BARNARDISTON v. SOAME: A RESTORATION DRAMA

By Robin L. Sharwood*

Causes celebres may not necessarily make good law, but they almost always make good reading. Bar and bench are on their mettle, and one can expect exhaustive arguments and substantial judgments which will repay study for generations. Great brou-ha-ha surrounded the litigation in *Barnardiston v. Soame* from its inception in 1674 to its conclusion in 1689[1], and in the course of it counsel and judges examined probably more closely and directly than at any time either before or since the central question of the common law of civil liability: will the law give a remedy on mere proof of injury wrongfully inflicted?

The case was *primae impressionis*. But 'here was malice and falsity in [the defendant]', argued plaintiff's counsel, 'and thereby damage and charge to the plaintiff, and all this found by the jury, which is sufficient to maintain an action in all cases'.[2] Was he right? Should such an argument be upheld? That was the great issue which fell to be determined.

I

The elements of the controversy can be quite simply stated. Sir Samuel Barnardiston and Lord Huntingtower were rival candidates at a Parliamentary by-election for Suffolk in 1672. It was a riotous affair, and although Barnardiston appeared to gain 78 more votes that Huntingtower, the sheriff in charge of the election (Sir William Soame) had doubts as to whether all those who voted were properly qualified as forty-shilling freeholders.[3] He decided, therefore, after taking advice, to make what was called a 'double return'— in effect, he sent all the papers to the House of Commons and left it to settle the issue. The House decided that Barnardiston should be declared elected. The successful candidate then brought suit against the sheriff, claiming that by 'falsely, maliciously and deceitfully' making the double return, he had intended 'to deprive the plaintiff of the trust and office of one of the knights of the shire, to be exercised in parliament; and to cause the plaintiff to expend great sums of

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[1] The most convenient record of the litigation is in 6 State Trials 1063; further references will be given hereafter.

[2] *Ibid.* 1069.

[3] *Ibid.* 1068.

money, against the duty of his office', whereby 'the plaintiff could not be admitted into the lower house at the return of the said writ, and a long time after. Till the plaintiff, upon his petition to the Commons, and till after he had spent divers great sums of money about the proving of his election, and divers pains and labours in that behalf sustained, afterwards, scil. 20 Feb. 26 Car. 2, he was admitted, and his election was declared to be good. To his damage of £3,000.'[4]

This complaint, though straightforward, was novel. Its full significance can only be appreciated when it is set in the context of its time.

Restoration England was racked by faction, corruption and intrigue, with open profligacy at the Court, and a low level of public and private morality amongst the governing classes. 'Scarcely any rank or profession escaped the infection of the prevailing immorality', wrote Macaulay in a famous passage, 'but those persons who made politics their business were perhaps the most corrupt part of the corrupt society.'[5]

The sitting Parliament, dubbed 'Royalist', 'Cavalier' or 'Pension', had been at Westminster since 1661. Its history, Trevelyan has written, 'is the history of a House of Commons elected in a frenzy of loyalty, rising by a series of struggles with the King, to acquire a control of his accounts, a negative voice in the selection of his ministers, and the power of veto on his policy at home and abroad'.[6] By 1672, when our story opens, the honeymoon period was well and truly over. At every by-election—and many followed the War, the Plague and the Fire—the anti-Royalist element in the House increased in numbers and power, and the Court strained its resources in the open purchase of votes.[7] Outside the Palace of Westminster, coffee-houses and political clubs began to produce the rudiments of those parties which were soon to be called Whig and Tory.[8] The executive government was in the hands of the most notorious of the cabals—Clifford, Ashley, Buckingham, Arlington and Lauderdale, all King's men.[9]

The by-election for Suffolk, following upon the death of the

[4] *Ibid* 1063, 1075. This is part translation and part paraphrase of the Latin declaration, set out at 1063-1068.

[5] Lord Macauley, *The History of England* (1858) i. 188-189. This view of the tone of the times is still substantially adhered to: see, *e.g.*, J. R. Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689* (Cambridge, 1961) 219-220.

[6] G. M. Trevelyan, *England under the Stuarts* (17th ed. 1938) 374.

[7] Tanner, *op. cit.* 231-232.

[8] *Ibid.* 220-221, 244-246.

[9] It was to fall in the following year, 1673. The fact that the initial letters of the names actually spell the word 'cabal' is mere coincidence: Trevelyan, *op. cit.* 363-364.

member Sir Henry North,[10] was a straightout fight between the Court party and the anti-royalists.

The former had for their candidate Lionel Tollemache, styled by courtesy Lord Huntingtower.[11] He was the eldest son of Sir Lionel Tollemache,[12] of Helmingham, Suffolk, by his wife Elizabeth Murray, Countess of Dysart in her own right in the peerage of Scotland. Elizabeth Murray was a formidable woman. The elder daughter of the first Earl of Dysart, she had succeeded to the title in 1650. She was one of the reigning beauties, and rumour had it that she had been Cromwell's mistress; her son Thomas was widely regarded as Cromwell's son, and he seemed to take some pride in it. This story is in fact very doubtful. But she was almost certainly the mistress of the Duke of Lauderdale, a most intimate friend of the King and a member of the Cabal; she married him after her husband's death,[13] and Ham House, the great home in which she reigned as Duchess of Lauderdale is still today much as she left it.[14] In 1672, her son Lord Huntingtower was a young man of 23.

By contrast, his opponent at the by-election, Sir Samuel Barnardiston, was a grave and upright puritan merchant of 52.[15] Indeed according to legend he was the original 'Roundhead'. The story goes that when he was 20 years old he was one of a crowd of young London apprentices protesting at the appointment of a certain person as Constable of the Tower. To quote an early historian: 'the apprentices, it seems, wore the hair of their head cut round, and the queen, observing out of a window Samuel Barnardiston among them, cryed out: "See what a handsome young Roundhead is there!" And the name came from thence.'[16]

Like the Vicar of Bray (and countless others), Barnardiston kept quiet and out of trouble during the civil wars, and concentrated on

[10] I have not been able to discover if he was related to the other members of the North family who played such a prominent part in this story, but he may well have been. He is not noticed in the *Dictionary of National Biography*.

[11] See *Dictionary of National Biography* entries for Thomas Tollemache, Elizabeth Murray; *Burke's Peerage* (1949), entries for Tollemache, Dysart; *The Diary of John Evelyn*, ed. E. S. de Beer (1955), IV, 114 n. 7.

[12] The name was also spelled Talmash and Talmach. The family is still extant. Indeed, there is even an Antipodean branch, founded in New Zealand by Lyulph Ydwalla Odin Nestor Egbert Lyonel Toedmag Hugh Erchenwyne Saxon Esa Cromwell Orma Nevill Dysart Plantagenet Tollemache: *Burke's Peerage* (1949) 1993.

[13] *Dictionary of National Biography*. This second marriage greatly increased her power. Bishop Burnet was, for a time, one of her parasites, and wrote of her:

> Cherub I doubt's too low a name for thee,
> For thou alone a whole rank seems to be:
> The onelie individual of thy kynd,
> No mate can fitlie suit so great a mind. *ibid.*

[14] Ham House, Petersham, Surrey. Open on Tuesdays to Sundays (inclusive) and on Bank Holidays, except Good Friday and Christmas Day, from noon to 4 p.m. from October to March and from 2 p.m. to 6 p.m. for the remainder of the year.

[15] *Dictionary of National Biography*.

[16] Rapin, quoted *ibid.*

making money. He entered active political life only after the Restoration of Charles II, from whom he obtained his baronetcy for 'irreproachable loyalty'. Already prior to 1672, he had attracted great public attention in connection with the case of *Skinner v. The East India Company,* of 1668.[17] Skinner had protested to the King in Council at the confiscation of his ships by the East India Company, of which Barnardiston was a deputy-governor. He was referred to the House of Lords, which assumed an original jurisdiction and awarded £5,000 damages. Barnardiston, for his Company, petitioned the Commons in protest, and that House ruled the action of the Lords illegal. The Lords, in turn, summoned Barnardiston to the bar, and fined him for his action in petitioning the Commons. Barnardiston would not pay the fine, and he was imprisoned by Black Rod for three months. At the beginning of the new session in October 1669, the Commons resolved 'that the censure and proceedings of the Lords against Sir Samuel Barnardiston were in subversion of the rights and privileges of the House of Commons and of the liberties of the Commons of England.'[18] The wrangle between the two Houses went on for several more months, until finally in December both Houses accepted the King's suggestion 'that he should give present order to eraze all records and entries of this matter in the council books and in the Exchequer; and that the two Houses should do the like; so that no memory might remain of the dispute.'[19] But of course memory did remain. It was a great victory for the Commons, 'for it operated as a blow so fatal to the claim of the Lords to an original jurisdiction, that the exercise in civil causes has ever since been relinquished.'[20] Nor was Sir Samuel's part in it forgotten. It undoubtedly made him a popular choice to stand against the representative of aristocratic privilege at the by-election for Suffolk.

The best known and most lively chronicler of this famous by-election is Roger North.[21] He was a son of the fourth Baron North, and a younger brother of Sir Francis North, later Lord-keeper Guilford, whom he plainly idolised, and who plays a prominent part in this story. In 1672, Roger North was a young man of 19, already down from the University and reading law at the Middle Temple. As a younger son of a large family, he had very little money to spend. He studied hard, and in his free time amused himself with carpentery and the sailing of a small yacht on the Thames and the Essex and Suffolk coasts. He was to rise quite high in his profession, taking silk in 1682, and becoming in turn Solicitor-General

[17] *Ibid;* David Ogg, *England in the Reign of Charles VI* (2nd ed., 1955), 469-470; VI State Trials 710-770. [18] VI State Trials 710, 765. [19] *Ibid.* 767. [20] *Ibid.* 770.
[21] *Dictionary of National Biography;* Holdsworth *History of English Law,* vi, 619-624.

to the Duke of York and Attorney-General to the Queen. But his fame rests on his literary activities.

