substantial justice: yet in no one of these is to be discovered the least mention of any proceeding in Parliament. There is no doubt that the legislature

[11] State Trials, Vol. V.

[12] Statutes at Large, from 12 Ed. I. to 16 and 17 Ch. II.

would have applied its remedy to that grievance in Parliamentary proceedings, if it had found those proceedings embarrassed with what Lord Mansfield, from the bench, and speaking of the matter of these statutes, very justly calls "disgraceful subtilties."

What is still more strong to the point, your Committee finds that in the 7th of William III. an act was made for the regulating of trials for treason and misprision of treason, containing several regulations for reformation of proceedings at law, both as to matters of form and substance, as well as relative to evidence. It is an act thought most essential to the liberty of the subject; yet in this high and critical matter, so deeply affecting the lives, properties, honors, and even the inheritable blood of the subject, the legislature was so tender of the high powers of this high court, deemed so necessary for the attainment of the great objects of its justice, so fearful of enervating any of its means or circumscribing any of its capacities, even by rules and restraints the most necessary for the inferior courts, that they guarded against it by an express proviso, "that neither this act, nor anything therein contained, shall any ways extend to *any impeachment or other proceedings in Parliament, in any land whatsoever*."[13]

[13] 7 W. III. ch. 3, sect. 12.

CONDUCT OF THE COMMONS IN PLEADING

This point being thus solemnly adjudged in the case of Dr. Sacheverell, and the principles of the judgment being in agreement with the whole course of Parliamentary proceedings, the Managers for this House have ever since considered it as an indispensable duty to assert the same principle, in all its latitude, upon all occasions on which it could come in question,—and to assert it with an energy, zeal, and earnestness proportioned to the magnitude and importance of the interest of the Commons of Great Britain in the religious observation of the rule, *that the Law of Parliament, and the Law of Parliament only, should prevail in the trial of their impeachments*.

In the year 1715 (1 Geo. I.) the Commons thought proper to impeach of high treason the lords who had entered into the rebellion of that period. This was about six years after the decision in the case of Sacheverell. On the trial of one of these lords, (the Lord Wintoun,[14]) after verdict, the prisoner moved in arrest of judgment, and excepted against the impeachment for error, on account of the treason therein laid "not being described with sufficient certainty,—the day on which the treason was committed not having been alleged." His counsel was heard to this point. They contended, "that the forfeitures in cases of

[14] State Trials, Vol. VI. p. 17.

treason are very great, and therefore they humbly conceived that the accusation ought to contain all the certainty it is capable of, that the prisoner may not by *general allegations* be rendered incapable to defend himself in a case which may prove fatal to him: that they would not trouble their Lordships with citing authorities; for they believed there is not one gentleman of the long robe but will agree that an indictment for any capital offence to be erroneous, if the offence be not alleged to be committed on a certain day: that this impeachment set forth only that in or about the months of September, October, or November, 1715, the offence charged in the impeachment had been committed." The counsel argued, "that a proceeding by impeachment is a proceeding at the Common Law, for *Lex Parliamentaria* is a part of Common Law, and they submitted whether there is not the same certainty required in one method of proceeding at Common Law as in another."

The matter was argued elaborately and learnedly, not only on the general principles of the proceedings below, but on the inconvenience and possible hardships attending this uncertainty. They quoted Sacheverell's case, in whose impeachment "the precise days were laid when the Doctor preached each of these two sermons; and that by a like reason a certain day ought to be laid in the impeachment when this treason was committed; and that the authority of Dr. Sacheverell's case seemed so much stronger than the case in question as the crime of treason is higher than that of a misdemeanor."

Here the Managers for the Commons brought the point a second time to an issue, and that on the highest of capital cases: an issue, the event of which was to determine forever whether their impeachments were to be regulated by the law as understood and observed in the inferior courts. Upon the usage below there was no doubt; the indictment would unquestionably have been quashed. But the Managers for the Commons stood forth upon this occasion with a determined resolution, and no less than four of them *seriatim* rejected the doctrine contended for by Lord Wintoun's counsel. They were all eminent members of Parliament, and three of them great and eminent lawyers, namely, the then Attorney-General, Sir William Thomson, and Mr. Cowper.

Mr. Walpole said,—"Those learned gentlemen [Lord Wintoun's counsel] *seem to forget in what court they are*. They have taken up so much of your Lordships' time in quoting of authorities, and using arguments to show your Lordships what would quash an indictment in *the courts below*, that they seemed to forget they are now in *a Court of Parliament, and on an impeachment of the Commons of Great Britain*. For, should the Commons admit all that they have offered, it will not follow that the impeachment of the Commons is insufficient; and I must observe to your Lordships, that neither of the learned gentlemen have offered to produce one instance relative to an impeachment. I mean to show that the sufficiency of an impeachment was never called in question for the generality of the charge, or that any

instance of that nature was offered at before. The Commons don't conceive, that, if this exception would quash an indictment, it would therefore make the impeachment insufficient. I hope it never will be allowed here as a reason, that what quashes an indictment in the courts below will make insufficient an impeachment brought by the Commons of Great Britain."

The Attorney-General supported Mr. Walpole in affirmance of this principle. He said,—"I would follow the steps of the learned gentleman who spoke before me, and I think he has given a good answer to these objections. I would take notice that we are upon an impeachment, not upon an indictment. The courts below have set forms to themselves, which have prevailed for a long course of time, and thereby are become the forms by which those courts are to govern themselves; but it never was thought that the forms of those courts had any influence on the proceedings of Parliament. In Richard II.'s time, it is said in the records of Parliament, that proceedings in Parliament are not to be governed by the forms of Westminster Hall. We are in the case of an impeachment, and in the Court of Parliament. Your Lordships have already given judgment against six upon this impeachment, and it is warranted by the precedents in Parliament; therefore we insist that the articles are good in substance."

Mr. Cowper.—"They [the counsel] cannot but know that the usages of Parliaments are part of the laws of the land, although they differ in many instances from the Common Law, as practised in the inferior courts, in point of form. My Lords,

if the Commons, in preparing articles of impeachment, should govern themselves by precedents of indictments, in my humble opinion they would depart from the ancient, nay, the constant, usage and practice of Parliament. It is well known that the form of an impeachment has very little resemblance to that of an indictment; and I believe the Commons will endeavor to preserve the difference, by adhering to their own precedents."

Sir William Thomson.—"We must refer to the forms and proceedings in the Court of Parliament, and which must be owned to be part of the law of the land. It has been mentioned already to your Lordships, that the precedents in impeachments are not so nice and precise in form as in the inferior courts; and we presume your Lordships will be governed by the forms of your own court, (especially forms that are not essential to justice,) as the courts below are by theirs: which courts differ one from the other in many respects as to their forms of proceedings, and the practice of each court is esteemed as the law of that court."

The Attorney-General in reply maintained his first doctrine. "There is no uncertainty; in it *that can be to the prejudice of the prisoner*: we insist, it is according to *the forms of Parliament*: he has pleaded to it, and your Lordships have found him guilty."

The opinions of the Judges were taken in the House of Lords, on the 19th of March, 1715, upon two questions which had been argued in arrest of judgment, grounded chiefly on the practice of the courts below. To the first the Judges answered,—"*It is*

necessary that there be a *certain* day laid in such indictments, on which the fact is alleged to be committed; and that alleging in such indictments that the fact was committed at or about a certain day would not be sufficient." To the second they answered, "that, although a day certain, when the fact is supposed to be done, be alleged in such indictments, yet it is not necessary upon the trial to prove the fact to be committed upon *that day*; but it is sufficient, if proved to be done *on any other day before* the indictment found."

Then it was "agreed by the House, and ordered, that the Lord High Steward be directed to acquaint the prisoner at the bar in Westminster Hall, 'that the Lords have considered of the matters moved in arrest of judgment, and are of opinion that they are not sufficient to arrest the same, but that the *impeachment* is sufficiently certain in point of time *according to the form of impeachments in Parliament*.'"[15]

On this final adjudication, (given after solemn argument, and after taking the opinion of the Judges,) in affirmance of the Law of Parliament against the undisputed usage of the courts below, your Committee has to remark,—1st, The preference of the custom of Parliament to the usage below. By the very latitude of the charge, the Parliamentary accusation gives the prisoner fair notice to prepare himself upon all points: whereas there seems something insnaring in the proceedings upon indictment, which, fixing the specification of a day certain for the treason or felony

[15] Lords' Journals, Vol. XX. p. 316.

as absolutely necessary in the charge, gives notice for preparation only on *that day*, whilst the prosecutor has the whole range of time antecedent to the indictment to allege and give evidence of facts against the prisoner. It has been usual, particularly in later indictments, to add, "at several other times"; but the strictness of naming one day is still necessary, and the want of the larger words would not quash the indictment. 2dly, A comparison of the extreme rigor and exactness required in the more *formal* part of the proceeding (the indictment) with the extreme laxity used in the *substantial* part (that is to say, the evidence received to prove the fact) fully demonstrates that the partisans of those forms would put shackles on the High Court of Parliament, with which they are not willing, or find it wholly impracticable, to bind themselves. 3dly, That the latitude of departure from the letter of the indictment (which holds in other matters besides this) is in appearance much more contrary to natural justice than anything which has been objected against the evidence offered by your Managers, under a pretence that it exceeded the limits of pleading. For, in the case of indictments below, it must be admitted that the prisoner may be unprovided with proof of an alibi, and other material means of defence, or may find some matters unlooked-for produced against him, by witnesses utterly unknown to him: whereas nothing was offered to be given in evidence, under any of the articles of this impeachment, except such as the prisoner must have had perfect knowledge of; the whole consisting of matters sent over by himself to the Court of

Directors, and authenticated under his own hand. No substantial injustice or hardship of any kind could arise from our evidence under our pleading: whereas in theirs very great and serious inconveniencies might happen.

Your Committee has further to observe, that, in the case of Lord Wintoun, as in the case of Dr. Sacheverell, the Commons had in their Managers persons abundantly practised in the law, as used in the inferior jurisdictions, who could easily have followed the precedents of indictments, if they had not purposely, and for the best reasons, avoided such precedents.

A great writer on the criminal law, Justice Foster, in one of his Discourses,[16] fully recognizes those principles for which your Managers have contended, and which have to this time been uniformly observed in Parliament. In a very elaborate reasoning on the case of a trial in Parliament, (the trial of those who had murdered Edward II.,) he observes thus:—"It is *well known*, that, in *Parliamentary* proceedings of this kind, *it is, and ever was*, sufficient that matters appear with proper light and certainty to *a common understanding*, without that minute exactness which is required in criminal proceedings in Westminster Hall. In these cases the rule has always been, *Loquendum ut vulgus*." And in a note he says,—"In the proceeding against Mortimer, in this Parliament, *so little regard was had to the forms used in legal proceedings*, that he who had been frequently summoned to Parliament as a baron, and had lately been created Earl of March,

[16] Discourse IV. p. 389.

is styled through the whole record merely Roger de Mortimer."

The departure from the common forms in the first case alluded to by Foster (viz., the trial of Berkeley, Maltravers, &c., for treason, in the murder of Edward II.[17]) might be more plausibly attacked, because they were tried, though in Parliament, by a jury of freeholders: which circumstance might have given occasion to justify a nearer approach to the forms of indictments below. But no such forms were observed, nor in the opinion of this able judge ought they to have been observed.

PUBLICITY OF THE JUDGES' OPINIONS

It appears to your Committee, that, from the 30th year of King Charles II. until the trial of Warren Hastings, Esquire, in all trials in Parliament, as well upon impeachments of the Commons as on indictments brought up by *Certiorari*, when any matter of law hath been agitated at the bar, or in the course of trial hath been stated by any lord in the court, it hath been the prevalent custom to state the same in open court. Your Committee has been able to find, since that period, no more than one precedent (and that a precedent rather in form than in substance) of the opinions of the Judges being taken privately, except when the case on both sides has been closed, and the Lords have retired to consider of their verdict or of their judgment thereon. Upon

[17] Parl. Rolls, Vol. II. p. 57. 4 Ed. III. A.D. 1330.

the soundest and best precedents, the Lords have improved on the principles of publicity and equality, and have called upon the parties severally to argue the matter of law, previously to a reference to the Judges, who, on their parts, have afterwards, *in open court*, delivered their opinions, often by the mouth of one of the Judges, speaking for himself and the rest, and in their presence: and sometimes all the Judges have delivered their opinion *seriatim*, (even when they have been unanimous in it,) together with their reasons upon which their opinion had been founded. This, from the most early times, has been the course in all judgments in the House of Peers. Formerly even the record contained the reasons of the decision. "The reason wherefore," said Lord Coke, "the records of Parliaments have been so highly extolled is, that therein is set down, in cases of difficulty, not only the judgment and resolution, but *the reasons and causes of the same* by so great advice."[18]

In the 30th of Charles II., during the trial of Lord Cornwallis,[19] on the suggestion of a question in law to the Judges, Lord Danby demanded of the Lord High Steward, the Earl of Nottingham, "whether it would be proper here [in open court] to ask the question of your Grace, or to propose it to the Judges?" The Lord High Steward answered,—"If your Lordships doubt of anything whereon a question in law ariseth, the latter opinion, and the *better* for the prisoner, is, *that it must be stated in the presence*

[18] Coke, 4 Inst. p. 3.

[19] State Trials, Vol. II. p. 725. A.D. 1678.

of the prisoner, that he may know whether the question be truly put. It hath *sometimes* been practised otherwise, and the Peers have sent for the Judges, and have asked their opinion in private, and have come back, and have given their verdict according to that opinion; and there is scarcely a precedent of its being otherwise done. There is a later authority in print that doth settle the point so as I tell you, and I do conceive *it ought to be followed*; and it being safer for the prisoner, my humble opinion to your Lordship is, that he ought to be present at *the stating of the question*. Call the *prisoner*." The prisoner, who had withdrawn, again appearing, he said,—"My Lord Cornwallis, my Lords the Peers, since they have withdrawn, have conceived a doubt in some matter [of law arising upon the matter] of fact in your case; and they have that tender regard of a prisoner at the bar, *that they will not suffer a case to be put up in his absence*, lest it should chance to prejudice him by being *wrong stated*." Accordingly the question was both put and the Judges' answer given publicly and in his presence.

Very soon after the trial of Lord Cornwallis, the impeachment against Lord Stafford was brought to a hearing,—that is, in the 32d of Charles II. In that case the lord at the bar having stated a point of law, "touching the necessity of two witnesses to an overt act in case of treason," the Lord High Steward told Lord Stafford, that "all the Judges that assist them, *and are here in your Lordship's presence and hearing*, should deliver their opinions whether it be doubtful and disputable or not." Accordingly the

Judges delivered their opinion, and each argued it (though they were all agreed) *seriatim* and *in open court*. Another abstract point of law was also proposed from the bar, on the same trial, concerning the legal sentence in high treason; and in the same manner the Judges on reference delivered their opinion *in open court*; and no objection, was taken to it as anything new or irregular.[20]

In the 1st of James II. came on a remarkable trial of a peer, —the trial of Lord Delamere. On that occasion a question of law was stated. There also, in conformity to the precedents and principles given on the trial of Lord Cornwallis, and the precedent in the impeachment of Lord Stafford, the then Lord High Steward took care that the opinion of the Judges should be given in open court.

