

FOR LADY PAMELA FITZGERALD AND
HER CHILDREN.

[AGAINST ATTAINER BILL.]

BAR OF THE IRISH COMMONS.

IN COMMITTEE.

August 20th, 1798,

Soon after the death of Lord Edward Fitzgerald his brother Henry wrote to Lord Lieutenant Camden a letter ending thus:—"One word more, and I have done, as I alone am answerable for this letter. Perhaps you will still take compassion on his wife and three babes, the eldest not four years old. The opportunity that I offer is to protect their estate for them from violence and plunder. You can do it if you please."

The appeal was vain, and on the 27th of July, a bill was introduced into the Commons, to attaint Lord Edward Fitzgerald, Cornelius Grogan, and Bagenal Harvey. It was read a second time on the 9th of August, and, on the same day, Lord Caulfield presented Lady Pamela Fitzgerald's petition against it. On the 13th Arthur Moore, in a sound and feeling speech, moved a clause to exempt the heirs from attaint. Barrington and Plunket supported him, but the motion was lost. On the 14th the case was gone into against Harvey, and, on the 18th, witnesses were heard at the bar for the bill, the principal one being Reynolds of Kilkea. He proved the same facts as on Bond's trial, with some special ones as to Lord Edward. There was no doubt of the facts or the evidence.

On the 20th CURRAN was heard against the bill, and spoke as follows:—

I appear in support of a petition presented on behalf of Lord Henry Fitzgerald, brother of the deceased Lord Edward Fitzgerald: of Pamela, his widow; Edward, his only son and heir, an infant of the age of four years; Pamela, his eldest daughter, of the age of two years; and Lucy, his youngest child, of the age of three months, against the bill of attainer now before the committee.

The bill of attainer has formed the division of the subject into two parts. It asserts the fact of the late Lord Edward's treason, and, secondly, it purports to attaint him, and to vest his property in the crown. I shall follow the same order.

As to the first part of the bill, I must remark upon the strange looseness of its allegation. The bill states that he had, during his life, and since the 1st of November last, committed several acts of high treason, without stating what, or when, or where, or with whom: it then affects to state the different species of treason of which he had been guilty; namely, conspiring to levy war, and endeavouring to persuade the enemies of the King to invade the country. The latter allegation they did not attempt to prove. The conspiring, without actually levying war, is clearly no high treason, and has been repeatedly so determined.

Upon this previous and important question, namely, the guilt of Lord Edward (without the full

proof of which no punishment can be just), I was asked by the committee, if I had any defence to go into?

I was confounded by a question which I could not answer; but upon a very little reflection, I saw in that very confusion the most conclusive proof of the injustice of the bill. For what can be more flagrantly unjust, than to inquire into a fact of the truth or falsehood of which no human being can have knowledge, save the informer who comes forward to assert it.

Sir, I now answer the question.

I have no defensive evidence! I have no case! it is impossible I should: I have often of late gone to the dungeon of the captive, but never have I gone to the grave of the dead, to receive instructions for his defence, nor in truth have I ever before been at the trial of a dead man! I offer, therefore, no evidence upon this inquiry: against the perilous example of which I do protest on behalf of the public, and against the cruelty and injustice of which I do protest in the name of the dead father, whose memory is sought to be dishonoured; and of his infant orphans, whose bread is sought to be taken away.

Some observations, and but a few, upon the assertions of Reynolds, I will make. I do verily believe him in this instance, even though I have heard him assert it upon his oath. By his own confession he is an informer—a bribed informer: a man whom seven respectable witnesses have sworn

in a court of justice, upon their oaths, not to be credible on his oath; a man upon whose single testimony no jury ever did, nor ever ought, to pronounce a verdict of guilty; a kind of man to whom the law resorts with abhorrence, and from necessity, in order to set the criminal against the crime; but who is made use of by the law for the same reason that the most noxious poisons are resorted to in medicine.