In 1706, White Kennett, Bishop of Peterborough, published his 'Compleat History of England'. Roger North was so incensed at what he considered to be the inaccurate picture there painted of Restoration England that he set about writing a vigorous reply. This was at length published after his death, with the splendid title:

EXAMEN:
OR, AN
ENQUIRY
INTO THE
CREDIT and VERACITY
OF A
Pretended Complete HISTORY;
SHEWING
The PERVERSE and WICKED DESIGN of it,
AND THE
Many FALSITIES and ABUSES of TRUTH contained in it.
Together with some
MEMOIRS
Occasionally inserted.
All tending to vindicate the HONOUR of the late KING CHARLES THE SECOND, and his HAPPY REIGN, from the intended *Aspersions* of that *Foul Pen.*

No-one would claim that 'Examen' is impartial history. But it is highly colourful and entertaining, and we would be the poorer without it.[22] Here is part of Roger North's description of the Suffolk by-election:

> At the Election the Candidates were the, now, Earl of *Dysert,* then Lord *Huntingtour,* and Sir *Samuel Bernardiston.* The former had the Gentry of the Country, and all the Church and Loyal Party entirely; the other had, as entirely, all the Dissenters, Sectaries, and factious People of all Sorts, who were generally Manufacturers, Traders, and Rabble. The Election was looked upon as a Trial of Strength of Parties; and both Sides mustered all their Forces, but

[22] 'It is historically interesting', Holdsworth has remarked, 'both because it presents us with a remarkable view of the ideas and feelings of the great royalist party at the end of the century; and because it is perhaps the ablest statement of the set of legal and political ideas which were decisively defeated by the Revolution, and finally succumbed at the accession of the Hanoverian dynasty.' *op. cit.,* vi, 621.

> the latter had the Adjunct of the non-voting Mob, who made more Noise and Stir than all the rest. The Assembly was at *Ipswich*, and, during the Poll, there came down upon the Sherriff and the Lord *Huntingtour's* Party, a disorderly Rout of Seamen and all Sorts of rude Rabble, with great Sticks and Clubs, making a fearful Noise, using Violence to all that stood in their Way, and knocking many down, as could not be checked by any Means of Authority or Persuasion. Nor was it to any good End to resist them with Force, for, as to that, the Law was in their own Hands and they used it to the Purpose. For they made all the Voters and Attendants upon the Poll at the Lord *Huntingtour's* Tent, scour off as fast as they could; and it became impossible to continue the Poll any longer, though many attended to have their Names taken; and so all broke up in Confusion.[23]

What was to be done? The sheriff Sir William Soame, being the official in charge of the election, was in a difficult position. If he were to return either candidate as elected, he exposed himself to the possibility of an action for a false return by the other. He was, as it happened, Barnardiston's kinsman,[24] but his political sympathies seem to have lain the other way,[25] although Roger North, naturally enough, will not hear of this.[26] Faced with such a dilemma, Sir William did not want for advice, some suggested that the poll be adjourned to another day and place, but others thought that Parliament would regard this as exhibiting partiality. It was agreed that the position of the sheriff himself should be protected.

> Then they fell to appealing to ancient Justices of the Peace, and such as had served in Parliament; desiring they would advise the Sherriff who, if he ever had any Wits, was then frightened out of them. . . . At length it was proposed that the Sherriff should make a double Return, and so, determining for neither, leave the Matter to the Parliament, who, upon hearing all Parties, might say which Side had the Right. And all the Gentlemen of Authority, and Lawyers, upon the Place, agreed this to be the safest Course for the Sherriff, and that the Parliament could not be displeased with him for putting the Difficulty to them to determine.[27]

But the 'Gentlemen of Authority' did not (in the eyes of Roger North) include Barnardiston and his friends, 'who, raging, breathed nothing but Ruin to the poor Sherriff, because he was not advised by him'.[28]

And so the problem was remitted to the House of Commons by

[23] *Examen* 516-517. [24] *Ibid.* 517.

[25] *Dictionary of National Biography*, entry for Barnardiston.

[26] 'He was a very honest Gentleman, and, in his Nature, extraordinarily mild, or rather weak, which rendered him absolutely unfit for a Bustle as fell to his Share . . . he was not only innocent but almost incapable of having an indirect Design or Malice; and his Enemies stuck not in Discourse to acquit him of all that. But he had offended the Faction, and then was condemned to bear all the Efforts of their Avarice, Rage, and Revenge': North, *op. cit.* 516.

[27] *Examen* 517. [28] *Ibid.* 517.

way of a double return. Each candidate petitioned the House to amend the return in his favour. A committee appointed to examine the issue reported in favour of Barnardiston, and a narrowly divided House declared him duly elected on 19 February 1673.[29]

But Sir Samuel was not satisfied with the Parliamentary victory alone. From what Roger North regards as motives of 'Greediness and Revenge',[30] he determined to pursue the matter further, and he brought a suit for damages against Sir William Soame at common law in the terms which have already been described.

Roger North tells us that Barnardiston was advised to take this course by Sir William Jones, the chief of 'the standing Counsel of the Faction'.[31] It was Jones who drew the novel declaration and who appeared for Barnardiston at the trial. Strange though it may seem, Sir William Jones was Solicitor-General, having been made a K.C. and knighted in 1671, and was to become Attorney-General in 1675. But he was already gravitating towards the anti-Court party, and it was for political reasons that he resigned the Attorney's office in 1679 in order to stand for Parliament.[32]

Sir William Jones was highly regarded. He entered the House of Commons, records Grey, 'with the fame of being the greatest lawyer in England and a very wise man'.[33] Even Roger North was obliged to admit that he was 'in the general, no bad Man'.[34] He was a native of Gloucestershire, retaining all his life a county accent, studied law in Gray's Inn, and first made his mark in a King's Bench practice. 'He was a Person', writes North, 'of very clear Understanding, and (if possible) clearer Expression; wherein he was assisted by an extraordinary Opinion he had of both, as also of his own general Worth, for that was his Foible. . . . But his greatest Misfortune was his mistaken Politics'.[35] Bishop Burnet described him as 'honest and wise', though sour-tempered.[36]

Perhaps, then, it was a combination of party politics and bad temper which induced Sir Samuel Barnardiston to bring his action. At all events, the case came on for trial in King's Bench before Lord Chief Justice Hale and a Middlesex jury on 12 November 1674. Only Roger North reports this first round in what was to be a protracted course of litigation at all fully:[37] 'a stout Trial it was, Well feed Counsel, willing Witnesses, and Zeal of Parties failed not to make the most of the Pretensions on both sides'. Sir William Jones, as we have already noted, was counsel for Barnardiston. Counsel for

[29] *Commons Journal*, ix, 260-262, 291, 312-313. The vote was 147 to 141.
[30] *Examen* 518. [31] *Ibid.* 518. [32] *Dictionary of National Biography.*
[33] *Debates* VII 451. [34] *Examen* 509. [35] *Ibid* 510.
[36] *History of His Own Times*, i, 396; ii, 681.
[37] *Examen* 518-519. The references to it in vi State Trials are very meagre. The fullest conventional law report would seem to be the single paragraph in 3 Keble 365: 84 E.R. 769.

Sir William Soame was Jones' great rival the eminent Sir Francis North, who was appointed Attorney-General on the very day of the trial.[38]

Francis North, brother to Roger, and the third son of the fourth Baron North, had risen early to the heights of his profession. Despite the demur of some of the benchers of his Inn, he had taken silk at the age of 31, and before his thirty-fourth birthday he was a knight and Solicitor-General. Francis North was to become Lord Keeper and to be ennobled as Lord Guilford, and as such a biography of him is to be found in Campbell's 'Lives of the Chancellors'.[39] Lord Campbell could hardly find a good word to say about him. 'We now come', he began, 'to one of the most contemptible men who ever held the Great Seal in England. He had not courage to commit great crimes; but—selfish, cunning, sneaking, and unprincipled,—his only restraint was a regard to his own personal safety, and throughout his whole life he sought and obtained advancement by the meanest arts.' No one now accepts this assessment of the man,[40] and all give Francis North a high reputation for honesty and ability. His brother Roger had nothing but admiration for him:

> Mr North was modest to a Weakness. . . . There can be no Doubt but his Skill in the Law was inferior to none. . . . He was also a general Scholar, Master of the chief *European* Languages, a good Historian, and an accomplished Virtuoso in the best Sense of the Word; for he was acquainted with all the Ingenuities extant in his Time, and, accordingly, was valued, and his Conversation courted by the Chief Artists of all Kinds. . . . All his Action shewed him to be a common Friend, and reconciled a general Friendship to him, such as stood him in good Stead when there was Need. His Inclinations were always to Loyalty. . . . And one Thing he had, very rarely found in a scrupulous Judge, and that was Affability and Patience, as well out of, as in, his Seat of Justice.[41]

Foss says that no-one (save Campbell) has found any substantial objection to this encomium.[42] 'North was clearly a man of vast knowledge and wide culture', writes another biographer;[43]

> As a lawyer he was held in great respect; nor did any of his contemporaries venture to dispute the technical ability and legality of

[38] Foss, *The Judges of England.* [39] Vol. iv, chs XCIV-XCVII.

[40] Campbell was a most unreliable historian. His biographer in the *Dictionary of National Biography* says that though his 'Lives' are 'eminently readable', 'none the less they are among the most censurable publications in our literature'. He plagiarized freely, and 'literary morality in its other form, the love of historical truth and accuracy, he hardly understood'. We may recall the well-known remark of one of his contemporaries that he had added a new sting to death. His life of Francis North has been described as 'venomous' (*Dictionary of National Biography*), and written 'with all the bitterness of party prejudices' (Foss).

[41] *Examen* 512-513.

[42] *Op. cit.* And see Holdsworth *op. cit.* vi, 531-535.