Precedents grounded on principles so favorable to the fairness and equity of judicial proceedings, given in the reigns of Charles II. and James II., were not likely to be abandoned after the Revolution. The first trial of a peer which we find after the Revolution was that of the Earl of Warwick.

In the case of the Earl of Warwick, 11 Will. III., a question in law upon evidence was put to the Judges; the statement of the question was made in open court by the Lord High Steward, Lord Somers:—"If there be six in company, and one of them is killed, the other five are afterwards indicted, and three are tried and found guilty of manslaughter, and upon their prayers have

[20] State Trials, Vol. III. p. 212.

their clergy allowed, and the burning in the hand is respited, but not pardoned,—whether any of the three can be a witness on the trial of the other two?"

Lord Halifax.—"I suppose your Lordships will have the opinion of the Judges upon this point: *and that must be in the presence of the prisoner*."

Lord High Steward (Lord Somers).—"*It must certainly be in the presence of the prisoner*, if you ask the Judges' opinions."[21]

In the same year, Lord Mohun was brought to trial upon an indictment for murder. In this single trial a greater number of questions was put to the Judges in matter of law than probably was ever referred to the Judges in all the collective body of trials, before or since that period. That trial, therefore, furnishes the largest body of authentic precedents in this point to be found in the records of Parliament. The number of questions put to the Judges in this trial was twenty-three. They all originated from the Peers themselves; yet the Court called upon the party's counsel, as often as questions were proposed to be referred to the Judges, as well as on the counsel for the Crown, to argue every one of them *before* they went to those learned persons. Many of the questions accordingly were argued at the bar at great length. The opinions were given and argued *in open court*. Peers frequently insisted that the Judges should give their opinions *seriatim*, which they did always publicly in the court, with great gravity and dignity, and greatly to the illustration of the law, as they held and

[21] State Trials, Vol. V. p. 169.

acted upon it in their own courts.[22]

In Sacheverell's case (just cited for another purpose) the Earl of Nottingham demanded whether he might not propose a question of law to the Judges *in open court*. It was agreed to; and the Judges gave their answer *in open court*, though this was after verdict given: and in consequence of the advantage afforded to the prisoner in hearing *the opinion* of the Judges, he was thereupon enabled to move in arrest of judgment.

The next precedent which your Committee finds of a question put by the Lords, sitting as a court of judicature, to the Judges, pending the trial, was in the 20th of George II., when Lord Balmerino, who was tried on an indictment for high treason, having raised a doubt whether the evidence proved him to be at the place assigned for the overt act of treason on the day laid in the indictment, the point was argued at the bar by the counsel for the Crown in the prisoner's presence, and for his satisfaction. The prisoner, on hearing the argument, waived his objection; but the then Lord President moving their Lordships to adjourn to the Chamber of Parliament, the Lords adjourned accordingly, and after some time returning into Westminster Hall, the Lord High Steward (Lord Hardwicke) said,—

"Your Lordships were pleased, in the Chamber of Parliament, to come to a resolution that the opinion of the learned and reverend Judges should be taken on the following question, namely, Whether it is necessary that an overt act of high treason

[22] State Trials, Vol. IV. from p. 538 to 552.

should be proved to have been committed on the particular day laid in the indictment? Is it your Lordships' pleasure that the Judges do now give their opinion on that question?"

Lords.—"Ay, ay."

Lord High Steward.—"My Lord Chief-Justice!"

Lord Chief-Justice (Lord Chief-Justice Lee).—"The question proposed by your Lordships is, Whether it be necessary that an overt act of high treason should be proved to be committed on the particular day laid in the indictment? We are all of opinion that it is not necessary to prove the overt act to be committed on the particular day laid in the indictment; but as evidence may be given of an overt act before the day, so it may be after the day specified in the indictment; for the day laid is circumstance and form only, and not material in point of proof: this is the known constant course of proceeding in trials."

Here the case was made for the Judges, for the satisfaction of one of the Peers, after the prisoner had waived his objection. Yet it was thought proper, as a matter of course and of right, that the Judges should state the question put to them in the open court, and in presence of the prisoner,—and that in the same open manner, and in the same presence, their answer should be delivered.[23]

Your Committee concludes their precedents begun under Lord Nottingham, and ended under Lord Hardwicke. They are of opinion that a body of precedents so uniform, so accordant

[23] State Trials, Vol. IX. p. 606*. Die Lunæ, 28º Julii 1746

with principle, made in such times, and under the authority of a succession of such great men, ought not to have been departed from. The single precedent to the contrary, to which your Committee has alluded above, was on the trial of the Duchess of Kingston, in the reign of his present Majesty. But in that instance the reasons of the Judges were, by order of the House, delivered in writing, and entered at length on the Journals:[24] so that the legal principle of the decision is equally to be found: which is not the case in any one instance of the present impeachment.

The Earl of Nottingham, in Lord Cornwallis's case, conceived, though it was proper and agreeable to justice, that this mode of putting questions to the Judges and receiving their answer in public was not supported by former precedents; but he thought a book of authority had declared in favor of this course. Your Committee is very sensible, that, antecedent to the great period to which they refer, there are instances of questions having been put to the Judges privately. But we find the *principle* of publicity (whatever variations from it there might be in practice) to have been so clearly established at a more early period, that all the Judges of England resolved in Lord Morley's trial, in the year 1666, (about twelve years before the observation of Lord Nottingham,) *on a supposition that the trial should be actually concluded, and the Lords retired to the Chamber of Parliament to consult on their verdict*, that even in that case, (much stronger

[24] Id., Vol. XI. p. 262.

than the observation of your Committee requires for its support,) if their opinions should then be demanded by the Peers, for the information of their private conscience, yet they determined that they should be given in public. This resolution is in itself so solemn, and is so bottomed on constitutional principle and legal policy, that your Committee have thought fit to insert it *verbatim* in their Report, as they relied upon it at the bar of the Court, when they contended for the same publicity.

"It was resolved, that, in case the Peers who are triers, *after the evidence given, and the prisoner withdrawn, and they gone to consult of the verdict*, should desire to speak with any of the Judges, to have their opinion upon any point of law, that, if the Lord Steward spoke to us to go, we should go to them; but when the Lords asked us any question, we should not deliver any private opinion, but let them know *we were not to deliver any private opinion without conference with the rest of the Judges, and that to be done openly in court; and this (notwithstanding the precedent in the case of the Earl of Castlehaven) was thought prudent in regard of ourselves, as well as for the avoiding suspicion which might grow by private opinions: ALL resolutions of Judges being ALWAYS done in public*."[25]

The Judges in this resolution overruled the authority of the precedent, which militated against the whole spirit of their place and profession. Their declaration was without reserve or exception, that "*all* resolutions of the Judges are *always* done

[25] Kelyng's Reports, p. 54.

in public." These Judges (as should be remembered to their lasting honor) did not think it derogatory from their dignity, nor from their duty to the House of Lords, to take such measures concerning the publicity of their resolutions as should secure them from suspicion. They knew that the mere circumstance of privacy in a judicature, where any publicity is in use, tends to beget suspicion and jealousy. Your Committee is of opinion that the honorable policy of avoiding suspicion by avoiding privacy is not lessened by anything which exists in the present time and in the present trial.

Your Committee has here to remark, that this learned Judge seemed to think the case of Lord Audley (Castlehaven) to be more against him than in truth it was. The precedents were as follow. The opinions of the Judges were taken three times: the first time by the Attorney-General at Serjeants' Inn, antecedent to the trial; the last time, after the Peers had retired to consult on their verdict; the middle time *was during the trial itself*: and here the opinion was taken in open court, agreeably to what your Committee contends to have been the usage ever since this resolution of the Judges.[26] What was done before seemed to have passed *sub silentio*, and possibly through mere inadvertence.

Your Committee observes, that the precedents by them relied on were furnished from times in which the judicial proceedings in Parliament, and in all our courts, had obtained a very regular form. They were furnished at a period in which Justice

[26] Rushworth, Vol. II. pp. 93, 94, 95, 100.

Blackstone remarks that more laws were passed of importance to the rights and liberties of the subject than in any other. These precedents lean all one way, and carry no marks of accommodation to the variable spirit of the times and of political occasions. They are the same before and after the Revolution. They are the same through five reigns. The great men who presided in the tribunals which furnished these examples were in opposite political interests, but all distinguished for their ability, integrity, and learning.

The Earl of Nottingham, who was the first on the bench to promulgate this publicity as a rule, has not left us to seek the principle in the case: that very learned man considers the publicity of the questions and answers as a matter of justice, *and of justice favorable to the prisoner*. In the case of Mr. Hastings, the prisoner's counsel did not join your Committee in their endeavors to obtain the publicity we demanded. Their reasons we can only conjecture. But your Managers, acting for this House, were not the less bound to see that the due Parliamentary course should be pursued, even when it is most favorable to those whom they impeach. If it should answer the purposes of one prisoner to waive the rights which belong to all prisoners, it was the duty of your Managers to protect those general rights against that particular prisoner. It was still more their duty to endeavor that their *own* questions should not be erroneously stated, or cases put which varied from those which they argued, or opinions given in a manner not supported by the spirit of our laws and institutions

or by analogy with the practice of all our courts.

Your Committee, much in the dark about a matter in which it was so necessary that they should receive every light, have heard, that, in debating this matter abroad, it has been objected, that many of the precedents on which we most relied were furnished in the courts of the Lord High Steward, and not in trials where the Peers were Judges,—and that the Lord High Steward not having it in his power to retire with the juror Peers, the Judges' opinions, from necessity, not from equity to the parties, were given before that magistrate.

Your Committee thinks it scarcely possible that the Lords could be influenced by such a feeble argument. For, admitting the fact to have been as supposed, there is no sort of reason why so uniform a course of precedents, in a legal court composed of a peer for judge and peers for triers, a course so favorable to all parties and to equal justice, a course in concurrence with the procedure of all our other courts, should not have the greatest authority over their practice in every trial before *the whole body* of the peerage.

The Earl of Nottingham, who acted as High Steward in one of these commissions, certainly knew what he was saying. He gave no such reason. His argument for the publicity of the Judges' opinions did not turn at all on the nature of his court, or of his office in that court. It rested on the equity of the principle, and on the fair dealing due to the prisoner.

Lord Somers was in no such court; yet his declaration is

full as strong. He does not, indeed, argue the point, as the Earl of Nottingham did, when he considered it as a new case. Lord Somers considers it as a point quite settled, and no longer standing in need of being supported by reason or precedent.

But it is a mistake that the precedents stated in this Report are wholly drawn from proceedings in that kind of court. Only two are cited which are furnished from a court constituted in the manner supposed. The rest were in trials by all the peers, and not by a jury of peers with an High Steward.

After long discussions with the Peers on this subject, "the Lords' committees in a conference told them (the committee of this House, appointed to a conference on the matter) that the High Steward is but Speaker *pro tempore*, and giveth his vote as well as the other lords: this changeth not the nature of the court. And the Lords declared, that they have power enough to proceed to trial, though the King should not name an High Steward." On the same day, "it is declared and ordered by the Lords Spiritual and Temporal in Parliament assembled, that the office of High Steward on trials of peers upon impeachments is not necessary to the House of Peers, but that the Lords may proceed in such trials, if an High Steward is not appointed according to their humble desire."[27]

To put the matter out of all doubt, and to remove all jealousy on the part of the Commons, the commission of the Lord High Steward was then altered.

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[27] Foster's Crown Law, p. 145.

These rights, contended for by the Commons in their impeachments, and admitted by the Peers, were asserted in the proceedings preparatory to the trial of Lord Stafford, in which that long chain of uniform precedents with regard to the publicity of the Judges' opinions in trials begins.

For these last citations, and some of the remarks, your Committee are indebted to the learned and upright Justice Foster. They have compared them with the Journals, and find them correct. The same excellent author proceeds to demonstrate that whatever he says of trials by impeachment is equally applicable to trials before the High Steward on indictment; and consequently, that there is no ground for a distinction, with regard to the public declaration of the Judges' opinions, founded on the inapplicability of either of these cases to the other. The argument on this whole matter is so satisfactory that your Committee has annexed it at large to their Report.[28] As there is no difference in fact between these trials, (especially since the act which provides that all the peers shall be summoned to the trial of a peer,) so there is no difference in the reason and principle of the publicity, let the matter of the Steward's jurisdiction, be as it may.

PUBLICITY GENERAL

Your Committee do not find any positive law which binds

[28] See the Appendix, No. 1.

the judges of the courts in Westminster Hall publicly to give a reasoned opinion from the bench, in support of their judgment upon matters that are stated before them. But the course hath prevailed from the oldest times. It hath been so general and so uniform, that it must be considered as the law of the land. It has prevailed, so far as we can discover, not only in all the courts which now exist, whether of law or equity, but in those which have been suppressed or disused, such as the Court of Wards and the Star Chamber. An author quoted by Rushworth, speaking of the constitution of that chamber, says,—"And so it was resolved *by the Judges, on reference made to them; and their opinion, after deliberate hearing, and view of former precedents, was published in open court.*"[29] It appears elsewhere in the same compiler that all their proceedings were public, even in deliberating previous to judgment.

The Judges in their reasonings have always been used to observe on the arguments employed by the counsel on either side, and on the authorities cited by them,—assigning the grounds for rejecting the authorities which they reject, or for adopting those to which they adhere, or for a different construction of law, according to the occasion. This publicity, not only of decision, but of deliberation, is not confined to their several courts, whether of law or equity, whether above or at Nisi Prius; but it prevails where they are assembled, in the Exchequer Chamber, or at Serjeants' Inn, or wherever matters come before

[29] Rushworth, Vol. II. p. 475, et passim.

the Judges collectively for consultation and revision. It seems to your Committee to be moulded in the essential frame and constitution of British judicature. Your Committee conceives that the English jurisprudence has not any other sure foundation, nor, consequently, the lives and properties of the subject any sure hold, but in the maxims, rules, and principles, and juridical traditionary line of decisions contained in the notes taken, and from time to time published, (mostly under the sanction of the Judges,) called Reports.