If such be the man, look for a moment at his story; he confines himself to mere conversation only, with a dead man! He ventures not to introduce any third person, living or even dead! he wishes, indeed, to asperse the conduct of Lady Edward Fitzgerald; but he well knew that, even were she in the country, she could not be adduced as a witness to disprove him. See, therefore, if there be any one assertion to which credit can be given, except this, that he has sworn and forsworn, that he is a traitor; that he has received five hundred guineas to be an informer; and that his general reputation is, to be utterly unworthy of credit.

As to the papers, it is sufficient to say, that no one of them, nor even all of them, were even asserted to contain any positive proof against Lord Edward; that the utmost that could be deduced from them is nothing more than doubt or conjecture, which, had Lord Edward been living, might have been easily explained, to explain which is now impossible, and upon which to found a sentence of guilt

would be contrary to every rule of justice or humanity?

Is this bill of attainder warranted by the principles of reason, the principles of forfeiture in the law of treason, or the usage of parliament in bills of attainder? The subject is, of necessity, very long; it has nothing to attract attention, but much to repel it. But I trust that the anxiety of the committee for justice, notwithstanding any dulness either in the subject or in the speaker, will secure to me their attention.

Mr. CURRAN then went into a minute detail of the principles of the law of forfeiture for high treason, of which no report appears to exist.

The laws of the Persians and Macedonians extended the punishment of a traitor to the extinction of all his kindred. The law subjected the property and life of every man to the most complicated despotism, because the loyalty of every individual of his kindred was as much a matter of wild caprice, as the will of the most arbitrary despot could be.

This principle was never adopted in any period of our law. At the earliest times of the Saxons, the law of treason acted directly only on the person of the criminal; it took away from him what he actually had to forfeit, his life and property. But as to his children, the law disclaimed to affect them directly; they suffered, but they suffered by a

necessary consequence of their father's punishment, which the law could not prevent, and never directly intended. It took away the inheritance, because the criminal, at the time of taking it away, had absolute dominion over it, and might himself have conveyed it away from his family. This is proved by the instances of conditional fees at the common law, and estates tail since the statute *de Donis*. In the former case the tenant did not forfeit until he had acquired an absolute dominion over the estate by the performance of the condition. Neither in the latter case is the estate tail made forfeitable, until the tenant in tail has become enabled in two ways to obtain the absolute dominion, by a common recovery, or by a fine. Until then the issue in tail, though not only the children of the tenant, but taking from him his estate by descent, could not be disinherited by his crime. Here is a decisive proof, that even the early law of treason never intended to extend the punishment of the traitor to his children as such; but even this direct punishment upon the traitor himself, is to take effect only upon a condition suggested by the unalterable rules of natural justice, namely, a judgment founded upon conviction, against which he might have made his defence; or upon an outlawry, where he refused to abide his trial. In that case he is punished, because during his life the fact was triable; because during his life the punishment could act directly upon his person; because during

his life the estate was his to convey, and therefore his to forfeit.

But if he died without attainder, a fair trial was impossible, because a fair defence was impossible; a direct punishment upon his person was impossible, because he could not feel it; and a confiscation of his estate was equally impossible, because it was then no longer his, but was vested in his heir, to whom it belonged by a title as good as that by which it had ever belonged to him in his lifetime, namely, the known law of the country.

As to a posthumous forfeiture of lands, that appears to have been attempted by inquest after death. But so early as the 8th of Edward III., the legality of such presentments was disallowed by the judges. And there is no lawyer at this day who can venture to deny that, since the 25th and 34th of Edward III., no estate of inheritance can regularly be forfeited, save by attainder in the life of the party; therefore, the law of the country being that, unless the descent is interrupted by an actual attainder in the lifetime of the criminal, it becomes vested in the heir, the moment it did descend, the heir became seized by a title the most favoured in law. He might, perhaps, have been considered as a purchaser for the most valuable consideration, his mother's marriage, of which he was the issue. Why, then, was posthumous attainder excluded from the protective law of treason? Why has it never since been enacted by a prospective law?

Clearly for this reason, that in its own nature it is inhuman, impolitic, and unjust.