[43] Rev. Canon Jessopp, D.D., in the *Dictionary of National Biography.*

> his decisions. . . . He lived at an age when social and political morality were at a deplorably low level. . . . There was no career for an enthusiast or a hero, and the worst that can be said of the Lord-Keeper Guilford is that he was neither the one nor the other.

Roger North relates that his brother Francis and Sir William Jones were the keenest of professional rivals.[44]

> Although, in the Course of their Practice, they were often chosen on Purpose to resist each other, especially in hot factious Causes, yet they never clashed in Words, or made any Shew of private Animosity, as commonly, in such Cases, is done with great Noise and Indecency. But they conversed, visited, and entertained familiarly; though less frequent after the Times grew hot, and Preferment of the one made a greater Distance between them.[45]

If counsel at the trial of *Barnardiston v. Soame* were able and upright to a degree worthy of comment in such an age, even more so was the judge, Sir Matthew Hale, 'one of the brightest luminaries of the law, as well for the soundness of his learning as for the excellence of his life,'[46] 'a consummate master of English law on all sides', and 'the greatest English lawyer of his day'.[47] This accomplished and admirable man had recently entered upon the last stage of his career, as Chief Justice of King's Bench, an office which he held from May 1671 until his retirement in February 1676. He had previously sat as a judge in Common Pleas and had presided as Chief Baron in Exchequer. Royalist in politics, his ability and integrity were such that the Civil War had had little effect on his career. Indeed it was Oliver Cromwell who had first raised him to the Bench.

On Roger North's account, the principal argument for the defendant when the case came before Lord Chief Justice Hale on 12 November 1674 was that to allow an action such as this would be to open the way to a conflict of opinion between Courts and Commons on election matters which would put sheriffs in an impossible position.[48] But Hale, for reasons which are not reported, thought the action was good. Evidence was given of the circumstances of the election, and a single witness for plaintiff swore to damages of £800. Hale appears to have directed the jury that they should not find for plaintiff unless they were satisfied of defendant's malice.[49] So ended the day's proceedings. A verdict was expected on the morrow.

> After the Trial Sir *William Jones,* who before, having Wind and Tide with him, had carried himself, with an Air as entirely pleased, was happy also in an Assurance of having Judgment for his Client, and,

[44] *Examen* 511-512, 514-516. [45] *Ibid.* 514. [46] Foss, *op. cit.*
[47] Holdsworth *op. cit.* vi, 574-595 at 581. [48] *Examen* 519.
[49] So it would appear from 3 Keble 369 and 2 Lev. 114 (reproduced in vi State Trials 1068), although in the latter report the trial of the action is mis-described.

> going down the Hall, could not forbear leaning himself towards Mr. Attorney *North,* to whom he was observed to say, *we shall have the Verdict;* the other turned towards him and said only, *you are a cruel People.*[50]

Sir William was right, for the following day—it was Friday the thirteenth—the jury returned a verdict for £800. There were those who urged Barnardiston to have compassion on his relative and forego part of the damages, but he refused: 'he would not remit a Penny, and so teach his Cousin whom to advise with.'[51]

The size of the jury verdict is said to have surprised even the Lord Chief Justice,[52] and within a few days Soame had applied to the Court for a new trial 'on the excess of damages', arguing that the verdict was against the evidence as to malice.[53] Mr. Justice Wilde was on the Bench, *'Hales* being then under the Infliction of an Apoplexy, and absent'.[54] The judge ruled that he could not disturb the jury finding.[53]

Sir Francis North at once moved for an arrest of judgment,[53] which (as Blackstone describes it) was the appropriate review procedure 'if the case laid in the declaration [was] not sufficient in point of law to found an action upon'.[55] He 'had insisted at the Trial,' records Roger North, 'and often discoursed with his Friends, that such an action, as this, could not be maintained by Law, and that he thought it a dangerous Innovation, of bad Consequences, and ought not to be countenanced'.[56] Sir Francis made a short opening argument on the point.[53] 'The Counsel, on the other Side, pretended to make slight of the Matter, and to answer it off Hand; but Justice *Wild* . . . wished them to take Time, for the Case was not so clear as they seemed to make it.'[57] He adjourned the case for a week.

II

There can be little doubt that the continuing litigation was maintaining if not increasing a lively general interest in the politics of the affair. But it seems reasonable, too, to suppose that, with the issues of fact out of the way for good or ill, the true weightiness of the central legal issues was becoming increasingly apparent. One of these issues was that with which we are here principally concerned: would proof of malice and damage alone found an action? In addition, as the arguments reveal, it was now seen that the case also involved a great question as to the respective jurisdictions of Parliament and the Courts.

At all events, when the Court resumed on Tuesday, 24 November, it presented to the spectator a very different appearance.

[50] *Examen* 519-520. [51] *Ibid.* 520. [52] *Ibid.* 520. [53] 3 Keble 369.
[54] *Examen* 520. [55] *Bl. Comm.* iii, 393. [56] *Examen* 520. [57] *Examen* 520-521.

There was now a bench of four judges—the Lord Chief Justice ('though far from well'[58]), Mr Justice Wilde, Mr Justice Twisden and Mr Justice Rainsford.[59]

Sir William Wilde was 'an honest and considerate judge', who, like Hale, had sat in Common Pleas before his appointment to King's Bench. Although once a member of Parliament (like so many members of the bench), he seems to have had no extreme political views.[60]

Sir Thomas Twisden, the oldest of the four (he was 72), had been a judge of King's Bench since 1660, and 'enjoyed the reputation of being a sound lawyer and an upright judge'. His politics were Royalist.[60]

Sir Richard Rainsford was to succeed Hale in the chief-justiceship. Though an honest man, he had no great reputation as a lawyer. It was said that 'he most commonly slept on the bench'.[61]

At the bar table Sir Francis North had been joined by a number of other Counsel of whom the most remarkable was Sir William Scroggs, then a King's Sergeant.[59] It seems hard at first to imagine a more unlikely or incongruous partnership. North had risen to his position as a result of talent, integrity and hard work. Scroggs, on the other hand, who was his senior by fifteen years, owed his advancement to patronage and corruption, had no reputation in his profession, and was described 'as a great voluptuary and debauchee, . . . so noted for the coarseness of his language and the looseness of his habits as to be despised by all good and respectable men'. He was to become Lord Chief Justice of King's Bench in succession to Rainsford in 1678, in which office he exhibited such a combination of 'ignorance, arrogance and brutality' that he was removed in 1681, and his stormy and disgraceful career brought to an end.[62] But Scrogg's principal patron at this time was the King's closest friend and first minister of the Crown, Lord Danby,[62] who had succeeded to power on the fall of the Cabal in 1673, and it is no doubt for this reason that we find him at the side of Sir Francis North. His presence testified to the continuing political importance of the affair.

Also with North was the Attorney-General to the Duke of York, Sir Francis Winnington,[63] a sound and successful lawyer who was to be made Solicitor-General to the Crown in the following month.[64]

In addition, it seems, arguments for the defendant were heard

[58] *Examen* 521.
[59] 2 Lev. 114 (vi State Trials 1068-1070).
[60] Foss, *op. cit.*
[61] Holdsworth *op. cit.* vi, 504, quoting the *Hatton Correspondence.*
[62] Foss, *op. cit.* Holdsworth *op. cit.* vi, 504-507.
[63] 1 Freeman 387; he is not mentioned in 2 Levinz or in 3 Keble.
[64] *Dictionary of National Biography.*

from two other members of the bar—Creswell Levinz and Richard Weston.[65]

Levinz is best remembered (but not very happily so) for his Reports. He was at this time a supporter of the Crown, and was shortly to act for it in several prosecutions arising out of the Popish Plot. He was to become Attorney-General, and to sit for five years in Common Pleas.

Richard Weston[66] had not advanced very far in his career at the time of *Barnardiston v. Soame,* but he would have been known as a learned lawyer of strong Royalist leanings. For the last year of his life (1680-1681) he was to be a Baron of Exchequer, and secured then a small place in history for a public rebuke to Bloody Judge Jeffreys.

Sir Samuel Barnardiston, too, had brought up reinforcements. Sir William Jones had been joined by Sir John Maynard, that extraordinary man Edmund Saunders, and another barrister named Offly.

Men must have thought that Sir John Maynard[67] was appearing in one of the last of his cases, for he was then 72; he had been born at the beginning of the reign of James I, and had sat in Parliaments of Charles I, Cromwell and Charles II. But the old man was to continue his active career to within a few months of his death in 1690. He was to sit in the Parliaments of James II, and he it was who congratulated William III in the name of the legal profession. He was a very great pleader—only Edmund Saunders, many years his junior, came near to rivalling him. In politics he played the part of caution, and it is hard to say that he was either a Royalist or a Parliament-man. Holdsworth says that he was 'both professionally and politically attached to constitutional principles; but too much the legal practitioner to care to risk much for these principles'.[68] He may well, in fact, have led for Barnardiston in this part of the litigation. Freeman lists him first[69] and Keble gives the impression that Maynard carried the main burden of the argument.

I must resist the temptation to write more of Edmund Saunders[70] than his comparatively minor role in this story deserves. His special skill was in pleading, and of all Barnardiston's counsel he was the

[65] These counsel are mentioned by Keble, and arguments are there attributed to them, but are not mentioned by Freeman.

[66] Foss, *op. cit.* [67] *Ibid.;* Holdsworth, *op. cit.* vi, 511-514.

[68] *Ibid.* 513. 'He used to call the law "ars bablativa", and delighted so much in his profession that he always carried one of the Year Books in his coach for his diversion, saying that it was as good to him as a comedy. His passion for law ruled him to such a degree that he left a will purposely worded so as to cause litigation, in order that sundry questions, which had been "moot points" in his lifetime, might be settled for the benefit of posterity': Foss, *op. cit.*

[69] 1 Freeman 382.