In the early periods of the law it appears to your Committee that a course still better had been pursued, but grounded on the same principles; and that no other cause than the multiplicity of business prevented its continuance. "Of ancient time," says Lord Coke, "in cases of difficulties, either criminal or civil, *the reasons and causes* of the judgment were set down *upon the record*, and so continued in the reigns of Ed. I. and Ed. II., and then there was no need of reports; but in the reign of Ed. III. (when the law was in its height) the causes and reasons of judgments, in respect of the multitude of them, are not set down in the record, but then *the great casuists and reporters of cases* (certain grave and sad men) published the cases, *and the reasons and causes of the judgments or resolutions*, which, from the beginning of the reign of Ed. III. and since, we have in print. But these also, though of great credit and excellent use in their kind, *yet far underneath the authority of the Parliament Rolls, reporting the acts, judgments,*

and resolutions of that highest court."[30]

Reports, though of a kind less authentic than the Year Books, to which Coke alludes, have continued without interruption to the time in which we live. It is well known that the elementary treatises of law, and the dogmatical treatises of English jurisprudence, whether they appear under the names of institutes, digests, or commentaries, do not rest on the authority of the supreme power, like the books called the Institute, Digest, Code, and authentic collations in the Roman law. With us doctrinal books of that description have little or no authority, other than as they are supported by the adjudged cases and reasons given at one time or other from the bench; and to these they constantly refer. This appears in Coke's Institutes, in Comyns's Digest, and in all books of that nature. To give judgment privately is to put an end to reports; and to put an end to reports is to put an end to the law of England. It was fortunate for the Constitution of this kingdom, that, in the judicial proceedings in the case of ship-money, the Judges did not then venture to depart from the ancient course. They gave and they argued their judgment in open court.[31] Their reasons were publicly given, and the reasons assigned for their judgment took away all its authority. The great historian, Lord Clarendon, at that period a young lawyer, has told us that the Judges gave as law from the

[30] Coke, 4 Inst. p. 5.

[31] This is confined to the judicial opinions in Hampden's case. It does not take in all the extra-judicial opinions.

bench what every man in the hall knew not to be law.

This publicity, and this mode of attending the decision with its grounds, is observed not only in the tribunals where the Judges preside in a judicial capacity, individually or collectively, but where they are consulted by the Peers on the law in all *writs of error* brought from below. In the opinion they give of the matter assigned as error, one at least of the Judges argues the questions at large. He argues them publicly, though in the Chamber of Parliament,—and in such a manner, that every professor, practitioner, or student of the law, as well as the parties to the suit, may learn the opinions of all the Judges of all the courts upon those points in which the Judges in one court might be mistaken.

Your Committee is of opinion that nothing better could be devised by human wisdom than argued judgments publicly delivered for preserving unbroken the great traditionary body of the law, and for marking, whilst that great body remained unaltered, every variation in the application and the construction of particular parts, for pointing out the ground of each variation, and for enabling the learned of the bar and all intelligent laymen to distinguish those changes made for the advancement of a more solid, equitable, and substantial justice, according to the variable nature of human affairs, a progressive experience, and the improvement of moral philosophy, from those hazardous changes in any of the ancient opinions and decisions which may arise from ignorance, from levity, from false refinement, from a

spirit of innovation, or from other motives, of a nature not more justifiable.

Your Committee, finding this course of proceeding to be concordant with the character and spirit of our judicial proceeding, continued from time immemorial, supported by arguments of sound theory, and confirmed by effects highly beneficial, could not see without uneasiness, in this great trial for Indian offences, a marked innovation. Against their reiterated requests, remonstrances, and protestations, the opinions of the Judges were always taken secretly. Not only the constitutional publicity for which we contend was refused to the request and entreaty of your Committee, but when a noble peer, on the 24th day of June, 1789, did in open court declare that he would then propose some questions to the Judges in that place, and hoped to receive their answer openly, according to the approved good customs of that and of other courts, the Lords instantly put a stop to the further proceeding by an immediate adjournment to the Chamber of Parliament. Upon this adjournment, we find by the Lords' Journals, that the House, on being resumed, ordered, that "it should resolve itself into a Committee of the whole House, on Monday next, to take into consideration what is the proper manner of putting questions by the Lords to the Judges, and of their answering the same, in judicial proceedings." The House did thereon resolve itself into a committee, from which the Earl of Galloway, on the 29th of the same month, reported as follows: —"That the House has, in the trial of Warren Hastings, Esquire,

proceeded in a regular course, in the manner of propounding their questions to the Judges in the Chamber of Parliament, and in receiving their answers to them in the same place." The resolution was agreed to by the Lords; but the protest as below[32] was entered thereupon, and supported by strong arguments.

Your Committee remark, that this resolution states only, that the House had proceeded, in this secret manner of propounding questions to the Judges and of receiving their answers, during the

[32] "*Dissentient.*"1st. Because, by consulting the Judges out of court, in the absence of the parties, and with shut doors, we have deviated from the most approved and almost uninterrupted practice of above a century and a half, and established a precedent not only destructive of the justice due to the parties at our bar, but materially injurious to the rights of the community at large, who in cases of impeachments are more peculiarly interested that all proceedings of this High Court of Parliament should be open and exposed, like all other courts of justice, to public observation and comment, in order that no covert and private practices should defeat the great ends of public justice."2dly. Because, from private opinions of the Judges, upon private statements, which the parties have neither heard nor seen, grounds of a decision will be obtained which must inevitably affect the cause at issue at our bar; this mode of proceeding seems to be a violation of the first principle of justice, inasmuch as we thereby force and confine the opinions of the Judges to our private statement; and through the medium of our subsequent decision we transfer the effect of those opinions to the parties, who have been deprived of the right and advantage of being heard by such, private, though unintended, transmutation of the point at issue."3dly. Because the prisoners who may hereafter have the misfortune to stand at our bar will be deprived of that consolation which the Lord High Steward Nottingham conveyed to the prisoner, Lord Cornwallis, viz., 'That the Lords have that tender regard of a prisoner at the bar, that they will not suffer a case to be put in his absence, lest it should prejudice him by being wrong stated.'"4thly. Because unusual mystery and secrecy in our judicial proceedings must tend either to discredit the acquittal of the prisoner, or render the justice of his condemnation doubtful."PORCHESTER. SUFFOLK AND BERKSHIRE. LOUGHBOROUGH."

trial, and on matters of debate between the parties, "in a regular course." It does not assert that another course would not have been *as* regular. It does not state either judicial convenience, principle, or body of precedents for that *regular course*. No such body of precedents appear on the Journal, that we could discover. Seven-and-twenty, at least, in a regular series, are directly contrary to this regular course. Since the era of the 29th of June, 1789, no one question has been admitted to go publicly to the Judges.

This determined and systematic privacy was the more alarming to your Committee, because the questions did not (except in that case) originate from the Lords for the direction of their own conscience. These questions, in some material instances, were not made or allowed by the parties at the bar, nor settled in open court, but differed materially from what your Managers contended was the true state of the question, as put and argued by them. They were such as the Lords thought proper to state for them. Strong remonstrances produced some alteration in this particular; but even after these remonstrances, several questions were made on statements which the Managers never made nor admitted.

Your Committee does not know of any precedent before this, in which the Peers, on a proposal of the Commons, or of a less weighty person before their court, to have the cases publicly referred to the Judges, and their arguments and resolutions delivered in their presence, absolutely refused. The very few

precedents of such private reference on trials have been made, as we have observed already, *sub silentio*, and without any observation from the parties. In the precedents we produce, the determination is accompanied with its reasons, and the publicity is considered as the clear, undoubted right of the parties.

Your Committee, using their best diligence, have never been able to form a clear opinion upon the ground and principle of these decisions. The mere result, upon each case decided by the Lords, furnished them with no light, from any principle, precedent, or foregone authority of law or reason, to guide them with regard to the next matter of evidence which they had to offer, or to discriminate what matter ought to be urged or to be set aside: your Committee not being able to divine whether the particular evidence, which, upon a conjectural principle, they might choose to abandon, would not appear to this House, and to the judging world at large, to be admissible, and possibly decisive proof. In these straits, they had and have no choice, but either wholly to abandon the prosecution, and of consequence to betray the trust reposed in them by this House, or to bring forward such matter of evidence as they are furnished with from sure sources of authenticity, and which in their judgment, aided by the best advice they could obtain, is possessed of a moral aptitude juridically to prove or to illustrate the case which the House had given them, in charge.

MODE OF PUTTING THE QUESTIONS

When your Committee came to examine into those private opinions of the Judges, they found, to their no small concern, that the mode both of putting the questions to the Judges, and their answers, was still more unusual and unprecedented than the privacy with which those questions were given and resolved.

This mode strikes, as we apprehend, at the vital privileges of the House. For, with the single exception of the first question put to the Judges in 1788, the case being stated, the questions are raised directly, specifically, and by name, on those privileges: that is, *What evidence is it competent for the Managers of the House of Commons to produce?* We conceive that it was not proper, *nor justified by a single precedent*, to refer to the Judges of the inferior courts any question, and still less for them to decide in their answer, of what is or is not competent for the House of Commons, or for any committee acting under their authority, to do or not to do, in any instance or respect whatsoever. This new and unheard-of course can have no other effect than to subject to the discretion of the Judges the Law of Parliament and the privileges of the House of Commons, and in a great measure the judicial privileges of the Peers themselves: any intermeddling in which on their part we conceive to be a dangerous and unwarrantable assumption of power. It is contrary to what has been declared by Lord Coke himself,

in a passage before quoted, to be the duty of the Judges,—and to what the Judges of former times have confessed to be their duty, on occasions to which he refers in the time of Henry VI. And we are of opinion that the conduct of those sages of the law, and others their successors, who have been thus diffident and cautious in giving their opinions upon matters concerning Parliament, and particularly on the privileges of the House of Commons, was laudable in the example, and ought to be followed: particularly the principles upon which the Judges declined to give their opinions in the year 1614. It appears by the Journals of the Lords, that a question concerning the law relative to impositions having been put to the Judges, the proceeding was as follows. "Whether the Lords the Judges shall be heard deliver their opinion touching the point of impositions, before further consideration be had of answer to be returned to the lower House concerning the message from them lately received. Whereupon the number of the Lords requiring to hear the Judges' opinions by saying '*Content*' exceeding the others which said '*Non Content*,' the Lords the Judges, so desiring, were permitted to withdraw themselves into the Lord Chancellor's private rooms, where having remained awhile and advised together, they returned into the House, and, having taken their places, and standing discovered, did, by the mouth of the Lord Chief-Justice of the King's Bench, humbly desire to be forborne at this time, in this place, to deliver any opinion in this case, for many weighty and important reasons, which his Lordship delivered

with great gravity and eloquence; concluding that himself and his brethren are upon particulars in judicial course to speak and judge between the King's Majesty and his people, and likewise between his Highness's subjects, and in no case to be disputants on any side."

Your Committee do not find anything which, through inadvertence or design, had a tendency to subject the law and course of Parliament to the opinions of the Judges of the inferior courts, from that period until the 1st of James II. The trial of Lord Delamere for high treason was had by special commission before the Lord High Steward: it was before the act which directs that *all* peers should be summoned to such trials. This was not a trial in full Parliament, in which case it was then contended for that the Lord High Steward was the judge of the law, presiding in the Court, but had no vote in the verdict, and that the Lords were triers only, and had no vote in the judgment of law. This was looked on as the course, where the trial was not in full Parliament, in which latter case there was no doubt but that the Lord High Steward made a part of the body of the triers, and that the whole House was the judge.[33] In this cause, after the evidence for the Crown had been closed, the prisoner prayed the Court to adjourn. The Lord High Steward doubted his power to take that step in that stage of the trial; and the question was, "Whether, the trial not being in full Parliament, when the prisoner is upon his trial, and evidence for the King is given, the

[33] See the Lord High Steward's speech on that head, 1st James II.

Lords being (as it may be termed) charged with the prisoner, the Peers may separate for a time, which is the consequence of an adjournment?" The Lord High Steward doubted of his power to adjourn the Court. The case was evidently new, and his Grace proposed to have the opinion of the Judges upon it. The Judges in consequence offering to withdraw into the Exchequer Chamber, Lord Falconberg "insisted that the question concerned the privilege of the Peerage only, and conceived that *the Judges are not concerned to make any determination in that matter; and being such a point of privilege, certainly the inferior courts have no right to determine it*." It was insisted, therefore, that the Lords triers should retire with the Judges. The Lord High Steward thought differently, and opposed this motion; but finding the other opinion generally prevalent, he gave way, and the Lords triers retired, taking the Judges to their consult. When the Judges returned, they delivered their opinion in *open court*. Lord Chief-Justice Herbert spoke for himself and the rest of the Judges. After observing on the novelty of the case, with a temperate and becoming reserve with regard to the rights of Parliaments, he marked out the limits of the office of the inferior Judges on such occasions, and declared,—"*All that we, the Judges, can do is to acquaint your Grace and the noble Lords what the law is in the inferior courts in cases of the like nature*, and the reason of the law in those points, and *then leave the jurisdiction of the court to its proper judgment*." The Chief-Justice concluded his statement of the usage below, and his observations on the

difference of the cases of a peer tried in full Parliament and by a special commission, in this manner:—"Upon the whole matter, my Lords, whether the Peers being judges in the one and not in the other instance alters the case, or whether the reason of the law in inferior courts why the jury are not permitted to separate until they have discharged themselves of their verdict may have any influence on this case, *where that reason seems to fail*, the prisoner being to be tried by men of unquestionable honor, *we cannot presume so far as to make any determination, in a case which is both new to us and of great consequence in itself*; but think it the proper way for *us*, having laid matters as we conceive them before your Grace and my Lords, *to submit the jurisdiction of your own court to your own determination*."

It appears to your Committee, that the Lords, who stood against submitting the course of their high court to the inferior Judges, and that the Judges, who, with a legal and constitutional discretion, declined giving any opinion in this matter, acted as became them; and your Committee sees no reason why the Peers at this day should be less attentive to the rights of their court with regard to an exclusive judgment on their own proceedings or to the rights of the Commons acting as accusers for the whole commons of Great Britain in that court, or why the Judges should be less reserved in deciding upon any of these points of high Parliamentary privilege, than the Judges of that and the preceding periods. This present case is a proceeding in full Parliament, and not like the case under the commission in the

time of James II., and still more evidently out of the province of Judges in the inferior courts.

All the precedents previous to the trial of Warren Hastings, Esquire, seem to your Committee to be uniform. The Judges had constantly refused to give an opinion on any of the powers, privileges, or competencies of either House. But in the present instance your Committee has found, with great concern, a further matter of innovation. Hitherto the constant practice has been to put questions to the Judges but in the three following ways: as, 1st, A question of pure abstract law, without reference to any case, or merely upon an A.B. case stated to them; 2dly, To the legal construction of some act of Parliament; 3dly, To report the course of proceeding in the courts below upon an abstract case. Besides these three, your Committee knows not of a single example of any sort, during the course of any judicial proceeding at the bar of the House of Lords, whether the prosecution has been by indictment, by information from the Attorney-General, or by impeachment of the House of Commons.

In the present trial, the Judges appear to your Committee not to have given their judgment on points of law, stated as such, but to have in effect tried the cause, in the whole course of it,—with one instance to the contrary.