But, it is said, this may be done by a bill of attainder; that the parliament is omnipotent, and, therefore, may do it; and that it is a proceeding familiar to our constitution. As to the first, it cannot be denied that the parliament is the highest power of the country, but an argument from the existence of a power to the exercise of it in any particular instance, is ridiculous and absurd. From such an argument it would follow, that it must do whatever it is able to do; and that it must be stripped of the best of all power—the power of abstaining from what is wrong.

Such a bill ought not to pass. First, because every argument against the justice or the policy of a prospective, is tenfold strong against a retrospective law; because every *ex post facto* law is in itself an exercise of despotic power. When it alters the law of property, it is peculiarly dangerous; when it punishes the innocent for the guilty, it is peculiarly unjust; when it affects to do that which the criminal law, as it now stands, could not do, it acts peculiarly against the spirit of the constitution; which is to contract and restrain penal law by the strictest construction, and not to add to it by vindictive innovation. But, I am warranted to go much further, upon the authority of the British legislature itself, and to say, that the principle of forfeiture, even in the prospective law, is

altogether repugnant to the spirit of the British constitution.

The statutes of Anne and of George the Second have declared that, after the death of the Pretender and of his sons, no such forfeiture should or ought to exist. In favour of that high authority, every philosophical and theoretic writer, Baron Montesquieu, the Marquis Beccaria, and many others, might be cited; against it, no one writer of credit or character that has come to my hands. Of the late Mr. Yorke I do not mean to speak with disrespect; he was certainly a man of learning and genius; but it must be observed, he wrote for a party and for a purpose; he wrote against the repeal of the law of forfeiture, more than for its principle; of that principle he expressly declines entering into a direct defence. But for the extending of that principle farther than it is already law, the slightest insinuation cannot be found in his treatise.

But it is asserted to be the usage of the constitution in both countries.

Of bills of attainder, the instances are certainly many, and most numerous in the worst times, and rising above each other in violence and injustice. The most tolerable of them was that which attainted the man who fled from justice, which gave him a day to appear, had he chosen to do so, and operated as a legislative outlawry. That kind of act has been passed, though but rarely, within the

present century. There have been many acts of attainer when the party was willing but not permitted to appear and take his trial. In these two kinds of bills of attainer, however, it is to be observed, that they do not any violence to the common law, by the declaring of a new crime or a new punishment, but only by creating a new jurisdiction, and a new order of proceedings.

Of the second kind that has been mentioned, many instances are to be found in the violent reigns of the Plantagenets and Tudors, and many of them revised by the wisdom of cooler and juster times. Of such unhappy monuments of human frailty, Lord Coke said, "*auferat oblivio, si non silentium tegat.*" I beg leave to differ in that from the learned judge: I say, let the record upon which they are written be indelible and immortal: I say, let the memory that preserves them have a thousand tongues to tell them; and when justice, even late and slow, shall have robbed their fellow principle of life, let them be interred in a monument of negative instruction to posterity for ever.

A third kind of bill of attainer might be found, which for the first time declared the law, and tainted the criminal upon it: such was the attainer of Strafford. A fourth, which did not change the law as to the crime, but as to the evidence upon which it was to be proved; such was the attainer of Sir John Fenwick.

Of these two last species of attainer, no lawyer

has ever spoken with respect; they were the cruel effect of the rancour and injustice of party spirit; nor could any thing be said in their excuse, except that they were made for the direct punishment of the actual criminals, and whilst they were yet living.

The only other attainer that remains possible to be added to this catalogue, is that of a bill like the present, which affects to try after a party's death, when trial is impossible; to punish guilt, when punishment is impossible; to inflict punishment where crime is not even pretended; change the settled law of property; to confiscate the widow's pittance! to plunder the orphan's cradle! and to violate the religion of the dead man's grave!

For this, too, there was a precedent: but for the honour of humanity let it be remembered, that an hundred and forty years have elapsed in which that precedent has not been thought worthy of imitation in Great Britain. I mean the attainer of the regicides. Upon the Restoration, four of them were included in that bill of attainer, which was passed after their death.

But, what were the circumstances of that period?

A king restored, and by his nature disposed to mercy; a ministry of uncommon wisdom, feeling that the salvation of the state could be secured only by mildness and conciliation; a bigoted, irritated, and interested faction in parliament; the public mind in the highest state of division and agitation.