[70] Foss, *op. cit.;* Holdsworth *op. cit.* vi, 564-567.

least politically-minded.[71] He had little to recommend him in his person: 'he was a fetid mass', writes Roger North (who liked and admired him),

> that offended his neighbours at the bar in the sharpest degree. Those whose ill fortune it was to stand near him were confessors, and, in the summer time, almost martyrs. This hateful decay of his carcase came from continual sottishness; for, to say nothing of brandy, he was seldom without a pot of ale at his nose or near him. That exercise was all he used; the rest of his life was sitting at his desk or piping at home.[72]

His learning, his wit, his honesty and his cheerfulness redeemed him. Saunders was made Chief Justice of King's Bench in January 1683, but the effort to live up to the dignity of his new position was too much for him, and in June he died of apoplexy. We remember him now for his splendid King's Bench reports for the years 1666 to 1672.

Of the fourth barrister for Barnardiston, Offly by name, I have been able to discover nothing.[73]

In contrast to the trial, this stage of *Barnardiston v. Soame* is quite extensively reported. Both Freeman[74] and Keble[75] devote a good deal of space to it, and Levinz himself has left a brief account.[76] Roger North, I am sorry to say, has not. Freeman's reports, though put together from a notebook stolen by a servant after his death and published without the authority of his family, are now regarded as more satisfactory than they once were.[77] Keble's reports are curious.[78] They consist of day to day jottings, unedited, and arranged chronologically; thus the report of *Barnardiston v. Soame* is spread over many entries. For this he has been much condemned. Lord Mansfield called him 'a bad reporter', and Mr Justice Park deliberately burnt his copy. But Mr Justice Burnet thought him 'a tolerable historian of the law', and Lord Hardwicke conceded that he gave 'a pretty good register'. His law-reporting was at one with his sermon-tasting: he left behind him the notes of four thousand sermons he had listened to over the years. I have already referred to Levinz's uncertain reputation in this field. Lord Mansfield and Lord Kenyon thought he was better than Keble, though that was

[71] 'In no time did he lean to faction, but did his business without offence to any. He put off officious talk of government and politics with jests. . . .' Roger North, *The Lives of the Norths* 1, 295.

[72] *Ibid.* 294.

[73] The name is spelt thus by Keble, and with a single 'f' by Freeman. Perhaps he was of the family of Sir Thomas Offley (1505?-1582), a Lord Mayor of London.

[74] 1 Freeman 380, 387, 390.

[75] 3 Keble 389, 419, 428, 439, 442.

[76] 2 Levinz 114 (reproduced vi State Trials 1068-1070).

[77] Wallace, *The Reporters* (4th ed.) 390-392.

[78] *Ibid.* 315-326.

no great praise: Lord Hardwicke said he was 'sometimes . . . very careless'.[79]

As it happens, all three reporters in this case are in agreement as to the principal arguments put to the Court, and, leaving technicalities aside,[80] these arguments appear to have been concerned with four points.

(i) In the first place, there was the statute of 1444, 23 Henry VI, c. 14., dealing with election matters. The preamble of this statute noted (*inter alia*) that 'divers Sheriffs . . . for their singular Avail and Lucre' had defaulted in their statutory duty to conduct elections and to make proper returns, and that 'sufficient Penalty and convenient Remedy for the Party in such Case grieved is not ordained in the said Statutes against the Sheriff, Mayors, and Bailiffs, which do contrary to the Form of the said Statutes'. The Act therefore provided that a sheriff defaulting in his statutory duty 'shall forfeit and pay to every Person hereafter chosen Knight, Citizen, or Burgess in his County, to come to any Parliament, and not duly returned, or to any other Person, which in default of such, Knight, Citizen or Burgess will sue, an hundred pounds'; this £100 could be recovered in a civil action.

Sir Samuel Barnardiston was not purporting to sue under this statute, but at common law.

North,[81] Winnington[82] and Weston[83] are all reported as arguing, however, that this statute in effect 'covered the field': that there was no common law action before the statute, and no room for any after it. 'The statute 23 H.6 is introductive of a new law',[84] said North, 'for that recites that the party wanted convenient remedy at the common law';[85] 'before the statute of H.6 no action lay for a false return, and that only gives an action of debt for £100.'[86] 'All ages have till now rested satisfied with the penalties of the statute', said Weston.[87]

Counsel for Barnardiston denied that the statute carried either of these implications. 'The statute of 23 H.6, doth not say there was no remedy before, but only that there wanted convenient remedy, and so gives £100 which was a great sum in those days'.[88] 'The Parliament intended only to give a certain penalty to the party, which was considerable then, though not so considerable now, and not leave them to a jury's discretion altogether for damages.'[89] 'The statute of 23 H.6, being an affirmative law', said Offly, 'the party

[79] *Ibid.* 304-315.
[80] The only argument reported of Levinz himself was a technical objection to the declaration: 3 Keble 420. [81] 1 Freeman 380-381; 3 Keble 389; 2 Levinz 115.
[82] 1 Freeman 387; 3 Keble 428. [83] 3 Keble 419. [84] 3 Keble 389.
[85] 1 Freeman 381. [86] 2 Levinz 115. [87] 3 Keble 419. [88] 1 Freeman 383.
[89] 2 Levinz 116.

may, if he pleases, take his remedy at common law', and he cited analogous cases.[90]

(ii) A second set of arguments turned on the role of the sheriff in making election returns.

It was contended for the defendant (with some citation of authority) that on these occasions a sheriff was acting as a judge and not as a ministerial officer, and was thus entitled to judicial immunity from suit.[91] 'That he is a judge', said North, 'appears in several acts of judgment in determining the election. 1. Whether the electors have 40s. per annum. 2. Whether it be freehold. 3. Whether it be their own without fraud. . . . 4. Whether they be resident in the county.'[92] The reason for the rule of judicial immunity, he argued, plainly applied to the case of the sheriff making an election return: 'Judges ought to be free of all apprehensions of fear of parties, one of which they must displease, and the determining the election is a matter of difficult judgment.'[93]

Counsel for plaintiff would have none of this. 'The sheriff is no more a judge than he that tells the voices at the Commons door, or on elections in Guildhall', said Maynard;[94] he is 'no more a judge in this case than in every return that he makes, for in all of them there must be something to judge of, whether *fieri facias, extendi, etc.*'[94] 'The sheriff is not a judge of the election in this case, but a minister to take the polls, of which in point of sufficiency the House of Commons is judge.'[96] 'The sheriff is not bound to determine the law', argued the malodorous Mr Saunders, 'but only the fact as a minister.'[97]

(iii) The first of the great questions of principle was whether an issue such as this arising out of a Parliamentary election could properly be tried before an ordinary court.

And here, by one of those curious paradoxes of litigation, the political roles of the parties and their counsel seem strangely reversed. For we find the Court party, through Sir William Soame and his counsel, arguing for the exclusive jurisdiction of Parliament,[98] and the Parliament-men against![99]

'The sheriff in this case,' said North, 'is an officer, not subordinate to the Court of Chancery, but to the Parliament; and in the case of the death of any member, the Chancery cannot issue out a writ to chuse a new member without a warrant from the Speaker; neither can that Court meddle with the return, but it is to be de-

[90] 1 Freeman 383; 3 Keble 391, 392.
[91] 1 Freeman 381, 384, 388; 3 Keble 389-390, 392, 429; 2 Levinz 115.
[92] 1 Freeman 381. [93] 3 Keble 389. [94] 3 Keble 391; and see Offly *ibid.*
[95] 1 Freeman 383; and see Offly *ibid.* [96] 2 Levinz 115. [97] 3 Keble 420.
[98] 1 Freeman 381, 384, 387; 3 Keble 390, 392, 419, 428-429; 2 Levinz 115.
[99] 1 Freeman 382, 388; 3 Keble 391, 392, 429-430; 2 Levinz 115.

cided in Parliament; and the Parliament seems to take care to free the sheriff from actions; for if he hath made a false return, and they appoint another to be the member, they cause him to mend his return; and when he makes a double return, after the cause is determined, they cause one to be taken off the file; and the House do allow of a double return in difficult cases; and if he do it in plain cases, they fine him.'[1] 'The falsity or verity of the return is only examinable in the House of Commons, who are the sole judges.'[2] 'The conusance of matters done in Parliament,' contended Winnington, 'belongs not to any other jurisdiction.'[3]

But counsel for plaintiff would not concede that this case fell within the principle that Winnington appealed to. 'In this case,' they said, 'the right of election cannot come in question; for here the party that brings the action is the person that sits in the House by vote of the House.'[4] 'Misdemeanours, *etc.* that are done in Parliament are examinable only there,' Maynard admitted; 'but this is for a matter out of Parliament, for a return into Chancery.'[5] 'The sheriff is an officer as well to the Court of Chancery as to the Parliament, and must make his return thither.'[6] Further, argued Offly, 'that this Court hath no jurisdiction of the principal is not material, for this Court hath no jurisdiction of incontinence, yet by a consequential damage, such slanders are liable to action on the case here, . . . [and] the same of adultery.'[7]

Defendant's counsel appealed to the case of *Nevill v. Stroud*,[8] before Exchequer Chamber in 1659, in which a suit in respect of an election return was 'adjourned into Parliament for difficulty relating to matters and privilege of Parliament'.[9] 'In *Nevill's* case they could never get a step forward,' said Winnington.[10]

Plaintiff's counsel argued that *Nevill v. Stroud* was distinguishable on several grounds: 'there Nevill was never admitted into the House, but here the action is with the judgment of Parliament;'[11] 'in *Nevill's* case there was no particular damage laid; but here it is said in the declaration, that it was *ea intentione* to put him to expenses;'[12] 'the case of *Nevill v. Stroud* was not for a double return, but for making no return; for there two were elected, and the sheriff made no return as to one, and for that he brought the action.'[13]

It is difficult now to know what to make of *Nevill v. Stroud*, though it was plainly an important precedent. The only report of it is one

[1] 1 Freeman 381. [2] 2 Levinz 115. [3] 1 Freeman 387.
[4] *Ibid.* 383. [5] *Ibid.* 388. [6] *Ibid.* 382.
[7] 3 Keble 392. [8] 2 Siderfin 168.
[9] 3 Keble 390 (North); 2 Levinz 115. [10] 3 Keble 429.
[11] 1 Freeman 383; 3 Keble 391. [12] 1 Freeman 383; 3 Keble 392.
[13] 2 Levinz 115.

which Siderfin made in his student days, and he is none too reliable.[14] He tells us that the case was 'sovenfoits argue in le Co. Banc.', and by that Court sent up to Parliament. Parliament in due course, and after argument, ordered that the case be adjourned into Exchequer Chamber, to be argued there 'devant touts les Justices d'Angleterre'. Heneage Finch (the future Lord Chancellor Nottingham) argued for the plaintiff, and Starkey (protesting his unworthiness)[15] for the defendant. Certainly, as the history of the case would suggest, a serious question of Parliamentary privilege was seen to be potentially involved, and both counsel adverted to it,[16] as they did too, to the question of novel actions.[17] But if the judges in Exchequer Chamber expressed any opinions, Siderfin does not record them. After his account of Starkey's argument, his report concludes laconically: 'Adjornatur'.[18] Sir Francis North said the case was never resolved, either in Parliament or out of it.[19] The explanation may be that the litigation proved abortive because it had arisen in the time of the Commonwealth. Twisden J., giving judgment in the case before us, was to say: 'Nevils case moves not, being upon Olivers instrument there could never be judgment.'[20]

(iv) The second great issue of principle was argued with little elaboration at this stage of the litigation. It was to loom larger later on.