The Lords have stated no question of general law, no question on the construction of an act of Parliament, no question concerning the practice of the courts below. *They put the whole gross case and matter in question, with all its circumstances, to*

the Judges. They have, *for the first time*, demanded of them what particular person, paper, or document ought or ought not to be produced before them by the Managers for the Commons of Great Britain: for instance, whether, under such an article, the Bengal Consultations of such a day, the examination of Rajah Nundcomar, and the like. The operation of this method is in substance not only to make the Judges masters of the whole process and conduct of the trial, but through that medium to transfer to them the ultimate judgment on the cause itself and its merits.

The Judges attendant on the Court of Peers hitherto have not been supposed to know the particulars and minute circumstances of the cause, and must therefore be incompetent to determine upon those circumstances. The evidence taken, is not, of course, that we can find, delivered to them; nor do we find that in fact any order has been made for that purpose, even supposing that the evidence could at all regularly be put before them. They are present in court, not to hear the trial, but solely to advise in matter of law; they cannot take upon themselves to say anything about the Bengal Consultations, or to know anything of Rajah Nundcomar, of Kelleram, or of Mr. Francis, or Sir John Clavering.

That the House may be the more fully enabled to judge of the nature and tendency of thus putting the question, *specifically, and on the gross case*, your Committee thinks fit here to insert one of those questions, reserving a discussion of its particular

merits to another place. It was stated on the 22d of April, 1790, "On that day the Managers proposed to show that Kelleram fell into great balances with the East India Company, in consequence of his appointment." It is so stated in the printed Minutes (p. 1206). But the real tendency and gist of the proposition is not shown. However, the question was put, "Whether it be or be not competent *to the Managers for the Commons to give evidence upon the charge in the sixth article, to prove* that the rent [at?] which the defendant, Warren Hastings, Esquire, let the lands mentioned in the said sixth article of charge to Kelleram fell into arrear and was deficient; and whether, if proof were offered that the rent fell into arrear immediately after the letting, the evidence in that case would be competent?" The Judges answered, on the 27th of the said month, as follows:—"*It is not competent for the Managers for the House of Commons* to give evidence upon the charge in the sixth article, to prove that the rent at which the defendant, Warren Hastings, let the lands [mentioned?] in the said sixth article of charge to Kelleram fell into arrear and was deficient."

The House will observe that on the question two cases of competence were put: the first, on the competence of Managers for the House of Commons to give the evidence supposed to be offered by them, but which we deny to have been offered in the manner and for the purpose assumed in this question; the second is in a shape apparently more abstracted, and more nearly approaching to Parliamentary regularity,—on the competence

of the evidence itself, in the case of a supposed circumstance being superadded. The Judges answered only the first, denying flatly the competence of the Managers. As to the second, the competence of the supposed evidence, they are profoundly silent. Having given this blow to our competence, about the other question, (which was more within their province,) namely, the competence of evidence on a case hypothetically stated, they give themselves no trouble. The Lords on that occasion rejected the whole evidence. On the face of the Judges' opinion it is a determination *on a case*, the trial of which was not with them, but it contains *no rule or principle of law*, to which alone it was their duty to speak.[34]

These essential innovations tend, as your Committee conceives, to make an entire alteration in the constitution and in the purposes of the High Court of Parliament, and even to reverse the ancient relations between the Lords and the Judges. They tend wholly to take away from the Commons the benefit of making good their case before the proper judges, and submit this high inquest to the inferior courts.

Your Committee sees no reason why, on the same principles and precedents, the Lords may not terminate their proceedings in this, and in all future trials, by sending the whole body of evidence taken before them, in the shape of a special verdict, to the Judges, and may not demand of them, whether they ought,

[34] All the resolutions of the Judges, to the time of the reference to the Committee, are in the Appendix, No. 2.

on the whole matter, to acquit or condemn the prisoner; nor can we discover any cause that should hinder them [the Judges] from deciding on the accumulative body of the evidence as hitherto they have done in its parts, and from dictating the existence or non-existence of a misdemeanor or other crime in the prisoner as they think fit, without any more reference to principle or precedent of law than hitherto they have thought proper to apply in determining on the several parcels of this cause.

Your Committee apprehends that very serious inconveniencies and mischiefs may hereafter arise from a practice in the House of Lords of considering itself as unable to act without the judges of the inferior courts, of implicitly following their dictates, of adhering with a literal precision to the very words of their responses, and putting them to decide on the competence of the Managers for the Commons, the competence of the evidence to be produced, who are to be permitted to appear, what questions are to be asked of witnesses, and indeed, parcel by parcel, on the whole of the gross case before them,—as well as to determine upon the order, method, and process of every part of their proceedings. The judges of the inferior courts are by law rendered independent of the Crown. But this, instead of a benefit to the subject, would be a grievance, if no way was left of producing a responsibility. If the Lords cannot or will not act without the Judges, and if (which God forbid!) the Commons should find it at any time hereafter necessary to impeach them before the Lords, this House would find the Lords disabled in

their functions, fearful of giving any judgment on matter of law or admitting any proof of fact without them [the Judges]; and having once assumed the rule of proceeding and practice below as their rule, they must at every instant resort, for their means of judging, to the authority of those whom they are appointed to judge.

Your Committee must always act with regard to men as they are. There are no privileges or exemptions from the infirmities of our common nature. We are sensible that all men, and without any evil intentions, will naturally wish to extend their own jurisdiction, and to weaken all the power by which they may be limited and controlled. It is the business of the House of Commons to counteract this tendency. This House had given to its Managers no power to abandon its privileges and the rights of its constituents. They were themselves as little disposed as authorized to make this surrender. They are members of this House, not only charged with the management of this impeachment, but partaking of a general trust inseparable from the Commons of Great Britain in Parliament assembled, one of whose principal functions and duties it is to be observant of the courts of justice, and to take due care that none of them, from the lowest to the highest, shall pursue new courses, unknown to the laws and constitution, of this kingdom, or to equity, sound legal policy, or substantial justice. Your Committee were not sent into Westminster Hall for the purpose of contributing in their persons, and under the authority of the House, to change the

course or law of Parliament, which had continued unquestioned for at least four hundred years. Neither was it any part of their mission to suffer precedents to be established, with relation to the law and rule of evidence, which tended in their opinion to shut up forever all the avenues to justice. They were not to consider a rule of evidence as a means of concealment. They were not, without a struggle, to suffer any subtleties to prevail which would render a process in Parliament, not the terror, but the protection, of all the fraud and violence arising from the abuse of British power in the East. Accordingly, your Managers contended with all their might, as their predecessors in the same place had contended with more ability and learning, but not with more zeal and more firmness, against those dangerous innovations, as they were successively introduced: they held themselves bound constantly to protest, and in one or two instances they did protest, in discourses of considerable length, against those private, and, for what they could find, unargued judicial opinions, which must, as they fear, introduce by degrees the miserable servitude which exists where the law is uncertain or unknown.

DEBATES ON EVIDENCE

The chief debates at the bar, and the decisions of the Judges, (which we find in all cases implicitly adopted, in all their extent and without qualification, by the Lords,) turned upon *evidence*. Your Committee, before the trial began, were apprised, by

discourses which prudence did not permit them to neglect, that endeavors would be used to embarrass them in their proceedings by exceptions against evidence; that the judgments and opinions of the courts below would be resorted to on this subject; that there the rules of evidence were precise, rigorous, and inflexible; and that the counsel for the criminal would endeavor to introduce the same rules, with the same severity and exactness, into this trial. Your Committee were fully assured, and were resolved strenuously to contend, that no doctrine or rule of law, much less the practice of any court, ought to have weight or authority in Parliament, further than as such doctrine, rule, or practice is agreeable to the proceedings in Parliament, or hath received the sanction of approved precedent there, or is founded on the immutable principles of substantial justice, without which, your Committee readily agrees, no practice in any court, high or low, is proper or fit to be maintained.

In this preference of the rules observed in the High Court of Parliament, preëminently superior to all the rest, there is no claim made which the inferior courts do not make, each with regard to itself. It is well known that the rules of proceedings in these courts vary, and some of them very essentially; yet the usage of each court is the law of the court, and it would be vain to object to any rule in any court, that it is not the rule of another court. For instance: as a general rule, the Court of King's Bench, on trials by jury, cannot receive depositions, but must judge by testimony *vivâ voce*. The rule of the Court of Chancery is not

only not the same, but it is the reverse, and Lord Hardwicke ruled accordingly. "The constant and established proceedings of this Court," said this great magistrate, "are on written evidence, like the proceedings on the Civil and Canon Law. This is the course of the Court, and the course of the Court is the law of the Court."[35]

Your Managers were convinced that one of the principal reasons for which this cause was brought into Parliament was the danger that in inferior courts their rule would be formed naturally upon their ordinary experience, and the exigencies of the cases which in ordinary course came before them. This experience, and the exigencies of these cases, extend little further than the concerns of a people comparatively in a narrow vicinage, a people of the same or nearly the same language, religion, manners, laws, and habits: with them an intercourse of every kind was easy.

These rules of law in most cases, and the practice of the courts in all, could not be easily applicable to a people separated from Great Britain by a very great part of the globe,—separated by manners, by principles of religion, and of inveterate habits as strong as nature itself, still more than by the circumstance of local distance. Such confined and inapplicable rules would be convenient, indeed, to oppression, to extortion, bribery, and corruption, but ruinous to the people, whose protection is the true object of all tribunals and of all their rules. Even English judges

[35] Atkyns, Vol. I. p. 445.

in India, who have been sufficiently tenacious of what they considered as the rules of English courts, were obliged in many points, and particularly with regard to evidence, to relax very considerably, as the civil and politic government has been obliged to do in several other cases, on account of insuperable difficulties arising from a great diversity of manners, and from what may be considered as a diversity even in the very constitution of their minds,—instances of which your Committee will subjoin in a future Appendix.

Another great cause why your Committee conceived this House had chosen to proceed in the High Court of Parliament was because the inferior courts were habituated, with very few exceptions, to try men for the abuse only of their individual and natural powers, which can extend but a little way.[36] Before them, offences, whether of fraud or violence or both, are, for much the greater part, charged upon persons of mean and obscure condition. Those unhappy persons are so far from being supported by men of rank and influence, that the whole weight and force of the community is directed against them. In this case, they are in general objects of protection as well as of punishment; and the course perhaps ought, as it is *commonly* said to be, not to suffer anything to be applied to their conviction beyond what the strictest rules will permit. But in the cause which your Managers have in charge the circumstances are the very reverse to what happens in the cases of mere personal

[36] Blackstone's Commentaries, Book IV. p. 258.

delinquency which come before the [inferior] courts. These courts have not before them persons who act, and who justify their acts, by the nature of a despotical and arbitrary power. The abuses stated in our impeachment are not those of mere individual, natural faculties, but the abuses of civil and political authority. The offence is that of one who has carried with him, in the perpetration of his crimes, whether of violence or of fraud, the whole force of the state,—who, in the perpetration and concealment of offences, has had the advantage of all the means and powers given to government for the detection and punishment of guilt and for the protection of the people. The people themselves, on whose behalf the Commons of Great Britain take up this remedial and protecting prosecution, are naturally timid. Their spirits are broken by the arbitrary power usurped over them, and claimed by the delinquent as his law. They are ready to flatter the power which they dread. They are apt to look for favor [from their governors] by covering those vices in the predecessor which they fear the successor may be disposed to imitate. They have reason to consider complaints as means, not of redress, but of aggravation to their sufferings; and when they shall ultimately hear that the nature of the British laws and the rules of its tribunals are such as by no care or study either they, or even the Commons of Great Britain, who take up their cause, can comprehend, but which in effect and operation leave them unprotected, and render those who oppress them secure in their spoils, they must think still worse of British justice than of

the arbitrary power of the Company's servants which hath been exercised to their destruction. They will be forever, what for the greater part they have hitherto been, inclined to compromise with the corruption of the magistrates, as a screen against that violence from which the laws afford them no redress.

For these reasons your Committee did and do strongly contend that the Court of Parliament ought to be open with great facility to the production of all evidence, except that which the precedents of Parliament teach them authoritatively to reject, or which hath no sort of natural aptitude directly or circumstantially to prove the case. They have been and are invariably of opinion that the Lords ought *to enlarge, and not to contrast, the rules of evidence, according to the nature and difficulties of the case*, for redress to the injured, for the punishment of oppression, for the detection of fraud,—and above all, to prevent, what is the greatest dishonor to all laws and to all tribunals, the failure of justice. To prevent the last of these evils all courts in this and all countries have constantly made all their maxims and principles concerning testimony to conform; although such courts have been bound undoubtedly by stricter rules, both of form and of prescript cases, than the sovereign jurisdiction exercised by the Lords on the impeachment of the Commons ever has been or ever ought to be. Therefore your Committee doth totally reject any rules by which the practice of any inferior court is affirmed as a directory guide to an higher, especially where the forms and the powers of the judicature are different, and the objects of judicial

inquiry are not the same.

Your Committee conceives that the trial of a cause is not in the arguments or disputations of the prosecutors and the counsel, but in *the evidence*, and that to refuse evidence is to refuse to hear the cause: nothing, therefore, but the most clear and weighty reasons ought to preclude its production. Your Committee conceives, that, when evidence on the face of it relevant, that is, connected with the party and the charge, was denied to be competent, *the burden lay upon those who opposed it* to set forth the authorities, whether of positive statute, known recognized maxims and principles of law, passages in an accredited institute, code, digest, or systematic treatise of laws, or some adjudged cases, wherein, the courts have rejected evidence of that nature. No such thing ever (except in one instance, to which we shall hereafter speak) was produced at the bar, nor (that we know of) produced by the Lords in their debates, or by the Judges in the opinions by them delivered. Therefore, for anything which as yet appears to your Committee to the contrary, these responses and decisions were, in many of the points, not the determinations of any law whatsoever, but mere arbitrary decrees, to which we could not without solemn protestation, submit.

Your Committee, at an early period, and frequently since the commencement of this trial, have neglected no means of research which might afford them information concerning these supposed strict and inflexible rules of proceeding and of evidence, which, appeared to them, destructive of all the means and ends of

justice: and, first, they examined carefully the Rolls and Journals of the House of Lords, as also the printed trials of cases before that court.

Your Committee finds but one instance, in the whole course of Parliamentary impeachments, in which evidence offered by the Commons has been rejected on the plea of inadmissibility or incompetence. This was in the case of Lord Strafford's trial; when the copy of a warrant (the same not having any attestation to authenticate it as a true copy) was, on deliberation, not admitted,—and your Committee thinks, as the case stood, with reason. But even in this one instance the Lords seemed to show a marked anxiety not to narrow too much the admissibility of evidence; for they confined their determination "to this individual case," as the Lord Steward reported their resolution; and he adds,—"They conceive this could be no impediment or failure in the proceeding, because the truth and verity of it would depend on the first general power given to execute it, which they who manage the evidence for the Commons say they could prove."[37] Neither have objections to evidence offered by the prisoner been very frequently made, nor often allowed when made. In the same case of Lord Strafford, two books produced by his Lordship, without proof by whom they were written, were rejected, (and on a clear principle,) "as being private books, and no records."[38] On both these occasions, the

[37] Lords' Journals, Vol. IV. p. 204. An. 1641. Rush. Trial of Lord Strafford, p. 430.