For what, then, is that act of attainer resorted to as a precedent? Surely it cannot be as a precedent of that servile paroxysm of simulated loyalty, with which the same men, who a few days before had shouted after the wheels of the good Protector, now raked out the grave of the traitorous usurper, and dragged his wretched carcase through the streets; that servile and simulated loyalty, which affected to bow in obsequious admiration of the salutary lenity which their vindictive folly was labouring to frustrate: that servile and interested hypocrisy, which gave a hollow and faithless support to the power of the monarch, utterly regardless alike of his character or his safety.

That the example, which this act of attainer held forth, was never respected, appears from this, that it never has been followed in Great Britain, although that country has since that time been agitated by one revolution, and vexed by two rebellions. So far from extending forfeiture or attainer beyond the existing law, the opinion of that wise and reflecting country was gradually maturing into a dislike of the principle altogether; until, at last, by the statutes of Anne and George II., she declared that no forfeiture or attainer for treason should prejudice any other than the actual offender, nor work any injury to the heir or other person, after the death of the pretenders to the throne. Why has Great Britain thus condemned

the principle of forfeiture? Because she felt it to be unjust, and because she found it to be ineffectual.

Need I prove the impolicy of severe penal laws? They have ever been found more to exasperate than to restrain. When the infliction is beyond the crime, the horror of the guilt is lost in the horror of the punishment; the sufferer becomes an object of commiseration; and the injustice of the state, of public odium. It was well observed that, in England, the highwayman never murdered, because there the offender was not condemned to torture! But, in France, where the offender was broken on the wheel, the traveller seldom or never escaped!* What, then, is it in England that sends the traveller home with life, but the comparative mildness of English law? What, but the merciless cruelty of the French law, that gives the atrocious aggravation of murder to robbery? The multiplication of penal laws lessens the value of life, and when you lessen the value of life, you lessen the fear of death.

Look to the history of England upon this subject with respect to treason. Notwithstanding all its formidable array of death, of Saxon forfeiture, and of feudal corruption of blood; in what country do you read of more treasons or of more rebellions? And why? Because these terrors do not restrain the traitor. Beyond all other delinquents, he is likely to be a person of that ardent, enthusiastic, and

* Beccaria on Crimes and Punishments.

intrepid spirit that is roused into more decisive and desperate daring by the prospect of peril.

Mr. Yorke thinks the child of the traitor may be reclaimed to his loyalty by the restitution of his estate. Mr. Yorke, perhaps, might have reasoned better if he had looked to the still greater likelihood of making him a deadly enemy to the state by the ignominy inflicted on his father, and by the loss of his own inheritance. How keenly did Hannibal pursue his vengeance which he had sworn against Rome? How much more enthusiastically would he have pursued his purpose, had that oath been taken upon a father's grave, for the avenging of a father's sufferings, for the avenging of a father's wrongs!

If I am called upon to give more reasons why this precedent has not been for more than a century and a half repeated, I will say, that a bill of attainer is the result of an unnatural union of the legislative and judicial functions; in which the judicial has no law to restrain it; in which the legislative has no rule to guide it, unless passion and prejudice, which reject all rule and law, be called rule and law. It puts the lives and properties of men completely at the mercy of an arbitrary and despotic power.

Such were the acts of posthumous attainer in Ireland, in the reign of the arbitrary Elizabeth, who used these acts as a mere mode of robbing an Irish subject, for the benefit of an English minion. Such was the act of the 9th William III., not passed for the same

odious and despicable purpose, but for a purpose equally arbitrary and unjust—the purpose of transferring the property of the country from persons professing one religion into the hands of those professing another—a purpose manifested and avowed by the remarkable clause in that act, which saves the inheritance to the heir of the traitor, provided that heir be a Protestant! Nor was it so brutally tyrannical in its operation, inasmuch as it gave a right to traverse and a trial by jury to every person claiming a right; and protected the rights of infants, until they should be of age, and capable to assert those rights.