'Here was malice and falsity in the sheriff,' contended counsel for Barnardiston, 'and thereby damage and charge to the plaintiff, and all this found by the jury, which is sufficient to maintain an action in all cases, whether there has been a like action in such case or no before; for actions upon the case are founded upon the particular case, which is mostly new.'[21] 'As in Co. *Slades case,* if the action be agreeable to the rules of law and no rule against it, the action is now well enough brought, though never any were brought before.'[22]

North's short answer to this was that an allegation of malice could not of itself turn a *damnum* into an *iniuria*: 'It being alleged that it was done, *falso et malitiose,* that will maintain the action. *Ans.* When the nature of the thing will not bear an action, the laying *falso et malitiose* will never support it.'[23]

These arguments were begun on Tuesday, 24 November 1673. At

[14] Wallace *op. cit.* 295-297. 'Many good cases are spoiled in Siderfin', said Holt C.J. *ibid.*

[15] 'Et icy jeo confesser mon unworthiness and inability pur arguer un case de tiel difficulty, especialment en tiel honorable chamber lou in temps pass le pluis learned de mon profession ont estre le sole pleaders': 2 Siderfin 171.

[16] *Ibid.* 170-171 (Finch), 173 (Starkey).

[17] *Ibid.* 168-170 (Finch), 172 (Starkey).

[18] *Ibid.* 174. [19] 2 Levinz 115. [20] 3 Keble 442.

[21] 2 Levinz 115; 1 Freeman 382, 383, 388. [22] 3 Keble 391.

[23] 1 Freeman 382; 3 Keble 390. Citing 4 Co. 28; *Madison v. Skipwith; Gave v. Gold* 23 Car. 1, Rot. 227.

the end of that day the matter was adjourned. It was the last week of Michaelmas Term, and the court rose for the Christmas Vacation. The case was heard again on Thursday, 28 January 1674, in the first week of Hilary Term, and the third and final day of argument was Wednesday, 3 February.[24]

At the end of that day, three of the four—Hale, Wilde and Twisden—were ready to give an immediate decision for the plaintiff. It seems plain from the reports[25] that they thought the principal question was that of a possible conflict of authority between courts and Parliament, but were satisfied that none arose in the case before them. 'In this case,' said Hale C.J., 'the Court doth not forestal nor anticipate the judgment of Parliament, but follows the determination of it.'[26] Rainsford, however, recommended caution—'This is a new case, and let us advise with our brethren'[26]—and, in deference to him, the judgments were deferred.

Rainsford's hesitancy was justified. On the following Monday, 'the Court said they had consulted all the Judges of England, and finding great diversity of opinions, they would give no judgment.' The case was further adjourned.[27] The consultation is probably that referred to by Roger North, who tells how Hale made the case 'a table case in Sergeants' Inn Hall', so that if the sergeants' views matched his own 'his sentence in court might be adorned with the adjunct of the opinions of the sergeants' bench'.[28]

The end of another term was fast approaching. Plaintiff's counsel pressed for a decision, and on the last day of term but one,[29] Thursday, 11 February,[30] the Court gave its judgment. The delay and consultations had induced none of its members to change his initial opinions on the outcome of the case, but there was a significant shift in the weighting of the arguments. The Court found for plaintiff, with Rainsford J. dissenting.[31]

Wilde J. based his short judgment on a high ground: the decision must be for plaintiff 'because else here would be a failer (*sic*) of justice;' he stressed the finding of malice, and the fact that Parliament itself gave no damages.[32]

So too did Twisden J.: 'maleficium non remanere debeat impunitum, wherefore no order being taken for this in Parliament, it must either remain unpunished or the action must lie.'[33]

Hale C.J. delivered judgment at somewhat greater length, dealing

[24] 3 Keble 389, 419, 428. [25] 1 Freeman 388; 3 Keble 430. [26] 1 Freeman 388.
[27] 3 Keble 439. [28] *The Lives of the Norths*, i, 89. [29] 1 Freeman 390.
[30] 3 Keble 442.
[31] The fullest report of the judgments is in 3 Keble 442-444. There is a shorter account in 1 Freeman 390, and a bare note in 2 Levinz 116.
[32] 3 Keble 442. He cited *Dawson v. Read* 1 Keble 182, 191; 83 E.R. 888, 893, in which, in a very different field, a statute was held not to have superseded common law. [33] Keble 442.

with all four of the principal arguments made to the Court.[34] He held in the first place that the statute 23 H. VI c. 14 did not 'cover the field'; 'as to the gist of the action, its not within the express terms of any statute, there being no false but a double return'. Secondly, in his view the sheriff had acted 'as a minister not as a Judge'. Thirdly, there was no conflict with the authority of Parliament: 'The matter is not anything acted in Parliament, but what is precedaneous to the return of the writ . . . here being a verdict only in pursuance on the judgment of Parliament, there is no anticipation, but consequence of their decision, which cannot but give satisfaction to all.' Finally, he held, the jury finding of falsity and malice must give to the plaintiff a cause of action in the absence of proof of 'probable cause'. 'The plaintiff ought to have a remedy.' The law was willing to recognize new causes of action.[35] There had been little possibility of such suits as these before.

Rainsford J., who dissented,[36] emphasized his belief that the matter was wholly one for Parliament, but he placed first and foremost his dislike of new law: there should be judgment for defendant, 'this being primae impressionis and no one instance of action upon the case at common law for a bad return in Parliament.'

So the case was decided; the verdict for Sir Samuel Barnardiston was confirmed and, as Roger North put it, 'the Sherriff once more undone'.[37] But no-one seems to have supposed that this was the end of the matter. Hale C.J. had begun his judgment with an acknowledgement that 'this cause must come by error before the rest of the Judges'[38] and Sir William Soame soon took out a Writ of Error returnable before Exchequer Chamber.

This was the Court created by statute in 1585 to provide an appellate jurisdiction from King's Bench more convenient than error to Parliament.[39] The bench comprised all the judges of the other two courts of common law, Common Pleas and Exchequer. It was presided over by the Chief Justice of Common Pleas.

Now it so happened that in December 1674, before the hearings began on the writ of error in *Barnardiston v. Soame,* John Vaughan, the Chief Justice of Common Pleas, died suddenly in his chambers at Sergeants' Inn.[40] The two keenest rivals for the vacant office were none other than Sir William Jones and Sir Francis North,[41] and it was the latter who was appointed to it on 23 January 1675.[42] Strange though it may seem to us, Lord Chief Justice North,

[34] 3 Keble 443-444.
[35] 'The title action of the case for slander is ten times as great as any other, yet 22 Ed. 4, *The Abbe of St. Albons case* was the first.' *ibid.* 443.
[36] 3 Keble 442. [37] *Examen* 521. [38] 3 Keble 443.
[39] 27 Eliz. c. 8, amended by 31 Eliz. c. 1. [40] Foss, *op. cit.*
[41] *Examen* 511-512, 514-516. [42] Foss, *op. cit.*

as he now was, saw no impropriety in his presiding as judge in a matter in which he had played so prominent a role as counsel. Nor did his brother Roger: 'a truly great Man will no more judge wrong, because he was once a Counsel, than not judge right, if his Opinion of the Law be clear.'[43] And it must be recorded that a later and less partial biographer has written that in his new office he acted 'with exemplary prudence in party cases, neither showing any bias toward either side, nor affecting to conceal the loyal principles which guided him'.[44] But, not unnaturally, Barnardiston and his supporters smelt rank injustice in the wind, and to the legal and political excitement of the affair there was now added an edge of scandal.

III

There is no report of the long and elaborate arguments which must have been made to the judges in Exchequer Chamber. But twenty-two-year-old Roger North was there, and he has left us his own colourful account:[45]

> The Cause depended in Argument in *Serjeants-Inn Hall* in *Chancery-Lane,* where these Judges sat to deliberate above a Year, and were spoke to over and over again, as long as either of the Parties desired to be heard. And, as it was a Cause of mighty Expectation, many came to listen after it, amongst whom I was one, having been present at most of the Hearings. And this Attendance will not be thought strange when it is considered that the Faction, after their branching Way of Reports, had possessed the Town, that here was such a flagrant Piece of Injustice doing, and with an Impudence barefaced, as never was known or heard of before. I could not but admire at the sedulous and constant Spirit of Faction; for the chief Attendance was of them. A strange Sort of People came, whose Faces I never saw any where else, odd, stiff Figures, whose Errand was partly, to see if their Friend was like to get his Money, and, partly, to observe the Behaviour of the Judges. For it was early resolved, that, if this Judgment was reversed, to make it a matter of Accusation against the Chief Justice in the House of Commons. And their broad Looks spoke as much, by which they intended, if possible, to awe and intimidate him.