[38] Lords' Journals, Vol. IV. p. 210.

questions were determined by the Lords alone, without any resort to the opinions of the Judges. In the impeachments of Lord Stafford, Dr. Sacheverell, and Lord Wintoun, no objection to evidence appears in the Lords' Journals to have been pressed, and not above one taken, which was on the part of the Managers.

Several objections were, indeed, taken to evidence in Lord Macclesfield's trial.[39] They were made on the part of the Managers, except in two instances, where the objections were made by the witnesses themselves. They were all determined (those started by the Managers in their favor) by the Lords themselves, without any reference to the Judges. In the discussion of one of them, a question was stated for the Judges concerning the law in a similar case upon an information in the court below; but it was set aside by the previous question.[40]

On the impeachment of Lord Lovat, no more than one objection to evidence was taken by the Managers, against which Lord Lovat's counsel were not permitted to argue. Three objections on the part of the prisoner were made to the evidence offered by the Managers, but all without success.[41] The instances of similar objections in Parliamentary trials of peers on indictments are too few and too unimportant to require being particularized;—one, that in the case of Lord Warwick, has been already stated.

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[39] Id. Vol. XXII. p. 536 to 546. An. 1725.

[40] Lords' Journals, Vol. XXII. p. 541.

[41] Id. Vol. XXVII. p. 63, 65. An. 1746

The principles of these precedents do not in the least affect any case of evidence which your Managers had to support. The paucity and inapplicability of instances of this kind convince your Committee that the Lords have ever used some latitude and liberality in all the means of bringing information before them: nor is it easy to conceive, that, as the Lords are, and of right ought to be, judges of law and fact, many cases should occur (except those where a personal *vivâ voce* witness is denied to be competent) in which a judge, possessing an entire judicial capacity, can determine by anticipation what is good evidence, and what not, before he has heard it. When he has heard it, of course he will judge what weight it is to have upon his mind, or whether it ought not entirely to be struck out of the proceedings.

Your Committee, always protesting, as before, against the admission of any law, foreign or domestic, as of authority in Parliament, further than as written reason and the opinion of wise and informed men, has examined into the writers on the Civil Law, ancient and more recent, in order to discover what those rules of evidence, in any sort applicable to criminal cases, were, which were supposed to stand in the way of the trial of offences committed in India.

They find that the term Evidence, *Evidentia*, from whence ours is taken, has a sense different in the Roman law from what it is understood to bear in the English jurisprudence; the term most nearly answering to it in the Roman being *Probatio*, Proof, which, like the term *Evidence*, is a generic term, including everything

by which a doubtful matter may be rendered more certain to the judge: or, as Gilbert expresses it, every matter is evidence which amounts to the proof of the point in question.[42]

On the general head of Evidence, or Proof, your Committee finds that much has been written by persons learned in the Roman law, particularly in modern times,—and that many attempts have been made to reduce to rules the principles of evidence or proof, a matter which by its very nature seems incapable of that simplicity, precision, and generality which are necessary to supply the matter or to give the form to a rule of law. Much learning has been employed on the doctrine of indications and presumptions in their books,—far more than is to be found in our law. Very subtle disquisitions were made on all matters of jurisprudence in the times of the classical Civil Law, by the followers of the Stoic school.[43] In the modern school of the same law, the same course was taken by Bartolus, Baldus, and the Civilians who followed them, before the complete revival of literature.[44] All the discussions to be found in those voluminous writings furnish undoubtedly an useful exercise to the mind, by methodizing the various forms in which one set of facts or collection of facts, or the qualities or demeanor of persons, reciprocally influence each other; and by this course of juridical discipline they add to the readiness and sagacity of those who

[42] Gilbert's Law of Evidence, p. 23.

[43] Gravina, 84, 85.

[44] Id. 90 usque ad 100.

are called to plead or to judge. But as human affairs and human actions are not of a metaphysical nature, but the subject is concrete, complex, and moral, they cannot be subjected (without exceptions which reduce it almost to nothing) to any certain rule. Their rules with regard to competence were many and strict, and our lawyers have mentioned it to their reproach. "The Civilians," it has been observed, "differ in nothing more than admitting evidence; for they reject *histriones*, &c., and whole tribes of people."[45] But this extreme rigor as to competency, rejected by our law, is not found to extend to the *genus* of evidence, but only to a particular *species*,—personal witnesses. Indeed, after all their efforts to fix these things by positive and inflexible maxims, the best Roman lawyers, in their best ages, were obliged to confess that every case of evidence rather formed its own rule than that any rule could be adapted to every case. The best opinions, however, seem to have reduced the admissibility of witnesses to a few heads. "For if," said Callistratus, in a passage preserved to us in the Digest, "the testimony is free from suspicion, either on account of the quality of the *person*, namely, that he is in a reputable situation, or for *cause*, that is to say, that the testimony given is not for reward nor favor nor for enmity, such a witness is admissible." This first description goes to *competence*, between which and *credit* Lord Hardwicke justly says the discrimination is very nice. The other part of the text shows their anxiety to reduce credibility itself to a fixed rule.

[45] Atkyns, Rep. Vol. I p. 37, Omichund *versus* Barker.

It proceeds, therefore,—"His Sacred Majesty, Hadrian, issued a rescript to Vivius Varus, Lieutenant of Cilicia, to this effect, that he who sits in judgment is the most capable of determining what credit is to be given to witnesses." The words of the letter of rescript are as follow:—"You ought best to know what credit is to be given to witnesses,—who, and of what dignity, and of what estimation they are,—whether they seem to deliver their evidence with simplicity and candor, whether they seem to bring a formed and premeditated discourse, or whether on the spot they give probable matter in answer to the questions that are put to them." And there remains a rescript of the same prince to Valerius Verus, on the bringing out the credit of witnesses. This appears to go more to the *general* principles of evidence. It is in these words:—"What evidence, and in what measure or degree, shall amount to proof in each case can be defined in no manner whatsoever that is sufficiently certain. For, though not always, yet frequently, the truth of the affair may appear without any matter of public record. In some cases the number of the witnesses, in others their dignity and authority, is to be weighed; in others, concurring public fame tends to confirm the credit of the evidence in question. This alone I am able, and in a few words, to give you as my determination: that you ought not too readily to bind yourself to try the cause upon any one description of evidence; but you are to estimate by your own discretion what you ought to credit, or what appears to you not to be established

by proof sufficient."[46]

The modern writers on the Civil Law have likewise much matter on this subject, and have introduced a strictness with regard to personal testimony which our particular jurisprudence has not thought it at all proper to adopt. In others we have copied them more closely. They divide Evidence into two parts, in which they do not differ from the ancients: 1st, What is Evidence, or Proof, by itself; 2dly, What is Presumption, "which is a probable conjecture, from a reference to something which, coming from marks and tokens ascertained, shall be taken for truth, until some other shall be adduced." Again, they have labored particularly to fix rules for presumptions, which they divide into, 1. Violent and necessary, 2. Probable, 3. and lastly, Slight and rash.[47] But finding that this head of Presumptive Evidence (which makes so large a part with them and with us in the trial of all causes, and particularly criminal causes) is extremely difficult to ascertain, either with regard to what shall be considered as exclusively creating any of these three degrees of presumption, or what facts, and how proved, and what marks and tokens, may serve to establish them, even those Civilians whose character it is to be subtle to a fault have been obliged to abandon the task, and have fairly confessed that the labors of writers to fix rules for these matters have been vain and fruitless. One of the most able

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[46] Digest. Lib. XXII. Tit. 5.

[47] Calvinus, voce *Præsumptio*.

of them[48] has said, "that the doctors of the law have written nothing of value concerning presumptions; nor is the subject-matter such as to be reduced within the prescribed limit of any certain rules. In truth, it is from the actual existing case, and from the circumstances of the persons and of the business, that we ought (under the guidance of an incorrupt judgment of the mind, which is called an equitable discretion) to determine what presumptions or conjectural proofs are to be admitted as rational or rejected as false, or on which the understanding can pronounce nothing, either the one way or the other."

It is certain, that, whatever over-strictness is to be found in the older writers on this law with regard to evidence, it chiefly related to the mere competency of witnesses; yet even here the rigor of the Roman lawyers relaxed on the necessity of the case. Persons who kept houses of ill-fame were with them incompetent witnesses; yet among the maxims of that law the rule is well known of *Testes lupanares in re lupanari*.

In ordinary cases, they require two witnesses to prove a fact; and therefore they held, "that, if there be but one witness, and no probable grounds of presumption of some kind (*nulla argumenta*), that one witness is by no means to be heard"; and it is not inelegantly said in that case, *Non jus deficit, sed probatio*, "The failure is not in the law, but in the proof." But if other grounds of presumption appear, one witness is to be heard: "for it is not necessary that one crime should be established by one

[48] Bartolus.

sort of proof only, as by witnesses, or by documents, or by presumptions; all the modes of evidence may be so conjoined, that, where none of them alone would affect the prisoner, all the various concurrent proofs should overpower him like a storm of hail." This is held particularly true in cases where crimes are secret, and detection difficult. The necessity of detecting and punishing such crimes superseded, in the soundest authors, this theoretic aim at perfection, and obliged technical science to submit to practical expedience. "*In re criminali*," said the rigorists, "*probationes debent esse evidentes et luce meridiana clariores*": and so undoubtedly it is in offences which admit such proof. But reflection taught them that even their favorite rules of incompetence must give way to the exigencies of distributive justice. One of the best modern writers on the Imperial Criminal Law, particularly as practised in Saxony, (Carpzovius,) says,—"This alone I think it proper to remark, that even incompetent witnesses are sometimes admitted, if otherwise the truth cannot be got at; and this particularly in facts and crimes which are of difficult proof"; and for this doctrine he cites Farinacius, Mascardus, and other eminent Civilians who had written on Evidence. He proceeds afterwards,—"However, this is to be taken with a caution, that the impossibility of otherwise discovering the truth is not construed from hence, that other witnesses were not actually concerned, but that, from the nature of the crime, or from regard had to the place and time, other witnesses could not be present." Many other passages from

the same authority, and from others to a similar effect, might be added; we shall only remark shortly, that Gaill, a writer on the practice of that law the most frequently cited in our own courts, gives the rule more in the form of a maxim,—"that the law is contented with such proof as *can* be made, if the subject *in its nature* is difficult of proof."[49] And the same writer, in another passage, refers to another still more general maxim, (and a sound maxim it is,) that the power and means of proof ought not to be narrowed, but enlarged, that the truth may not be concealed: "*Probationum facultas non angustari, sed ampliari debeat, ne veritas occultetur.*"[50]

On the whole, your Committee can find nothing in the writings of the learned in this law, any more than they could discover anything in the Law of Parliament, to support any one of the determinations given by the Judges, and adopted by the Lords, against the evidence which your Committee offered, whether direct and positive, or merely (as for the greater part it was) circumstantial, and produced as a ground to form legitimate presumption against the defendant: nor, if they were to admit (which they do not) this Civil Law to be of authority in furnishing any rule in an impeachment of the Commons, more than as it may occasionally furnish a principle of reason on a new or undetermined point, do they find any rule or any principle, derived from that law, which could or ought to have made us

[49] Lib. II. Obs. 149, § 9.

[50] Lib. I. Obs. 91, § 7.

keep back the evidence which we offered; on the contrary, we rather think those rules and principles to be in agreement with our conduct.

As to the Canon Law, your Committee, finding it to have adopted the Civil Law with no very essential variation, does not feel it necessary to make any particular statement on that subject.

Your Committee then came to examine into the authorities in the English law, both as it has prevailed for many years back, and as it has been recently received in our courts below. They found on the whole the rules rather less strict, more liberal, and less loaded with positive limitations, than in the Roman law. The origin of this latitude may perhaps be sought in this circumstance, which we know to have relaxed the rigor of the Roman law: courts in England do not judge upon evidence, *secundum allegata et probata*, as in other countries and under other laws they do, but upon verdict. By a fiction of law they consider the jury as supplying, in some sense, the place of testimony. One witness (and for that reason) is allowed sufficient to convict, in cases of felony, which in other laws is not permitted.

In ancient times it has happened to the law of England (as in pleading, so in matter of evidence) that a rigid strictness in the application of technical rules has been more observed than at present it is. In the more early ages, as the minds of the Judges were in general less conversant in the affairs of the world, as the sphere of their jurisdiction was less extensive, and

as the matters which came before them were of less variety and complexity, the rule being in general right, not so much inconvenience on the whole was found from a literal adherence to it as might have arisen from an endeavor towards a liberal and equitable departure, for which further experience, and a more continued cultivation of equity as a science, had not then so fully prepared them. In those times that judicial policy was not to be condemned. We find, too, that, probably from the same cause, most of their doctrine leaned towards the restriction; and the old lawyers being bred, according to the then philosophy of the schools, in habits of great subtlety and refinement of distinction, and having once taken that bent, very great acuteness of mind was displayed in maintaining every rule, every maxim, every presumption of law creation, and every fiction of law, with a punctilious exactness: and this seems to have been the course which laws have taken in every nation.[51] It was probably from this rigor, and from a sense of its pressure, that, at an early period of our law, far more causes of criminal jurisdiction were carried into the House of Lords and the Council Board, where laymen were judges, than can or ought to be at present.

As the business of courts of equity became more enlarged and more methodical,—as magistrates, for a long series of

[51] Antiqua jurisprudentia aspera quidem illa, tenebricosa, et tristis, non tam in æquitate quam in verborum superstitione fundata, eaque Ciceronis ætatem fere attigit, mansitque annos circiter CCCL. Quæ hanc excepit, viguitque annos fere septuaginta novem, superiori longe humanior; quippe quæ magis utilitate communi, quam potestate verborum, negotia moderaretur.—Gravina, p. 86.

years, presided in the Court of Chancery, who were not bred to the Common Law,—as commerce, with its advantages and its necessities, opened a communication more largely with other countries,—as the Law of Nature and Nations (always a part of the law of England) came to be cultivated,—as an increasing empire, as new views and new combinations of things were opened,—this antique rigor and overdone severity gave way to the accommodation of human concerns, for which rules were made, and not human concerns to bend to them.