There are yet other reasons why that precedent of the regicides was not followed in Great Britain. A government that means honestly will appeal to the affections, not to the fears of the people. A state must be at the last gasp, when it is driven to seek protection in the abandonment of the law—that melancholy avowal of its weakness and its fear. Therefore, it was not done in the rebellion of 1715, nor in that of 1745.

I have hitherto abstained from advertiring to the late transactions of Ireland: but I could not defraud my clients, or their cause, of so pregnant an example.

In this country, penal laws have been tried beyond any example of any former times. What was the event? The race between penalty and crime was continued, each growing fiercer in the conflict,

until the penalty could go no further, and the fugitive turned upon the breathless pursuer.

From what a scene of wretchedness and horror have we escaped!

But I do not wish to annoy you by the stench of those unburied and unrotted examples of the havoc and the impotence of penal law pushed to its extravagance. I am more pleased to turn your attention to the happy consequences of temperate, conciliatory government—of equal law. Compare the latter with the former, and let your wisdom decide between the tempest and the calm. I know it is a delicate subject, but let me presume to suggest what must be the impression upon this grieved and anxious country, if the rigour of the parliament shall seem at war with the mildness of the government, if the people shall have refuge in the mercy of the crown from the rigour of their own representatives. But if, at the same moment, they shall see the convicted and attainted secured in their lives and in their property by the wise lenity of the crown, while the parliament is visiting shame, and misery, and want, upon the cradle of the unprotected infant, who could not have offended—but I will not follow the idea, I will not see the inauspicious omen; I pray that heaven may avert it.

One topic more you will permit me to add. Every act of the sort ought to have a practical morality flowing from its principle. If loyalty and justice require that these infants should be deprived

of bread, must it not be a violation of that principle to give them food or shelter? Must not every loyal and just man wish to see them, in the words of the famous Golden Bull, "always poor and necessitous, and for ever accompanied by the infamy of their father, languishing in continued indigence, and finding their punishment in living, and their relief in dying?" If the widowed mother should carry the orphan heir of her unfortunate husband to the gate of any man who might feel himself touched with the sad vicissitudes of human affairs, who might feel a compassionate reverence for the noble blood that flowed in his veins, nobler than the royalty that first ennobled it, that like a rich stream rose till it ran and hid its fountain;—if, remembering the many noble qualities of his unfortunate father, his heart melted over the calamities of the child; if his heart swelled, if his eyes overflowed, if his too precipitate hand were stretched out by his pity or his gratitude to the poor excommunicated sufferers, how could he justify the rebel tear, or the traitorous humanity?

I shall trespass no longer upon the patience for which I am grateful: one word only, and I have done; and that is, once more earnestly and solemnly to conjure you to reflect, that the fact, I mean the fact of guilt or innocence, which must be the foundation of this bill, is not now, after the death of the party, capable of being tried, consistently with the liberty of a free people, or the unalterable rules of

eternal justice; and that, as to the forfeiture and the ignominy which it enacts, that only can be punishment which lights upon guilt, and that can be only vengeance which breaks upon innocence!

Though great exertions were made to stop the bill, it reached the Lords, and passed in September.

A final effort was now made by Lady Edward's friends. A memorial was presented to the King, setting out the reasons, from the constitution, from justice, and from clemency, for stopping this bill. The names to the Memorial are "Richmond" (the Duke), "W. Ogilvie" (Lord Edward's step-father), "Henry Fitzgerald," "Charles James Fox," "Henry Edward Fox," "Holland." This document, and many letters written by the Duchess of Leinster to the Royal Family, will be found in the appendix to Moore's touching and simple narrative of "The Life and Death of Lord Edward Fitzgerald." This, too, was for the time unsuccessful, and the bill received the Royal assent in October; but the execution of the attainer was delayed, and the estate was sold in Chancery for a mortgage, and bought for £10,500, by Mr. Ogilvie, who cleared the property, and restored it to Lady Edward. She went to France, and married there imprudently. She separated from her second husband, and after living long in retirement at Toulouse, died in poor lodgings in the Rue Richepanse, Paris, in November, 1831. An application for the reversal of the attainer was made in 1799; Government agreed to bring it forward in the United Parliament; but it did not pass till 1819.