At last the time came for the delivery of judgment. It was Saturday, 3 June 1676,[46] and late in the day at that, for argument had continued to the very end.[47] The eight judges sat in the Hall of Serjeants' Inn, with the portraits and escutcheons of their serjeant predecessors around them.[48]

[43] *Examen* 521. [44] Foss, *op. cit.* [45] *Examen* 521-522.
[46] 3 Keble 664. [47] *Examen* 522.
[48] Portion of the buildings survived until the First World War: see Mathew 'The Decline and Fall of the Serjeants-at-Law' (1919) 35 *Law Quarterly Review* 264.

> The Hall (being little) was very much crowded, the Judges had but just Room for their Table and Chairs. Many Gentlemen of the Law were there, partly for Learning, and partly for News. They stood behind the Judges Chairs; but the Rabble (or, in *Compleat History*, the People) crowded the Room, and filled almost the Yard without. A learned Rout, and true Party Muster: A Regiment that, on all like Occasions, never failed to give Attendance. But that, which was most surprising, was that, as soon as the Lawyers had done arguing, and the Judges were preparing to give their Opinion, *O mirum!* a Scene, as in a Theatre, being a Pair of Balcony Doors aloft, opened, and there appeared sitting in Front against the Judge's Table, the Earl of *Shaftsbury*, Lord *Wharton*, Lord *Hollis*, and some other Lords. These came for Indifference without Doubt, and to observe, but more to be observed.[49]

These distinguished spectators were the leaders of the Whig opposition.[50]

Of the eight judges who comprised Exchequer Chamber on this occasion, only Sir Francis North is already known to us. His colleagues from Common Pleas were Sir Robert Atkyns, Sir William Ellis, and Sir Hugh Wyndham. The judges from Exchequer were Lord Chief Baron Montagu, Baron Lyttleton, Baron Thurland and Baron Bertie.[51]

Sir Robert Atkyns came from an ancient legal family.[52] His father had been a Baron of Exchequer, and he himself succeeded his own brother as Lord Chief Baron. Fair and upright, he was regarded as second only to Hale in point of learning. He had sat in the Common Pleas in 1672. He was forced to retire for political reasons in 1679, but was appointed Lord Chief Baron of Exchequer after the Revolution. He remained active even after his retirement in 1694, writing pamphlets attacking the growing jurisdiction of Chancery and the exercise of judicial functions by the House of Lords.

Sir William Ellis had also sat in Parliament and had been Solicitor-General to Cromwell before appointment to Common Pleas in the same year as Atkyns. He too was to be removed for political reasons in 1676, but was reinstated three years later.

The other members of the bench were men of little distinction who have left no mark on the law. Wyndham had spent three years in Exchequer before taking his seat in Common Pleas in 1673. Montagu had been less than two months in office, having formerly been Solicitor-General to the Queen. Thurland is remembered for

[49] *Examen* 522.

[50] On Shaftsbury, Holdsworth *op. cit., loc. cit.* 524-527.

[51] 1 Freeman 430. Bertie is here given as 'Barton', but this seems plainly a misprint. He appears as 'Baron Bertie' in an account of the litigation in Grey *Debates of the House of Commons*, 1667-1694 (1763), IV, 141-143.

[52] Biographical details of this Bench are from Foss, *op. cit.*, *Dictionary of National Biography*, Holdsworth *op. cit., loc. cit.*

his close friendship with Jeremy Taylor and John Evelyn. Vere Bertie had sat in Exchequer for a year; he may well have owed his rapid professional advancement to his family; there are no reports of any decisions by him in the four years of his judicial career. Practically nothing is known of Lyttleton beyond the fact that he was a brother to the able and upright Edward Lyttleton who was Lord Keeper in 1641.

It seems plainly, then, to have been a court dominated by North and Atkyns, with Ellis in the third place, and this makes the decision of the Chamber the more interesting. North, it does not surprise us to discover, found for the defendant. He was supported by the five least distinguished of his colleagues, and thus, by a majority, the decision of King's Bench was reversed. But Sir Robert Atkyns and Sir William Ellis were in dissent.

From Roger North's account, it appears that Atkyns and Ellis, the dissentients, delivered judgment first. They were substantial judgments, and they have been reported in detail.[53] The dissentients 'spoke very long', Roger North records, adding rather unkindly (and with what justification?) 'There was Cunning in this; for it was so done, that the Judges, of another Opinion, might huddle in giving their Judgments, and so the Cause look more foul on their Side.'[54]

Atkyns examined the four principal points of the argument as we saw it in King's Bench. He agreed that the statute of Henry VI did not cover the field.[55] He was satisfied that the sheriff was not entitled to judicial immunity for his acts as returning officer.[56] He considered that there was no trespass upon the authority of Parliament: the suit did not call in question the right of election, but was indeed grounded upon the House of Commons' finding in the matter.[57] But the heart of his judgment was his view of the nature and ground of civil liability in English law:[58]

> My ground and foundation is this, That where one person does injury to another, and the person to whom the wrong is done sustains particular damage and loss by the injury, there the law gives a remedy, by action, to the party injured.
>
> But here is an injury done.
>
> And here is a particular damage sustained.

[53] Atkyns in 6 How. St. Tr. 1074-1092; Ellis in Pollexfen 470 (86 E.R. 615), reprinted in 6 How. St. Tr. 1070-1074. See Wallace *The Reporters* 67-68, 346-347.

[54] *Examen* 522.

[55] 6 How. St. Tr. 1079-1082, 1090-1091.

[56] *Ibid.* 1090.

[57] *Ibid.* 1082-1086. He contended that in any case there were certain matters concerning Parliament in which the courts might concern themselves, and cited a most interesting precedent for judicial inquiry into the details of the passage of legislation: *ibid.* 1083.

[58] *Ibid.* 1076-1078.

Therefore an action lies.

I shall first prove the ground or foundation, which is the major proposition. That where a wrong or injury is done, and a particular damage sustained, there the law gives a remedy by action.

1. From the nature and quality of the law; which is to do right to all, and to give relief and redress to those that receive wrongs. And should there be any case where a person might receive an injury and damage, and yet have no remedy nor redress, the law would be defective; which would be a reproach to the law and government.

The law has appointed several courts, and given them several powers and jurisdictions; so that in the one or the other, every person that has suffered injury and damage may make his complaint, and have right done him.

Sir Edw. Coke, in his Mag. Chart. fol. 405, in his Expos. upon the Stat. of W. 2, c. 14, says, It is an ancient maxim of the common law, 'Non recedant quaerentes a curia regis sine remedio.' Whoever has just cause to complain, shall have their just remedy. And 'curia regis non debet deficere in justitia exhibenda.'

Both these rules and maxims, which have one and the same sense, are remembered in that Stat. of Mag. Chart. c. 24. . . .

Nay, the law has so great a zeal for redressing wrongs, that as sacred as the maxims and rules of the law are, yet if there were any rules or maxims that stood in our way to hinder, the law would break through those rules and maxims, rather than suffer an injury to be without remedy. 4 Inst. fol. 71, about the middle, 'No wrong or injury, either public or private, can be done, but it shall be reformed or punished in one court or other, by due course of law.' And in the lower end of that folio, 'A failure of justice is abhorred in law.'

Sir Fran. Bacon, amongst the elements of the law, fol. 51, delivers this as a principle, 'Receditur a placitis juris potius quam injuria et delicta remaneant impunita;' which he himself expounds in this sense, the law will dispense with some maxims, rather than wrongs should be unpunished.

2. My next argument to prove this position, 'That where an injury is done, and damage sustained, the law gives remedy', shall be taken from the nature of an action, which is the ordinary remedy the law gives for the repairing of a private wrong.

Now what the nature and definition of an action is, we learn from the most ancient authors of the law, as Bracton and Fleta, and the Mirror of the Justices, as they are collected by sir E.C. 2 Inst. fol. 40, and they all agree almost in the same words: 'Actio nihil aliud est quam jus prosequendi in judicio, quod alicui debetur, et quod nascitur ex maleficio, vel quod provenit ex delicto vel injuria.' It is nothing else but a means or remedy for a man to have right done him, that has suffered wrong and injury.

It is the argument commonly used, and the reason given to maintain an action, and in particular an action upon the case, viz That there is an injury done, and a damage sustained. . . .

This may suffice to prove the major proposition, 'That where wrong and injury is done to any man, and particular damage sustained by it, there the law entitled him to an action.'

Plainly, he argued, Sir Samuel Barnardiston had proved particular damage.

> Shall I have my action for a halfpenny trespass *pedibus ambulando?* Does the law give me an action of assault and battery, if a man does but lift up his hand to strike me? Or for a few ill words, that will break no bones? And shall I recover damage for these petty things, and shall no action lie for so notorious an injury as is done in this case?[59]. . .

He was not impressed by the objection that the action was a 'new invention.'

> It is true, it is new, in the particular circumstances, but not in the main, nor in the substance; 'tis new, in that 'tis brought by one elected knight of the shire against the sheriff, for a false and malicious return of another indenture, whereby the plaintiff was put to great expense and trouble; but 'tis not new in the general nature of the action. For nothing is more frequent than actions upon the case, where an injury is done and damage sustained; nay it is very frequent for actions upon the case to be brought against the sheriffs, for mere false returns, and that where there is no malice, nor any of those great aggravations that appear in this case. . . . Sir Francis Bacon, in his book of Advancement of Learning, speaking of cases omitted in law, fol. 38, says, 'That the narrow compass of man's wisdom cannot comprehend all cases which time hath found out;' and therefore cases omitted and new, do often present themselves, but, every new case does not require a new law; for then the legislative power must be continually exercised: But though it differs from former cases in circumstances, yet it may fall under a general rule, or be proceeded upon by parity of reason; 'ubi est eadem ratio, ibi idem est jus'.
>
> As the statute of W. 21. cap. 24. has made ample provision for all such new cases that fall under a general rule, but have no formed writ, or writ of course, that fits it in all the particulars and circumstances. 'In consimili casu, simili remedio indigenete, fiat breve,' says that statute. . . . And the common law does comply with, and conform to the general opinion and genius of the kingdom, and values what they generally esteem and value, and disesteems what they value not.[60]

Ellis J. delivered judgment along similar lines. To him, too, the leading issue was the principle of civil liability recognized in English law, and he was as clear on this as Atkyns: 'When I suffer an injury, joined with a loss, the common law gives me a remedy for it.'[61] It cannot be a complete objection to argue that the Court would be making new law. New actions have been recognized in the past.