At length, Lord Hardwicke, in one of the cases the most solemnly argued, that has been in man's memory, with the aid of the greatest learning at the bar, and with the aid of all the learning on the bench, both bench and bar being then supplied with men of the first form, declared from the bench, and in concurrence with the rest of the Judges, and with the most learned of the long robe, the able council on the side of the old restrictive principles making no reclamation, "that the judges and sages of the law have laid it down that there is but ONE general rule of evidence, —*the best that the nature of the case will admit*."[52] This, then, the master rule, that governs all the subordinate rules, does in reality subject itself and its own virtue and authority *to the nature of the case*, and leaves no rule at all of an independent, abstract, and substantive quality. Sir Dudley Ryder, (then Attorney-General, afterwards Chief-Justice,) in his learned argument, observed, that "it is extremely proper that there should be *some* general

[52] Omichund *v.* Barker, Atk. I.

rules in relation to evidence; but *if exceptions were not allowed to them, it would be better to demolish all the general rules*. There is no general rule without exception that we know of but this,—that *the best evidence shall be admitted which the nature of the case will afford*. I will show that rules as general as this are broke in upon *for the sake of allowing evidence*. There is no rule that seems more binding than that a man shall not be admitted an evidence in his own case, and yet the Statute of Hue and Cry is an exception. A man's books are allowed to be evidence, or, which is in substance the same, his servant's books, *because the nature of the case requires it*,—as in the case of a brewer's servants. Another general rule, that a wife cannot be witness against her husband, has been broke in upon in cases of treason. Another exception to the general rule, that a man may not be examined without oath,—the last words of a dying man are given in evidence in the case of murder." Such are the doctrines of this great lawyer.

Chief-Justice Willes concurs with Lord Hardwicke as to dispensing with strict rules of evidence. "Such evidence," [he says,] "is to be admitted as the *necessity* of the case will allow of: as, for instance, a marriage at Utrecht, certified under the seal of the minister there, and of the said town, and that they cohabited together as man and wife, was held to be sufficient proof that they were married." This learned judge (commenting upon Lord Coke's doctrine, and Serjeant Hawkins's after him, that the oaths of Jews and pagans were not to be taken) says, "that

this notion, though advanced by so great a man, is contrary to religion, common sense, and common humanity, and I think the devils, to whom he has delivered them, could not have suggested anything worse." Chief-Justice Willes, admitting Lord Coke to be a great lawyer, then proceeds in very strong terms, and with marks of contempt, to condemn "*his narrow notions*"; and he treats with as little respect or decorum the ancient authorities referred to in defence of such notions.

The principle of the departure from those rules is clearly fixed by Lord Hardwicke; he lays it down as follows:—"The first ground judges have gone upon, in departing from strict rules, is *absolute strict necessity*; 2dly, a *presumed* necessity." Of the first he gives these instances:—"In the case of writings subscribed by witnesses, if all are dead, the proof of one of their hands is sufficient to establish the deed. Where an original is lost, a copy may be admitted; if no copy, then a proof by witnesses who have *heard* the deed: and yet it is a thing the law abhors, to admit the memory of man for evidence." This enlargement through two stages of proof, both of them contrary to the rule of law, and both abhorrent from its principles, are by this great judge accumulated upon one another, and are admitted from *necessity*, to accommodate human affairs, and to prevent that which courts are by every possible means instituted to prevent,—A FAILURE OF JUSTICE. And this necessity is not confined within the strict limits of physical causes, but is more lax, and takes in *moral and even presumed and argumentative necessity*, a necessity which

is in fact nothing more than a great degree of expediency. The law creates a fictitious necessity against the rules of evidence in favor of the convenience of trade: an exception which on a similar principle had before been admitted in the Civil Law, as to mercantile causes, in which the books of the party were received to give full effect to an insufficient degree of proof, called, in the nicety of their distinctions, a *semiplena probatio*.[53]

But to proceed with Lord Hardwicke. He observes, that "a tradesman's books" (that is, the acts of the party interested himself) "are admitted as evidence, though no *absolute necessity*, but by reason of a *presumption* of necessity only, *inferred* from the nature of commerce." "No rule," continued Lord Hardwicke, "can be more settled than that testimony is not to be received but upon oath"; but he lays it down, that an oath itself may be dispensed with. "There is another instance," says he, "where the lawful oath may be dispensed with,—where our courts admit evidence for the Crown without oath."

In the same discussion, the Chief-Baron (Parker) cited cases in which *all* the rules of evidence had given way. "There is not a more general rule," says he, "than that hearsay cannot be admitted, nor husband and wife as witnesses against each other; and yet it is *notorious* that from necessity they have been allowed, —not an *absolute* necessity, but a *moral* one."

It is further remarkable, in this judicial argument, that exceptions are allowed not only to rules of evidence, but that

[53] Gaill, Lib. II. Obs. 20, § 5.

the rules of evidence themselves are not altogether the same, where the subject-matter varies. The Judges have, to facilitate justice, and to favor commerce, even adopted the rules of *foreign* laws. They have taken for granted, and would not suffer to be questioned, the regularity and justice of the proceedings of foreign courts; and they have admitted them as evidence, not only of the fact of the decision, but of the right as to its legality. "Where there are foreign parties interested, and in commercial matters, the rules of evidence are not quite the same as in other instances in courts of justice: the case of Hue and Cry, Brownlow, 47. A feme covert is not a lawful witness against her husband, except in cases of treason, but has been admitted in civil cases.[54] The testimony of a public notary is evidence by the law of France: contracts are made before a public notary, and no other witness necessary. I should think it would be no doubt at all, if it came in question here, whether this would be a valid contract, but a testimony from persons of that credit and reputation would be received as a very good proof in foreign transactions, and would authenticate the contract."[55]

These cases show that courts always govern themselves by these rules in cases of foreign transactions. To this principle Lord Hardwicke accords; and enlarging the rule of evidence by the

[54] N.B.—In some criminal cases also, though not of treason, husband is admitted to prove an assault upon his wife, for the King, ruled by Raymond, Chief-Justice, Trin. 11th Geo., King *v.* Azire. And for various other exceptions see Buller's Nisi Prius, 286, 287.

[55] Cro. Charl. 365.

nature of the subject and the exigencies of the case, he lays it down, "that it is a common and *natural* presumption, that persons of the Gentoo religion should be principally apprised of facts and transactions in their own country. As the English have only a factory in this country, (for it is in the empire of the Great Mogul,) if we should admit this evidence [Gentoo evidence on a Gentoo oath], it would be agreeable to the genius of the law of England." For this he cites the proceedings of our Court of Admiralty, and adopts the author who states the precedent, "that this Court will give credit to the sentence of the Court of Admiralty in France, and take it to be according to right, and will not examine their proceedings: for it would be found very inconvenient, if one kingdom should, by peculiar laws, correct the judgments and proceedings of another kingdom." Such is the genius of the law of England, that these two principles, of the general moral necessities of things, and the nature of the case, overrule every other principle, even those rules which seem the very strongest. Chief-Baron Parker, in answer to an objection made against the infidel deponent, "that the plaintiff ought to have shown that he could not have the evidence of Christians," says, "that, repugnant to natural justice, in the Statute of Hue and Cry, the robbed is admitted to be witness of the robbery, as *a moral or presumed necessity is sufficient.*" The same learned magistrate, pursuing his argument in favor of liberality, in opening and enlarging the avenues to justice, does not admit that "the authority of one or two cases" is valid

against reason, equity, and convenience, the vital principles of the law. He cites Wells *v.* Williams, 1 Raymond, 282, to show that the necessity of trade has mollified the too rigorous rules of the old law, in their restraint and discouragement of aliens. "A Jew may sue at *this* day, but *heretofore he could not*, for then they were looked upon as enemies, but now commerce has taught the world more humanity; and therefore held that an alien enemy, commorant here by the license of the King, and under his protection, may maintain a debt upon a bond, though he did not come with safe-conduct." So far Parker, concurring with Raymond. He proceeds:—"It was objected by the defendant's counsel, that this is a novelty, and that what never has been done ought not to be done." The answer is, "*The law of England is not confined to particular cases, but is much more governed by reason than by any one case whatever.* The true rule is laid down by Lord Vaughan, fol. 37, 38. 'Where the law,' saith he, 'is *known and clear*, the Judges must determine as the law is, without regard to the inequitableness or inconveniency: these defects, if they happen in the law, can only be remedied by Parliament. But where the law is doubtful and not clear, the Judges ought to interpret the law to be as is most consonant to equity, and what is least inconvenient.'"

These principles of equity, convenience, and natural reason Lord Chief-Justice Lee considered in the same ruling light, not only as guides in matter of interpretation concerning law in general, but in particular as controllers of the whole law of

evidence, which, being artificial, and made for convenience, is to be governed by that convenience for which it is made, and is to be wholly subservient to the stable principles of substantial justice, "I do apprehend," said that Chief-Justice, "that the rules of evidence are to be considered as *artificial* rules, framed by men for *convenience in courts of justice*. This is a case that ought to be looked upon in that light; and I take it that considering evidence in this way [viz. according to natural justice] *is agreeable to the genius of the law of England*."

The sentiments of Murray, then Solicitor-General, afterwards Lord Mansfield, are of no small weight in themselves, and they are authority by being judicially adopted. His ideas go to the growing melioration of the law, by making its liberality keep pace with the demands of justice and the actual concerns of the world: not restricting the infinitely diversified occasions of men and the rules of natural justice within artificial circumscriptions, but conforming our jurisprudence to the growth of our commerce and of our empire. This enlargement of our concerns he appears, in the year 1744, almost to have foreseen, and he lived to behold it. "The arguments on the other side," said that great light of the law, (that is, arguments against admitting the testimony in question from the novelty of the case,) "prove nothing. Does it follow from thence, that no witnesses can be examined in a case that never specifically existed before, or that an action cannot be brought in a case that never happened before? *Reason* (being stated to be the first ground of all laws

by the author of the book called 'Doctor and Student') must determine the case. Therefore the only question is, Whether, *upon principles of reason, justice, and convenience*, this witness be admissible? Cases in law depend upon the *occasions* which gave rise to them. All occasions do not arise at once: now a particular species of Indians appears; hereafter another species of Indians may arise. A statute can seldom take in all cases. Therefore the Common Law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of Parliament."[56]

From the period of this great judgment to the trial of Warren Hastings, Esquire, the law has gone on continually working itself pure (to use Lord Mansfield's expression) by rules drawn from the fountain of justice. "General rules," said the same person, when he sat upon the bench, "are wisely established for attaining justice with ease, certainty, and dispatch; but the great end of them being *to do justice*, the Court will see that it be really obtained. The courts have been more liberal of late years in their determinations, and have more endeavored to attend to the *real justice* of the case than formerly." On another occasion, of a proposition for setting aside a verdict, he said, "This seems to be the true way to come at justice, and what we therefore ought to do; for the true text is, *Boni judicis est ampliare justitiam* (not *jurisdictionem*, as has been often cited)."[57] In conformity to

[56] Omichund *v.* Barker, 1st Atkyns, ut supra.

[57] Rex *v.* Philips, Burrow, Vol. I. p. 301, 302, 304.

this principle, the supposed rules of evidence have, in late times and judgments, instead of being drawn to a greater degree of strictness, been greatly relaxed.

"*All evidence is according to the subject-matter to which it is applied.* There is a great deal of difference between length of time that operates as a bar to a claim and that which is used only by way of evidence. Length of time used merely by way of evidence may be left to the consideration of the jury, to be credited or not, or to draw their inferences one way or the other, according to circumstances. *I do not know an instance in which proof may not be supplied.*"[58] In all cases of evidence Lord Mansfield's maxim was, *to lean to admissibility*, leaving the objections which were made to competency to go to credit, and to be weighed in the minds of the jury after they had heard it.[59] In objections to wills, and to the testimony of witnesses to them, he thought "it clear that the Judges ought to lean *against* objections to the formality."[60]

Lord Hardwicke had before declared, with great truth, "that the boundaries of what goes to the credit and what to the competency *are very nice, and the latter carried too far*"; and in the same case he said, "that, unless the objection appeared to him to carry a strong danger of perjury, and some apparent advantage might accrue to the witness, he was always inclined to let it go to

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[58] Mayor of Hull *v.* Horner, Cowper's Reports, 109.

[59] Abrahams *v.* Bunn, Burrow, Vol. IV. p. 2254. The whole case well worth reading.

[60] Wyndham *v.* Chetwynd, Burrow, Vol. I. p. 421.

his credit, only *in order to let in a proper light to the case, which would otherwise be shut out*; and *in a doubtful case*, he said, it was generally his custom *to admit the evidence*, and give such directions to the jury as the nature of the case might require."[61]

It is a known rule of evidence, that an interest in the matter to be supported by testimony disqualifies a witness; yet Lord Mansfield held, "that *nice* objections to a remote interest which could not be paid or released, though they held in other cases, were not allowed to disqualify a witness to a will, as parishioners might have [prove?] a devise to the use of the poor of the parish forever." He went still nearer, and his doctrine tends so fully to settle the principles of departure from or adherence to rules of evidence, that your Committee inserts part of the argument at large. "The disability of a witness from interest is very different from a positive incapacity. If a deed must be acknowledged before a judge or notary public, every other person is under a positive incapacity to authenticate it; but objections of interest are deductions from natural reason, and proceed upon a presumption of too great a bias in the mind of the witness, and the public utility of rejecting partial testimony. Presumptions stand no longer than till the contrary is proved. The presumption of bias may be taken off by showing the witness has a [as?] great or a greater interest the other way, or that he has given it up. The presumption of public utility may be answered by showing that it would be very inconvenient,

[61] King *v.* Bray.

under the particular circumstances, not to receive such testimony. Therefore, from the course of business, necessity, and other reasons of expedience, *numberless exceptions* are allowed to the *general* rule."[62]

These being the principles of the latter jurisprudence, the Judges have suffered no positive rule of evidence to counteract those principles. They have even suffered subscribing witnesses to a will which recites the soundness of mind in the testator to be examined to prove his insanity, and then the court received evidence to overturn that testimony and to destroy the credit of those witnesses. They were five in number, who attested to a will and codicil. They were admitted to annul the will they had themselves attested. Objections were taken to the competency of one of the witnesses in support of the will against its subscribing witnesses: 1st, That the witness was an executor in trust, and so liable to actions; 2dly, As having acted under the trust, whereby, if the will were set aside, he would be liable to answer for damages incurred by the sale of the deceased's chambers to a Mr. Frederick. Mr. Frederick offered to submit to a rule to release, for the sake of public justice. Those who maintained the objection cited Siderfin, a reporter of much authority, 51, 115, and 1st Keble, 134. Lord Mansfield, Chief-Justice, did not controvert those authorities; but in the course of obtaining substantial justice he treated both of them with equal contempt, though determined by judges of high reputation. His words are

[62] Wyndham *v.* Chetwynd.

remarkable: "We do not *now* sit here to take our rules of evidence from Siderfin and Keble." He overruled the objection upon more recent authorities, which, though not in similar circumstances, he considered as within the reason. The Court did not think it necessary that the witness should release, as he had offered to do. "It appeared on this trial," says Justice Blackstone, "that a black conspiracy was formed to set aside the gentleman's will, without any foundation whatever." A prosecution against three of the testamentary witnesses was recommended, who were afterwards convicted of perjury.[63] Had strict formalities with regard to evidence been adhered to in any part of this proceeding, that very black conspiracy would have succeeded, and those black conspirators, instead of receiving the punishment of their crimes, would have enjoyed the reward of their perjury.

