AN ENQUIRY INTO THE QUESTION WHETHER JURIES ARE, OR ARE NOT, JUDGES OF LAW, AS WELL AS OF FACT

Joseph Towers

1764

AN
ENQUIRY
Into the QUESTION,
Whether JURIES are, or are not,
JUDGES OF LAW, As well as of FACT;
With a particular Reference to
The CASE of LIBELS.

[Joseph Towers]
[1764]

Among other Devices to undermine the Rights and Power of Juries, and render them insignificant, there has been an Opinion advanced, That they are only Judges of Fact, and not at all to consider the Law.
VET. AUTH.

We may conclude, that the Liberty of Britain is gone for ever, whenever any Attempts to wrest away the Liberty of the Press shall succeed. HUME.

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PREFACE.

THE following is an attempt towards an Examination into the just grounds of a proposition, which hath been advanced by some sages of the law, and assented to by many other persons; but which the Writer of this little Tract apprehends to be false in itself, and of the most dangerous consequence with respect to public liberty in general, and the Liberty of the Press in particular. If the light in which he considers it be a just one, no subject can be more worthy of the public attention. It is observed by Mr. Hume, that whenever any attempts to wrest from us the Liberty of the Press shall succeed, we may then conclude, that the liberty of Britain is gone for ever. And though the freedom of the press may often degenerate into a censurable licentiousness, yet it is certain, that a free people have much more danger to apprehend from a restraint of the Liberty of the Press, than from any, even the worst abuse of it.

The ingenious author just quoted, observes; that, "'tis sufficiently known, that despotic power would steal in upon us, were we not extremely watchful to prevent its progress; and were there not an easy method of conveying the alarum from one end of the kingdom to the other. The spirit of the people must frequently be routed to curb the ambition of the court; and the dread of rousing this spirit, must be employed to prevent that ambition. And nothing is so effectual to this purpose as the Liberty of the Press; by which all the learning, wit, and genius of the nation, may be employed on the side of liberty, and every one animated to its defence."

That the freedom of the Press may, and sometimes does, degenerate into licentiousness, cannot be disputed; but the laws against sedition and libelling are already amply sufficient, and much too strong to be left to the arbitrary decision of any Lord Chief Justice. The liberty which this nation enjoys, has rendered it the admiration and the envy of Europe; the man who is insensible of its value and its importance, is unworthy to live in a free country. With the Liberty of the Press in particular, Civil Liberty in general is closely and inseparably connected: they will stand or fall together. Let us not, then, suffer our opinion of the value of this inestimable Privilege to be lessened, because it is attended, as every thing human is, with some inconveniences; but which are infinitely overbalanced by its advantages; nor let us suffer that Liberty, for which our gallant ancestors have so often and so nobly hazarded their lives and fortunes, to be wrested from us by the quibbling of lawyers.

Whether in the following pages any light is thrown upon the subject which is attempted to be investigated, the Public will determine. They are not written to serve the purposes of any party; nor has the Writer, in what be has advanced, been influenced by any motives, but the love of Freedom, and of his Country.

AN
ENQUIRY, &c.

THE Importance and Advantages which arise to the liberties of the subject, from trials by jury, are so universally acknowledged, that, to Englishmen; it may be presumed, little need be said upon that head. This great privilege has ever been the pride and the boast of our ancestors; it has excited the highest applause, and been the admiration of foreigners; and is justly considered as the greatest security of our lives and properties, and the best defence against Tyranny and Arbitrary Power.

BUT this great privilege, though too strong to be battered down, may yet be so undermined by subtle pretences, as to be rendered, in many cases, of very little worth. In particular, some positions have been laid down by certain Lawyers, with respect to the doctrine of libels, which have the most fatal aspect upon the liberty of the press; if they do not tend to a total annihilation of it. Thus it hath sometimes been asserted, from Our benches of justice, and again repeated at

a period of time not very remote from the present, that jurymen, particularly in the case of libels, are judges of the Fact only, and not of the Law. That is, that if any man is charged in any information or indictment, with writing, printing, or publishing, any book, pamphlet, or paper, which is in such information or indictment stiled a libel, it is not the business of the jury to enquire, whether such book, pamphlet, or paper, really be a libel, or not; but only into the simple matter of fact, whether the person so charged be the author, printer, or publisher of such book, pamphlet, or paper; and to leave the matter of the libel, the determination whether it be a libel or not, entirely to the Court.

BUT if this principle be once admitted, a very moderate degree of reflection may be sufficient to convince us, that for the people of England then to pretend to be in possession of a freedom of the press, would be ridiculous. They would then have no liberty of the Press, but what the judges of the court of King's Bench might think proper to grant them; who, if they were influenced by any the most infamous and corrupt ministry, or by any other motive, might punish as a violator of the laws, any author, printer, or publisher, for writing, printing, or publishing, any book or paper whatever, which they might be displeased with, and think proper to declare a libel. This then being the natural, the unavoidable consequence of this position, That jurymen are not, in these cases, to judge of the law, as well as of the fact; a position replete with the most fatal consequences to the liberties of this kingdom; it is of the highest importance to enquire, whether it has any just foundation in law or in reason.