> Before Stade's [*sic*] case they never could shew any action of the case upon an *indebitatus assumptsit;* multitudes of actions of debt, but none of the case, yet adjudged it would lie: For where there is

[59] *Ibid.* 1079. [60] *Ibid.* 1086-1085 [61] *Ibid.* 1071.

> *eadem ratio,* there is *eadem lex:* and will any man doubt where there is a false return whether an action will lie? In actions of the case there is less reason to expect precedents than in other things; they grow as the invention of man grows; according as new frauds and new deceits arise, so should new remedies.[62]

Atkyns and Ellis at length concluded their judgments. The hour was late and the Hall of the Inn was already darkening; soon candles were to be brought in. But the restless crowd still remained. The lesser men—Wyndham, Montagu, Lyttleton, Thurland and Bertie—hurried uncomfortably through judgments for the defendant. 'They did not expect so great an Audience, and, being also straightened in Time, did not expatiate much; nor were they prepared to speak so solemnly as others had done, but gave their Reasons short.'[63] They have not been separately reported.

The decision of Exchequer Chamber was now plain: King's Bench had been reversed, and Barnardiston had lost his suit. The people in Serjeants' Inn Hall wondered whether Lord Chief Justice North might not defer to the clock and add little or nothing of his own. But to North the matter was too important to be thus disposed of, and he was to speak for nearly an hour.[64]

> I have but little time left me to say what I have to offer, it being very late; and yet I must desire leave to produce those reasons I have in maintenance of my opinion: I will be careful not to detain you longer than will be necessary. . . .
>
> Because this is a cause of considerable value, great damages being recovered; because it is a judgment of great authority, being upon a cause tried at the King's Bench bar, and given upon deliberation there; because it is a case of an extra-ordinary nature, and of great import, each party pretending benefit to the parliament of it; because it is an action *primae impressionis,* that never was before adjudged, the report of which will be listened after: I have taken pains to collect and set down the reasons that I must go upon in determining this case; that as the judgment had the countenance of some deliberation in the court where it was given; so the reversal being with greater deliberation, may appear grounded upon reasons that ought to prevail.[65]

We have preserved what reads like a verbatim record of his judgment.[66] I do not propose to analyse it in detail. His principal reasons are what we would expect them to be, having regard to the arguments we saw him make as counsel in the King's Bench action. The sheriff is entitled to judicial immunity;[67] this is a matter for Parliament;[68] the situation is governed by the statute of Henry VI.[69] But with North, too, as with Atkyns and Ellis, it seems plain that the greatest legal issue of all was now the dispute as to the basis of

[62] *Ibid.* 1072. [63] *Examen* 522. [64] *Ibid.* 522. [65] 6 How. St. Tr. 1093-1094.
[66] *Ibid.* 1092-1117. [67] *Ibid.* 1096-1098. [68] *Ibid.* 1098-1099. [69] *Ibid.* 1103-1106.

civil liability at common law. If the principle were that contended for by Barnardiston and the dissenting judges—what North called 'the main substance and foundation' of their case[70]—it carried major implications for the judicial function and the development of the whole common law. North tackled the issue at once:

> I must needs say, this is a cause that imports it more than any cause I have known to come before us, for it is a cause *primae impressionis;* and the question is, Whether by this judgment a change of the common law be introduced? It is the principal use of Writs of Error, and appeals, to hinder the change of the law; therefore do Writs of Error in our law, and appeals in the civil law, carry judgments and decrees to be examined by superior courts until they come to the highest, who are entrusted that they will not change the law. . . .
>
> For otherwise, it would be very easy for judges, by construction and interpretation, to change even a written law; and it would be most easy for the judges of the common laws of England, which are not written, but depend upon usage, to make a change in them, especially if they may justify themselves by such a rule as my brother Atkyns lays down to support this case, viz. that the common law complies with the genius of the nation. I admit that the laws are fitted to the genius of the nation; but when that genius changes, the parliament is only entrusted to judge of it, and by changing the law to make it suitable to it. But if the judges shall say it is common law, because it suits with the genius of the nation, they may take upon them to change the whole as well as any part of it, the consequence whereof may easily be seen; I wish we had not found it by sad experience.[71]

The device of a double return, he argued, was a lawful way for the sheriff to perform his duty in doubtful cases. 'If this be so, then all aggravations of *falso, malitiose et scienter* will not make the thing actionable.' The common law recognized the concept of *damnum absque iniuria*—he gave a number of examples.[72]

> The words *falso, malitiose, et deceptive,* will sometimes make a thing actionable, which is not so in itself, without malice proved, though there be the same damage to the party.
>
> As where a man causes another to be falsely indicted, yet if it be not *malitiose,* no action lies; though there be the same trouble, charge and damage in one case as the other.
>
> But it is only where a man is a voluntary agent; for if a man be compellable to act, you cannot molest him upon any averment of malice. . . .
>
> If we should make the words *falso et malitiose* support an action without a fit subject matter, all the actions of mankind would be liable to suit and vexation: they that have the cooking (as we call it) of declarations in actions of the case, if they be skilful in their art,

[70] *Ibid.* 1115. And see Roger North: 'The chief, and indeed only, Reason for the Action, was the general Rule that where Wrong there Remedy . . .': *Examen* 523.
[71] 6 How. St. Tr. 1094-1095.
[72] *Ibid.* 1099.

> will be sure to put in the words *falso et malitiose,* let the case be what it will; they are here pepper and vinegar in a cook's hand, that help to make sauce for any meat, but will not make a dish of themselves.[73]

He admitted that the courts had in the past admitted new forms of the action upon the case, but, he said, 'they have been more often rejected'.

> These instances shew, that although an action upon the case be esteemed a catholicon, yet when actions have been applied to new cases, they have always been strictly examined, and upon considerations of justice or inconvenience they have been many times rejected.
>
> For though the law advances remedies, as my brothers observed, yet it is with consideration that vexation be not more advanced than remedy.
>
> It is my opinion, that no new device ever was, or can be introduced into the law, but absurdities and difficulties arise upon it, which were not foreseen: which makes me very jealous of admitting novelties.[74]

In any case, he argued, 'in matters relating to the parliament, . . . there is no need of introducing novelties; for the parliament can provide new laws to answer any mischiefs that arise, and it ought to be left to them to do it.'[75]

These last points he repeated again at the close of his long judgment, ending it as he had begun it with a warning against judicial innovation:

> My brothers that argued even now for the action, shewed great learning and great pains; and certainly have said all that can be invented in support of this case. . . .
>
> As for the rule they go upon, that where falsity, malice and damage do concur, there must be remedy; I confess it is true generally, but not universally, for it holds not in the case of a judge, nor an indictor, nor a witness, nor of words that import not legal slander, though they are found to bring damage, as I have shewn before. And the reasons that exempt these cases from the general rule, have the same force in the case at bar.
>
> I must confess the judges have sometimes entertained new kinds of actions, but it was upon great deliberation, and with great discretion, where a general inconvenience required it.
>
> If Slane's Case [*sic*] were new (for my brother Thurland observed truly it was said in that Case, that there were infinite numbers of precedents) that Case imported the common course of justice. Actions for words that are said to be new, though they have been used some hundreds of years, are a necessary means to preserve the peace of the kingdom. The Case of Smith and Craschaw, Cro. Car. 15, was a Case of general concern, being that prosecutions for treasons may be against any man, and at any time.
>
> But in the Case at bar, neither the peace of the kingdom, nor the

[73] *Ibid.* 1113-1114. [74] *Ibid.* 1108-1109. [75] *Ibid.* 1109.

course of justice is concerned in general, but only the administration of officers of the parliament, in the execution of parliamentary writs; and can never happen but in time of parliament, and must of necessity fall under the notice of the parliament; so that if the law were deficient, it is to be presumed the parliament would take care to supply it: discretion requires us rather to attend that, than to introduce new precedents upon such general notions that cannot govern the course of parliament.

My brother Atkyns said, the common law complied with the genius of the nation; I do not understand the argument. Does the common law change? Are we to judge of the changes of the genius of the nation? Whither may general notions carry us at this rate? For my own part, I think, though the common law be not written, yet it is certain, and not arbitrary. We are sworn to observe the laws as they are, and I see not how we can change them by our judgments; and as for the genius of the nation, it will be best considered by the parliament, who have power of the laws, and may bring us to a compliance with it. . . .

It is time for me to conclude, which I shall do by repeating the opinion I at first delivered, *viz* That this judgment is not warranted by the rules of law; that it introduceth novelty of dangerous consequence, and therefore ought to be reversed. 'Saepe viatorem nova, non vetus orbita, fallit.'[76]

These are recognizably great judgments of Sir Robert Atkyns and Sir Francis North. Grappling as they do with a basic issue of the common law, backed by long and painstaking argument, both at the bar and also formally and informally amongst all the judges of England, they seem to distinguish *Barnardiston v. Soame* as a case of seminal importance in English jurisprudence.

I have extracted the judgments here at considerable length because it seems to me that they have lingered too long in almost complete obscurity. There are few express citations reported of *Barnardiston v. Soame,* even in the years immediately following the decision,[77] and most modern writers have consequently been unaware of it.[78] For a case with all the marks of greatness upon it, this is undoubtedly curious. It may be explained in part by the fact that (as we shall

[76] *Ibid.* 1115-1117.