Lord Mansfield, it seems, had been misled, in a certain case, with regard to precedents. His opinion was against the reason and equity of the supposed practice, but he supposed himself not at liberty to give way to his own wishes and opinions. On discovering his error, he considered himself as freed from an intolerable burden, and hastened to undo his former determination. "There are no precedents," said he, with some exultation, "which stand in the way of our determining *liberally*, *equitably*, and according to the *true* intention of the parties." In the same case, his learned assessor, Justice Wilmot, felt the same sentiments. His expressions are remarkable:—"Courts of law

[63] Lowe *v.* Joliffe, 1 Black. J. p. 366.

ought to concur with courts of equity in the execution of those powers which are very convenient to be inserted in settlements; and they ought not to listen to nice distinctions that savor of the schools, but to be guided by true good sense and manly reason. After the Statute of Uses, it is much to be lamented that the courts of Common Law had not adopted all the rules and maxims of courts of equity. This would have prevented the absurdity of receiving costs in one court and paying them in another."[64]

Your Committee does not produce the doctrine of this particular case as directly applicable to their charge, no more than several of the others here cited. We do not know on what precedents or principles the evidence proposed by us has been deemed inadmissible by the Judges; therefore against the grounds of this rejection we find it difficult directly to oppose anything. These precedents and these doctrines are brought to show the general temper of the courts, their growing liberality, and the general tendency of all their reasonings and all their determinations to set aside all such technical subtleties or formal rules, which might stand in the way of the discovery of truth and the attainment of justice. The cases are adduced for the principles they contain.

The period of the cases and arguments we have cited was that in which large and liberal principles of evidence were more declared, and more regularly brought into system. But they had been gradually improving; and there are few principles of the

[64] Burrow, 1147. Zouch, ex dimiss. Woolston, *v.* Woolston.

later decisions which are not to be found in determinations on cases prior to the time we refer to. Not to overdo this matter, and yet to bring it with some degree of clearness before the House, your Committee will refer but to a few authorities, and those which seem most immediately to relate to the nature of the cause intrusted to them. In Michaelmas, 11 Will. III., the King *v.* the Warden of the Fleet, a witness, who had really been a prisoner, and voluntarily suffered to escape, was produced to prove the escape. To the witness it was objected, that he had given a bond to be a true prisoner, which he had forfeited by escaping: besides, he had been retaken. His testimony was allowed; and by the Court, among other things, it was said, in secret transactions, if any of the parties concerned are not to be, for the necessity of the third, admitted as evidence, it will be impossible to detect the practice: as in cases of the Statute of Hue and Cry, the party robbed shall be a witness to charge the hundred; and in the case of Cooke *v.* Watts in the Exchequer, where one who had been prejudiced by the will was admitted an evidence to prove it forged.[65] So in the case of King *v.* Parris,[66] where a feme covert was admitted as a witness for *fraudulently* drawing her in, when sole, to give a warrant of attorney for confessing a judgment on an unlawful consideration, whereby execution was sued out against her husband, and Holt, Chief-Justice, held that a feme covert could not, by law, be a witness to convict one on an information;

[65] In this single point Holt did not concur with the rest of the judges.

[66] 1st Siderfin, p. 431.

yet, in Lord Audley's case, it being a rape on her person, she was received to give evidence against him, and the Court concurred with him, because it was the best evidence the nature of the thing would allow. This decision of Holt refers to others more early, and all on the same principle; and it is not of this day that this one great principle of eminent public expedience, this moral necessity, "that crimes should not escape with impunity,"[67] has in all cases overborne all the common juridical rules of evidence,—it has even prevailed over the first and most natural construction of acts of Parliament, and that in matters of so penal a nature as high treason. It is known that statutes made, not to open and enlarge, but on fair grounds to straiten proofs, require two witnesses in cases of high treason. So it was understood, without dispute and without distinction, until the argument of a case in the High Court of Justice, during the Usurpation. It was the case of the Presbyterian minister, Love, tried for high treason against the Commonwealth, in an attempt to restore the King. In this trial, it was contended for, and admitted, that one witness to one overt act, and one to another overt act of the same treason, ought to be deemed sufficient.[68] That precedent, though furnished in times from which precedents were cautiously drawn, was received as authority throughout the whole reign of Charles II.; it was equally followed after the Revolution; and at this day it

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[67] Interest reipublicæ ut maleficia ne remaneant impunita.

[68] Love's Trial, State Trials, Vol. II. p. 144, 171 to 173, and 177; and Foster's Crown Law, p. 235.

is undoubted law. It is not so from the natural or technical rules of construction of the act of Parliament, but from the principles of juridical policy. All the judges who have ruled it, all the writers of credit who have written upon it, assign this reason, and this only,—*that treasons, being plotted in secrecy, could in few cases be otherwise brought to punishment.*

The same principle of policy has dictated a principle of relaxation with regard to severe rules of evidence, in all cases similar, though of a lower order in the scale of criminality. It is against fundamental maxims that an accomplice should be admitted as a witness: but accomplices are admitted from the policy of justice, otherwise confederacies of crime could not be dissolved. There is no rule more solid than that a man shall not entitle himself to profit by his own testimony. But an informer, in case of highway robbery, may obtain forty pounds to his own profit by his own evidence: this is not in consequence of positive provision in the act of Parliament; it is a provision of policy, lest the purpose of the act should be defeated.

Now, if policy has dictated this very large construction of an act of Parliament concerning high treason, if the same policy has dictated exceptions to the clearest and broadest rules of evidence in other highly penal causes, and if all this latitude is taken concerning matters for the greater part within our insular bounds, your Committee could not, with safety to the larger and more remedial justice of the Law of Parliament, admit any rules or pretended rules, unconnected and uncontrolled by

circumstances, to prevail in a trial which regarded offences of a nature as difficult of detection, and committed far from the sphere of the ordinary practice of our courts.

If anything of an over-formal strictness is introduced into the trial of Warren Hastings, Esquire, it does not seem to be copied from the decisions of these tribunals. It is with great satisfaction your Committee has found that the reproach of "disgraceful subtleties," inferior rules of evidence which prevent the discovery of truth, of forms and modes of proceeding which stand in the way of that justice the forwarding of which is the sole rational object of their invention, cannot fairly be imputed to the Common Law of England, or to the ordinary practice of the courts below.

CIRCUMSTANTIAL EVIDENCE, ETC

The rules of evidence in civil and in criminal cases, in law and in equity, being only reason methodized, are certainly the same. Your Committee, however, finds that the far greater part of the law of evidence to be found in our books turns upon questions relative to civil concerns. Civil cases regard property: now, although property itself is not, yet almost everything concerning property and all its modifications is, of artificial contrivance. The rules concerning it become more positive, as connected with positive institution. The legislator therefore always, the jurist frequently, may ordain certain methods by which alone they

will suffer such matters to be known and established; because their very essence, for the greater part, depends on the arbitrary conventions of men. Men act on them with all the power of a creator over his creature. They make fictions of law and presumptions of (*præsumptiones juris et de jure*) according to their ideas of utility; and against those fictions, and against presumptions so created, they do and may reject all evidence. However, even in these cases there is some restraint. Lord Mansfield has let in a liberal spirit against the fictions of law themselves; and he declared that he would do what in one case[69] he actually did, and most wisely, that he would admit evidence against a fiction of law, when the fiction militated against the policy on which it was made.

Thus it is with things which owe their existence to men; but where the subject is of a physical nature, or of a moral nature, independent of their conventions, men have no other reasonable authority than to register and digest the results of experience and observation. Crimes are the actions of physical beings with an evil intention abusing their physical powers against justice and to the detriment of society: in this case fictions of law and artificial presumptions (*juris et de jure*) have little or no place. The presumptions which belong to criminal cases are those natural and popular presumptions which are only observations turned into maxims, like adages and apophthegms, and are admitted (when their grounds are established) in the place of proof, where

[69] Coppendale *v.* Bridgen, 2 Burrow, 814.

better is wanting, but are to be always over turned by counter proof.

These presumptions mostly go to the *intention*. In all criminal cases, the crime (except where the law itself implies malice) consists rather in the intention than the action. Now the intention is proved but by two ways: either, 1st, by confession,—this first case is rare, but simple,—2dly, by circumstantial proof,—this is difficult, and requires care and pains. The connection of the intention and the circumstances is plainly of such a nature as more to depend on the sagacity of the observer than on the excellence of any rule. The pains taken by the Civilians on that subject have not been very fruitful; and the English law-writers have, perhaps as wisely, in a manner abandoned the pursuit. In truth, it seems a wild attempt to lay down any rule for the proof of intention by circumstantial evidence. All the acts of the party,—all things that explain or throw light on these acts,—all the acts of others relative to the affair, that come to his knowledge, and may influence him,—his friendships and enmities, his promises, his threats, the truth of his discourses, the falsehood of his apologies, pretences, and explanations, his looks, his speech, his silence where he was called to speak,—everything which tends to establish the connection between all these particulars,—every circumstance, precedent, concomitant, and subsequent, become parts of circumstantial evidence. These are in their nature infinite, and cannot be comprehended within any rule or brought under any classification.

Now, as the force of that presumptive and conjectural proof rarely, if ever, depends on one fact only, but is collected from the number and accumulation of circumstances concurrent in one point, we do not find an instance, until this trial of Warren Hastings, Esquire, (which has produced many novelties,) that attempts have been made by any court to call on the prosecutor for an account of the purpose for which he means to produce each particle of this circumstantial evidence, to take up the circumstances one by one, to prejudge the efficacy of each matter separately in proving the point,—and thus to break to pieces and to garble those facts, upon the multitude of which, their combination, and the relation of all their component parts to each other and to the culprit, the whole force and virtue of this evidence depends. To do anything which can destroy this collective effect is to deny circumstantial evidence.

Your Committee, too, cannot but express their surprise at the particular period of the present trial when the attempts to which we have alluded first began to be made. The two first great branches of the accusation of this House against Warren Hastings, Esquire, relate to public and notorious acts, capable of direct proof,—such as the expulsion of Cheyt Sing, with its consequences on the province of Benares, and the seizure of the treasures and jaghires of the Begums of Oude. Yet, in the proof of those crimes, your Committee cannot justly complain that we were very narrowly circumscribed in the production of much circumstantial as well as positive evidence. We did not find

any serious resistance on this head, till we came to make good our charges of secret crimes,—crimes of a class and description in the proof of which all judges of all countries have found it necessary to relax almost all their rules of competency: such crimes as peculation, pecuniary frauds, extortion, and bribery. Eight out of nine of the questions put to the Judges by the Lords, in the first stage of the prosecution, related to circumstances offered in proof of these secret crimes.

Much industry and art have been used, among the illiterate and unexperienced, to throw imputations on this prosecution, and its conduct, because so great a proportion of the evidence offered on this trial (especially on the latter charges) has been circumstantial. Against the prejudices of the ignorant your Committee opposes the judgment of the learned. It is known to them, that, when this proof is in its greatest perfection, that is, when it is most abundant in circumstances, it is much superior to positive proof; and for this we have the authority of the learned judge who presided at the trial of Captain Donellan. "On the part of the prosecution, a great deal of evidence has been laid before you. It is *all* circumstantial evidence, and in its nature it must be so: for, in cases of this sort, no man is weak enough to commit the act in the presence of other persons, or to suffer them to see what he does at the time; and therefore it can only be made out by circumstances, either before the committing of the act, at the time when it was committed, or subsequent to it. And a presumption, which necessarily arises from circumstances, is

very often more convincing and more satisfactory than any other kind of evidence: because it is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt, without affording opportunities of contradicting a great part, if not all, of these circumstances. But if the circumstances are such as, when laid together, bring conviction to your minds, it is then fully equal, if not, as I told you before, *more* convincing than positive evidence." In the trial of Donellan no such selection was used as we have lately experienced; no limitation to the production of every matter, before, at, and after the fact charged. The trial was (as we conceive) rightly conducted by the learned judge; because secret crimes, such as secret assassination, poisoning, bribery, peculation, and extortion, (the three last of which this House has charged upon Mr. Hastings,) can very rarely be proved in any other way. That way of proof is made to give satisfaction to a searching, equitable, and intelligent mind; and there must not be a failure of justice. Lord Mansfield has said that he did not know a case in which proof might not be supplied.[70]

Your Committee has resorted to the trial of Donellan, and they have and do much rely upon it, first, on account of the known learning and ability of the judge who tried the cause, and the particular attention he has paid to the subject of evidence, which forms a book in his treatise on *Nisi Prius*;—next, because, as the trial went *wholly* on circumstantial evidence, the proceedings in

[70] Vide supra.

it furnish some of the most complete and the fullest examples on that subject;—thirdly, because the case is recent, and the law cannot be supposed to be materially altered since the time of that event.

Comparing the proceedings on that trial, and the doctrines from the bench, with the doctrines we have heard from the woolsack, your Committee cannot comprehend how they can be reconciled. For the Lords compelled the Managers to declare for what purpose they produced each separate member of their circumstantial evidence: a thing, as we conceive, not usual, and particularly not observed in the trial of Donellan. We have observed in that trial, and in most others which we have had occasion to resort to, that the prosecutor is suffered to proceed narratively and historically, without interruption. If, indeed, it appears on the face of the narration that what is represented to have been said, written, or done did not come to the knowledge of the prisoner, a question sometimes, but rarely, has been asked, whether the prisoner could be affected with the knowledge of it. When a connection with the person of the prisoner has been in any way shown, or even promised to be shown, the evidence is allowed to go on without further opposition. The sending of a sealed letter,—the receipt of a sealed letter, inferred from the delivery to the prisoner's servant,—the bare possession of a paper written by any other person, on the presumption that the contents of such letters or such paper were known to the prisoner,—and the being present when anything was said or

done, on the presumption of his seeing or hearing what passed, have been respectively ruled to be sufficient. If, on the other hand, no circumstance of connection has been proved, the judge, in summing up, has directed the jury to pay no regard to a letter or conversation the proof of which has so failed: a course much less liable to inconvenience, where the same persons decide both the law and the fact.[71]

To illustrate the difficulties to which your Committee was subjected on this head, we think it sufficient to submit to the House (reserving a more full discussion of this important point to another occasion) the following short statement of an incident which occurred in this trial.

By an express order of the Court of Directors, (to which, by the express words of the act of Parliament under which he held his office, he was ordered to yield obedience,) Mr. Hastings and his colleagues were directed to make an inquiry into all offences of bribery and corruption in office. On the 11th of March a charge in writing of bribery and corruption in office was brought against himself. On the 13th of the same month, the accuser, a man of high rank, the Rajah Nundcomar, appears personally before the Council to make good his charge against Mr. Hastings before his own face. Mr. Hastings thereon fell into a very intemperate heat, obstinately refused to be present

[71] Girdwood's Case, Leach, p. 128. Gordon's Case, Ibid. p. 245. Lord Preston's Case, St. Tr. IV. p. 439. Layer's Case, St. Tr. VI. p. 279. Foster's Crown Law, p. 198. Canning's Trial, St. Tr. X. p. 263, 270. Trial of the Duchess of Kingston, St. Tr. XI. p. 244. Trial of Huggins, St. Tr. IX. p. 119, 120, 135.

at the examination, attempted to dissolve the Council, and contumaciously retired from it. Three of the other members, a majority of the Council, in execution of their duty, and in obedience to the orders received under the act of Parliament, proceeded to take the evidence, which is very minute and particular, and was entered in the records of the Council by the regular official secretary. It was afterwards read in Mr. Hastings's own presence, and by him transmitted, under his own signature, to the Court of Directors. A separate letter was also written by him, about the same time, desiring, on his part, that, in any inquiry into his conduct, "not a single word should escape observation." This proceeding in the Council your Committee, in its natural order, and in a narrative chain of circumstantial proof, offered in evidence. It was not permitted to be read; and on the 20th and 21st of May, 1789, we were told from the woolsack, "that, when a paper is not evidence by itself," (such this part of the Consultation, it seems, was reputed,) "a party who wishes to introduce a paper of that kind is called upon not only to state, but to make out on proof, *the whole of the grounds upon which he proceeds to make that paper proper evidence*; that the evidence that is produced must be *the demeanor* of the party respecting that paper; and it is the connection between them, *as material to the charge depending*, that will enable them to be produced."

Your Committee observes, that this was not a paper *foreign* to the prisoner, and sent to him as *a letter*, the receipt of which, and his conduct thereon, were to be brought home to him, to

infer his guilt from his demeanor. It was an office document of his own department, concerning himself, and kept by officers of his own, and by himself transmitted, as we have said, to the Court of Directors. Its proof was in the record. The charge made against him, and his demeanor on being acquainted with it, were not in separate evidence. They all lay together, and composed a connected narrative of the business, authenticated by himself.

In that case it seems to your Committee extremely irregular and preposterous to demand previous and extraneous proofs of the demeanor of the party respecting the paper, and the connection between them, as *material to the charge* depending; for this would be to try what the effect and operation of the evidence would be on the issue of the cause, before its production.

The doctrine so laid down demands that every several circumstance should in itself be conclusive, or at least should afford a violent presumption: it must, we were told, without question, be material to the charge depending. But, as we conceive, its materiality, more or less, is not in the first instance to be established. To make it admissible, it is enough to give proof, or to raise a legal inference, of its connection both with the charge depending and the person of the party charged, where it does not appear on the face of the evidence offered. Besides, by this new doctrine, the materiality required to be shown must be decided from a consideration, not of the whole circumstance, but in truth of one half of the circumstance,—of a demeanor

unconnected with and unexplained by that on which it arose, though the connection between the demeanor of the party and the paper is that which must be shown to be material. Your Committee, after all they have heard, is yet to learn how the full force and effect of any demeanor, as evidence of guilt or innocence, can be known, unless it be also fully known *to what that demeanor applied*,—unless, when a person did or said anything, it be known, not generally and abstractedly, that a paper was read to him, but particularly and specifically *what were the contents of that paper*: whether they were matters lightly or weightily alleged,—within the power of the party accused to have confuted on the spot, if false,—or such as, though he might have denied, he could not instantly have disproved. The doctrine appeared and still appears to your Committee to be totally abhorrent from the genius of circumstantial evidence, and mischievously subversive of its use. We did, however, offer that extraneous proof which was demanded of us; but it was refused, as well as the office document.

Your Committee thought themselves the more bound to contend for every mode of evidence *to the intention,* because in many of the cases the gross fact was admitted, and the prisoner and his counsel set up pretences of public necessity and public service for his justification. No way lay open for rebutting this justification, but by bringing out all the circumstances attendant on the transaction.

ORDER AND TIME OF PRODUCING EVIDENCE

Your Committee found great impediment in the production of evidence, not only on account of the general doctrines supposed to exist concerning its inadmissibility, drawn from its own alleged natural incompetency, or from its inapplicability under the pleading of the impeachment of this House, but also from the mode of proceeding in bringing it forward. Here evidence which we thought necessary to the elucidation of the cause was not suffered, upon the supposed rules of *examination in chief and cross-examination*, and on supposed rules forming a distinction between evidence *originally* produced on the charge and evidence offered on *the reply*.

On all these your Committee observes in general, that, if the rules which respect the substance of the evidence are (as the great lawyers on whose authority we stand assert they are) no more than rules of convenience, much more are those subordinate rules which regard the order, the manner, and the time of the arrangement. These are purely arbitrary, without the least reference to any fixed principle in the nature of things, or to any settled maxim of jurisprudence, and consequently are variable at every instant, as the conveniencies of the cause may require.

We admit, that, in the order of mere arrangement, there is a difference between examination of witnesses in chief and cross-

examination, and that in general these several parts are properly cast according to the situation of the parties in the cause; but there neither is nor can be any precise rule to discriminate the exact bounds between examination and cross-examination. So as to time there is necessarily some limit, but a limit hard to fix. The only one which can be fixed with any tolerable degree of precision is when the judge, after fully hearing all parties, is to consider of his verdict or his sentence. Whilst the cause continues under hearing in any shape, or in any stage of the process, it is the duty of the judge to receive every offer of evidence, apparently material, suggested to him, though the parties themselves, through negligence, ignorance, or corrupt collusion, should not bring it forward. A judge is not placed in that high situation merely as a passive instrument of parties. He has a duty of his own, independent of them, and that duty is to investigate the truth. There may be no prosecutor. In our law a permanent prosecutor is not of necessity. The Crown prosecutor in criminal cases is a grand jury; and this is dissolved instantly on its findings and its presentments. But if no prosecutor appears, (and it has happened more than once,) the court is obliged through its officer, the clerk of the arraigns, to examine and cross-examine every witness who presents himself; and the judge is to see it done effectually, and to act his own part in it,—and this as long as evidence shall be offered within the time which the mode of trial will admit.

Your Committee is of opinion, that, if it has happened that

witnesses, or other kinds of evidence, have not been frequently produced after the closing of the prisoner's defence, or such evidence has not been in reply given, it has happened from the peculiar nature of our common judicial proceedings, in which all the matter of evidence must be presented whilst the bodily force and the memory or other mental faculties of men can hold out. This does not exceed the compass of one natural day, or thereabouts: during that short space of time new evidence very rarely occurs for production by any of the parties; because the nature of man, joined to the nature of the tribunals, and of the mode of trial at Common Law, (good and useful on the whole,) prescribe limits which the mere principles of justice would of themselves never fix.

But in other courts, such as the Court of Chancery, the Courts of Admiralty Jurisdiction, (except in prize causes under the act of Parliament,) and in the Ecclesiastical Courts, wherein the trial is not by an inclosed jury in those courts, such strait limits are not of course necessary: the cause is continued by many adjournments; as long as the trial lasts, new witnesses are examined (even after the regular stage) for each party, on a special application under the circumstances to the sound discretion of the court, where the evidence offered is newly come to the knowledge or power of the party, and appears on the face of it to be material in the cause. *Even after hearing*, new witnesses have been examined, or former witnesses reëxamined, not as the right of the parties,

but *ad informandam conscientiam judicis*.[72] All these things are not unfrequent in some, if not in all of these courts, and perfectly known to the judges of Westminster Hall; who cannot be supposed ignorant of the practice of the Court of Chancery, and who sit to try appeals from the Admiralty and Ecclesiastical Courts as delegates.

But as criminal prosecutions according to the forms of the Civil and Canon Law are neither many nor important in any court of this part of the kingdom, your Committee thinks it right to state the undisputed principle of the Imperial Law, from the great writer on this subject before cited by us,—from Carpzovius. He says, "that a doubt has arisen, whether, evidence being once given in a trial on a public prosecution, (*in processu inquisitorio*,) and the witnesses being examined, it may be allowed to form other and new articles and to produce new witnesses." Your Committee must here observe, that the *processus inquisitorius* is that proceeding in which the prosecution is carried on in the name of the judge acting *ex officio*, from that duty of his office which is called the *nobile officium judicis*. For the judge under the Imperial Law possesses both those powers, the inquisitorial and the judicial, which in the High Court of Parliament are more aptly divided and exercised by the different Houses; and in this kind of process the House will see that Carpzovius couples the production of new witnesses and the forming of new articles

[72] Harrison's Practice of Chancery, Vol. II. p. 46. 1 Ch. Ca. 228. 1 Ch. Ca. 25. Oughton, Tit. 81, 82, 83. Do. Tit. 116. Viner, Tit. Evidence (P. a.).

(the undoubted privilege of the Commons) as intimately and necessarily connected. He then proceeds to solve the doubt. "Certainly," says he, "there are authors who deny, that, after publication of the depositions, any new witnesses and proofs that can affect the prisoner ought to be received; which," says he, "is true in a case where a private prosecutor has intervened, who produces the witnesses. But if the judge proceeds by way of inquisition *ex officio*, then, even after the completion of the examination of witnesses against the prisoner, new witnesses may be received and examined, and, on new grounds of suspicion arising, new articles may be formed, according to the common opinion of the doctors; and as it is the most generally received, so it is most agreeable to reason."[73] And in another chapter, relative to the ordinary criminal process by a private prosecutor, he lays it down, on the authority of Angelus, Bartolus, and others, that, after the right of the party prosecuting is expired, the judge, taking up the matter *ex officio*, may direct new witnesses and new proofs, even after publication.[74] Other passages from the same writer and from others might be added; but your Committee trusts that what they have produced is sufficient to show the general principles of the Imperial Criminal Law.

The High Court of Parliament bears in its modes of proceeding a much greater resemblance to the course of the Court of Chancery, the Admiralty, and Ecclesiastical Courts,

[73] Carpz. Pract. Saxon. Crimin. Pars III. Quest. CXIV. No. 13.

[74] Ibid. Quest. CVI. No. 89.

(which are the King's courts too, and their law the law of the land,) than to those of the Common Law. The accusation is brought into Parliament, at this very day, by *exhibiting articles*; which your Committee is informed is the regular mode of commencing a criminal prosecution, where the office of the judge is promoted, in the Civil and Canon Law courts of this country. The answer, again, is usually specific, both to the fact and the law alleged in each particular article; which is agreeable to the proceeding of the Civil Law, and not of the Common Law.

Anciently the resemblance was much nearer and stronger. Selden, who was himself a great ornament of the Common Law, and who was personally engaged in most of the impeachments of his time, has written expressly on the judicature in Parliament. In his fourth chapter, intituled, *Of Witnesses*, he lays down the practice of his time, as well as of ancient times, with respect to the proof by examination; and it is clearly a practice more similar to that of the Civil than the Common Law. "The practice at this day," says he, "is to swear the witnesses in open House, and then to examine them there, *or at a committee*, either upon *interrogatories* agreed upon in the House, or such as the committee in their discretion shall demand. Thus it was in ancient times, as shall appear by the precedents, so many as they are, they being very sparing to record those ceremonies, which I shall briefly recite: I then add those of later times."

Accordingly, in times so late as those of the trial of Lord

Middlesex,[75] upon an impeachment of the Commons, the whole course of the proceeding, especially in the mode of adducing the evidence, was in a manner the same as in the Civil Law: depositions were taken, and publication regularly passed: and on the trial of Lord Strafford, both modes pointed out by Selden seem to have been indifferently used.

It follows, therefore, that this high court (bound by none of their rules) has a liberty to adopt the methods of any of the legal courts of the kingdom at its discretion; and in *sound* discretion it ought to adopt those which bear the nearest resemblance to its own constitution, to its own procedure, and to its exigencies in the promotion of justice. There are conveniencies and inconveniencies both in the shorter and the longer mode of trial. But to bring the methods observed (if such are in fact observed) in the former, only from necessity, into the latter, by choice, is to load it with the inconveniency of both, without the advantages of either. The chief benefit of any process which admits of adjournments is, that it may afford means of fuller information and more mature deliberation. If neither of the parties have a strict right to it, yet the court or the jury, as the case may be, ought to demand it.

Your Committee is of opinion, that all rules relative to laches or neglects in a party to the suit, which may cause nonsuit on the one hand or judgment by default in the other, all things which cause the party *cadere in jure*, ought not to be adhered

[75] 22 Jac. I. 1624.

to in the utmost rigor, even in civil cases; but still less ought that spirit which takes advantage of lapses and failures on either part to be suffered to govern in causes criminal. "Judges ought to *lean* against every attempt to nonsuit a plaintiff on objections which have no relation to the real merits. It is unconscionable in a defendant to take advantage of the *apices litigandi*: against such objections *every possible presumption ought to be made which ingenuity can suggest*. How disgraceful would it be to the administration of justice to allow chicane to obstruct right!"[76] This observation of Lord Mansfield applies equally to every means by which, indirectly as well as directly, the cause may fail upon any other principles than those of its merits. He thinks that all the resources of ingenuity ought to be employed to baffle chicane, not to support it. The case in which Lord Mansfield has delivered this sentiment is merely a civil one. In civil causes of *meum et tuum*, it imports little to the commonwealth, whether *Titus* or *Mævius* profits of a legacy, or whether *John à Nokes* or *John à Stiles* is seized of the manor of *Dale*. For which reason, in many cases, the private interests of men are left by courts to suffer by their own neglects and their own want of vigilance, as their fortunes are permitted to suffer from the same causes in all the concerns of common life. But in crimes, where the prosecution is on the part of the public, (as all criminal

[76] Morris *v.* Pugh, Burrow, Vol. III. p. 1243. See also Vol. II. Alder *v.* Chip; Vol. IV. Dickson *v.* Fisher; Grey *v.* Smythyes.—N.B. All from the same judge, and proceeding on the same principles.

prosecutions are, except appeals,) the public prosecutor ought not to be considered as a plaintiff in a cause of *meum et tuum*; nor the prisoner, in such a cause, as a common defendant. In such a cause the state itself is highly concerned in the event: on the other hand, the prisoner may lose life, which all the wealth and power of all the states in the world cannot restore to him. Undoubtedly the state ought not to be weighed against justice; but it would be dreadful indeed, if causes of such importance should be sacrificed to petty regulations, of mere secondary convenience, not at all adapted to such concerns, nor even made with a view to their existence. Your Committee readily adopts the opinion of the learned Ryder, that it would be better, if there were no such rules, than that there should be no exceptions to them. Lord Hardwicke declared very properly, in the case of the Earl of Chesterfield against Sir Abraham Janssen, "that political arguments, in the fullest sense of the word, as they concerned the government of a nation, must be, and always have been, of great weight in the consideration of this court. Though there be no *dolus malus*

Конец ознакомительного фрагмента.