[77] Followed in *Onslow v, Rapley* (1681) 3 Lev. 29, *Prideau v. Morris* (1702) 2 Lutw. 82, *Kendall v. John* (1707) Fortes. 104. Referred to in *Ashby v. White* (1703) 2 Ld. Ray. 938 (in which both Gould J. at 942 and Holt C.J. at 958 chose to cite a dictum of Hale L.C.J.), *Ford v. Tilly* (1706) 2 Salk. 653, *Myddelton v. Wynn* (1746) Willes 597, *Burdett v. Abbott* (1811) 14 East 1, *Stockdale v. Hansard* (1839) 9 Ad. & El. 1, *Everett v. Griffith* [1920] 3 K.B. 163, *More v. Weaver* [1928] 2 K.B. 520. On the evidence of the reports, it was only in *Kendall v. John* that the arguments and judgments in *Barnardiston v. Soame* were extensively examined, and in which the 'novel actions' ratio of the case was emphasized; this appears from Fortescue's argument; the reported judgments of Holt C.J., Powell and Gould JJ. are short, but each relies expressly on *Barnardiston v. Soame.*

[78] No reference to the case will be found in the standard works on Torts by Pollock, Winfield, Salmond (early editions), Clerk and Lindsell, Street, Fleming, James, Holmes, Prosser, Harper and James, Morris, Wright. My attention was first drawn to the case by the extracts in Morison, *Cases on Torts* (1955).

see) the election law of the case was soon rendered obsolete by statute. Perhaps the politics of the affair would have made it an unfashionable citation after the Revolution. It may be that its learning on the main point of principle (although not its doctrine) was overlooked and at length forgotten in that barren period immediately following when all public teaching of law in England and the collegiate life of the Inns of Court came to an end: there was no room for expositions of this kind in the Abridgments.[79]

Yet after the House of Lords in 1689 (as again we shall see) had affirmed the decision in Exchequer Chamber—and this, let us note here was *after* the Revolution—it would seem true to say that the the main issue was never debated again in the courts with quite such open and elaborate care, although, of course, it was not forgotten and of its nature never will be. Despite the lack of much express reference to it in the books, the decision in *Barnardiston v. Soame* appears to have set the temper of Westminster Hall, and this Roger North would seem to witness:

> In Westminster-Hall the next Day, . . . the Gentlemen of the Law, discoursing upon the Subject one with another, as their Way is, for the most Part of them, agreed that the *Exchequer Chamber* had done right, and that such Action did not lie at the Common Law.[80]

English law was confirmed on a course to which, for good or ill, and *pace* Sir Frederick Pollock,[81] it still in the main adheres.[82]

Let us remember, however, that had all the judges sitting in Exchequer Chamber on this occasion been of equal calibre, the decision might well have gone the other way. It is true that Vaughan L.C.J. and Turner L.C.B., both deceased, were said to have been of North's opinion,[83] and Roger North, we saw, claimed a general agreement with it. But it is to be recalled that the King's Bench had earlier consulted 'all the Judges of England' and found 'great diversity of opinions',[84] and in that Court, presided over by the most eminent lawyer of his generation (Sir Matthew Hale), the decision had been for plaintiff, with the least distinguished member of the bench the sole dissentient. The arguments on authority were nicely balanced. The arguments on principle were weighty on either side. There was nothing inevitable about the decision in Exchequer Chamber.

Nothing inevitable, that is, unless politics made it so. Sir Robert Atkyns had his fears of this, and expressed them plainly in his

[79] Holdsworth *op. cit.* vi, 481-499.
[80] *Examen* 523.
[81] *The Law of Torts* (13th ed., 1929) 20-21.
[82] *Salmond on Torts,* (12th ed.) 14-19; *Winfield on Torts,* (6th ed.) 13-20; Street, *The Law of Torts* (3rd ed.) 6; Fleming, *The Law of Torts* (2nd ed.) 6-7.
[83] 6 How. St. Tr. 1117.
[84] 3 Keble 439.

judgment. The difficulty of the case, he said, 'rather lies in the great power and interest of the parties to the action, and of those that concern themselves in the example and consequence of it, upon a politic account, than from any uncertainty of the law'.[85] The decision in Exchequer Chamber was a victory for the Court party. All knew that North's political sympathies lay openly in this direction, and it can be no surprise that on so difficult an issue he was able to sway the opinions of the weaker members of the bench, several of whom were almost certainly of that party themselves.[86] It is true, as we have seen, that there are (despite Lord Campbell) many testimonies to North's fairness and impartiality in party causes, but the fact remains that he had been politically committed to his conclusion since his first contact with the case as Attorney-General. Sir Robert Atkyn's politics, on the other hand, were swinging to the opposition. A biographer relates that his judgment in this case 'marks the beginning of his separation from the party in power', and after his enforced retirement in 1679, for which he blamed in part his dissent in *Barnardiston v. Soame,* he lent his legal learning to the opponents of the Government.[87] Sir William Ellis was dismissed for political reasons in the very year of the decision, and as *Barnardiston v. Soame* had been the only case of public interest in his judicial career, the two events can hardly be unconnected.[87] It may be a not unreasonable conclusion, therefore, that the basic structure of our common law of torts owes a good deal to the Court intrigues and party politics of Restoration England.

IV

It remains to tell the rest of the story, which finishes as picturesquely as it began.

Barnardiston's friends determined, if possible, to take the matter by writ of error to the House of Lords.[88] But they thought it desirable that this move should be preceded by an adverse vote on the decision in the Commons, which might in turn lead to an Address to remove the Chief Justice. The initial steps were to be taken with as little publicity as possible in a Committee of the House. But word of the 'Contrivance' (as Roger North calls it) got around, and when the Committee finally met the Chief Justice's interests were well represented. His spokesman was Mr Serjeant Strode. Here is Roger North's account of the meeting:

> The whole Room, as well as the Table, was full of Members, and

[85] 6 How. St. Tr. 1079.
[86] Montague L.C.B., Bertie B. Biographical details are scanty; see *supra* 23-24.
[87] *Dictionary of National Biography.*
[88] The account is from *Examen* 524-527.

> Serjeant Strode, with his Ammunition, had planted himself directly over-against the Chairman. The first Act was to wheadle the Friends of the Chief Justice to give up the Judgment, pretending that *now* (for they found that their Design was scented) *they sought only to set the Law right, and would drop Persons.* So the Chairman stated the Case very short, and proposed a Question for the Opinion of the Committee, that the Judgment was illegal. *Hold,* says the Serjeant, *we deny that, and desire to be heard. How,* says the Chairman, with a menacing Phiz, *Will you defend the Judgment? will ye? will ye? Yes,* said the Serjeant as hot on the other Side, *I will, and here argue it presently;* and, while he was bustling among his Papers, a grave Member observed that they were both too forward.

In the end the Committee was persuaded that there was no action they could properly take in the matter, 'and thereupon,' says North, 'they rose *sine die*. And so ended (for that Time) a delicate Stratagem. And, Story Fashion, I may conclude, the Company departed heartily laughing.'

Many years later, and after the Glorious Revolution, Barnardiston thought the time ripe to attempt a further appeal.

He had, in the meantime, suffered considerable privation.[89] In 1683-4 he had had been tried by Judge Jeffreys for publishing seditious libels and fined £10,000. He resisted payment and was imprisoned until June of 1688, when he paid £6,000 and was released, substantially a ruined man. The House of Lords reversed the verdict against him in May of 1689. Heartened by this success, and although both Sir Francis North and Sir William Soame were dead and the latter's estate insolvent, Barnardiston brought his earlier litigation by writ of error to the House of Lords in the following month. The Lords heard argument, took the opinion of the judges, and resolved by majority to uphold Exchequer Chamber.[90] No reasons are reported, but the first ground which the minority gave for its dissent confirms that the central issue was still seen to be the same:

> Because it is a denying Sir Samuel Barnardiston the benefit of law, which gives relief in all wrong and injury. And though this be an action of the first impression, yet there being a damage to the plaintiff, the common law gives him this action to repair himself; and if it were not so, there would be a failure of justice, which cannot be admitted.[91]

When we bear in mind that the ruling politics of the country had so recently changed, and that Barnardiston was not without reason in thinking the Lords now to be 'more propitious',[92] the majority's

[89] *Dictionary of National Biography.*

[90] *Examen* 525; 6 How St. Tr. 1117-1120.

[91] *Ibid.* 1119-1120. The Dissenters signed themselves Bolton, Macclesfield, P. Wharton, S. Stamford, Herbert. It would appear that none of them had held judicial office. Wharton, we may recall, had shared in Shaftesbury's theatrical appearance in Serjeants' Inn Hall.

[92] *Examen* 526.

affirmation of Lord North's judgment is striking testimony to the extent to which his views on this central issue had been accepted. For on the narrow issue, of whether, as a matter of election law, there *should* be a suit for damages against a sheriff for a double return, the House of Lords in its legislative capacity was prepared to be persuaded, and in 1696 the effect of *Barnardiston v. Soame* on this point was reversed by a statute which provided an action for double damages.[93]

Sir Samuel was then seventy-six years of age, still a House of Commons man although almost at the end of his long and turbulent career,[94] and he must have regarded the passage of this statute as the final vindication of the stand he had taken over twenty years before. 'He was accounted an honest Man,' Roger North concludes, 'but mistaken, and betrayed into many Inconveniences by Popularity. . . . And now, since his Death, his Posterity live with much Honour and Respect, and seem to be out of all Danger of falling into those Errors of popular Flattery, as cost Sir *Samuel,* and consequently them, so dear'.[95]

[93] 7 & 8 Will, iii, c. 7 (now repealed).
[94] *Dictionary of National Biography.* Little is known of his activities after 1697; he retired from Parliament in 1702 and died in 1707.
[95] *Examen* 527.