Now that jurymen have a legal right to determine the matter of law, as well as the matter of fact, in the case of libels, and in other cases, if they think proper, appears very clear. In Magna Charta, cap. 29. it is declared, "that no freeman shall be taken, or imprisoned, nor be disseized of his freehold, or liberties, or free customs, or be out-lawed, or any other way destroyed; nor shall we pass upon him, or condemn him, but by the lawful judgment of his peers, &c." That is, that no man can be legally punished, in any way whatever, without a fair trial by a jury of twelve men; and without their finding him guilty of some crime which the law declares punishable. It cannot be supposed to be consistent with this, that any jury should be arbitrarily directed to bring any man in guilty, when they are not convinced in their own minds, whether the action the accused person is charged with be a crime or not. No man (says Magna Charta) shall be punished, but by the lawful judgment of his peers; it follows then that they are his proper judges; judges not in part only, but of the whole matter; judges not only whether he hath been guilty of the action alleged against him, but whether he hath been guilty of a crime.

"A JURY of twelve men (says Lord Chief Justice Coke) are, by our law, the only proper judges of the matter in issue before them." And that great oracle of law, Littleton, declares, § 368. "That if a jury will take upon them the knowledge of the law upon the matter, they may." To which Coke, in his Comment thereupon, agrees; and we have, to the same purpose, the opinion of a very respectable gentleman, who holds, at this time, one of the highest stations in the law, and who is as much distinguished by his knowledge in his profession, as by his integrity and uprightness.

AND it is notorious, that, in many cases, juries do constantly judge of matters of law, as well as fact. When persons are indicted for Murther, it is a matter of law, whether the action committed, provided the fact be proved, fall under the denomination of Murther, Manslaughter, Chance-medley, or Self-defence; and yet these matters of law are determined by the jury. The court inform the jury, what it is that constitutes an action Murder, Man-slaughter, &c. and the jury themselves apply these general principles of law to the particular fact which they are appointed to try, and then bring in their verdict according to their own judgments. "All that the judges do (says an old author[1]) is but advice, though in matter of law; and it is the jury only that judges one guilty, or not guilty of murder, &c."

AND in most general issues, as upon Not Guilty pleaded in Trespasses, Breaches of the peace, or Felonies, though it be matter in law whether the party be a trespasser, a breaker of the peace,

or a felon; yet the jury do not find the fact of the case by itself, leaving the law to the court; but find the party guilty or not guilty generally. "The law (says the author just quoted) considering the great burden that lies upon the consciences of jurymen, has favoured them with this liberty. They may take upon them the knowledge of what the law is in the matter, or upon the truth of the fact, as well as the knowledge of the fact; and so give in a verdict generally, that the Defendant is guilty, or not" And indeed even the very custom of bringing in special verdicts, in those nice and intricate cases in which juries will not venture to take upon themselves the knowledge of the law, but chuse to leave it to the determination of the judges, appears to be a proof that, in other cases, they do take upon themselves the determination of it.

Now if it appears to be the custom and the right of juries to determine the matter of law in other matters, what reason can be assigned, why this right should be taken from them in the case of libels only? "Among other devices (says another old author) to undermine the rights and power of juries, and render them insignificant, there has been an opinion advanced, That they are only judges of fact, and not at all to consider the law. —— Thus some people argue; but it is an apparent trap at once to perjure innocent juries, and render them so far from being of good use, as to be only tools of oppression, to ruin and murder their innocent neighbours with the greater formality."

IT appears clearly from the design of the institution of juries, and from the declarations of the greatest lawyers, that the jurors are the only proper judges of the matters which they are appointed to try. "Whether an act was done in such or such a manner, (says Sir John Hawles), or to such or such an intent, the jurors are judges. For the court is not judge of these matters, which are evidence to prove or disprove the thing in issue. And therefore the witnesses are always ordered to direct their speecb to the jury; they being the proper judges of their testimony. And in all pleas of the crown, the prisoner is said to put himself for trial upon his country; which is explained and referred by the clerk of the court, to be meant of the jury, saying to them, which country you are." It being then manifestly the right, and the duty of jurymen, to judge entirely of the whole matter before them, it is easy to see what is the proper business of the judge. He is to state the law to the jury, and he may deliver his opinion, where the case is difficult; but they are under no kind of obligation to be guided implicitly by that opinion.

The office of a judge, Coke observes, is jus dicere, not jus dare, not to make any law by strains of wit, or forced interpretations; but plainly and impartially to declare the law already established. And the jury are to apply the general rules and maxims of law, or any particular statute or statutes, to the particular fact which is the object of their enquiry. This being the case, the duty of a judge, in the business of libels, as well as of other matters, is very plain: He is to inform the jury what the law says concerning libels, and they are to apply that law to the particular fact in question. This is the method in which the judges act, when they act rightly, in other matters; and in this manner they certainly ought to act in the case of libels. They are not to dictate to the jury what verdict they are to bring in, but only to inform their judgments, by instructing them in such points of law as they, from their situation in life, may reasonably be supposed to be unacquainted with. A judge ought not to say to a jury: "This book, pamphlet, or paper, is a libel; and if you are convinced that this man wrote, printed, or published it, you must find him guilty." But should first declare to them, what the law says concerning libels; and then leave them to apply it to the point in question; to enquire whether the particular action with which the accused person is charged, be a breach of the laws, and then to enquire whether he is guilty of that breach? And it is therefore clear, that, as the jurors are the proper legal judges of the whole matter, they ought not to bring in any man guilty, in any case, upon the mere ipse dixit of a judge, nor unless the guilt of the person they are appointed to try, be made evident to them.

If no evidence is produced sufficient to convince them, that the person has been guilty of a criminal action, of an action which is contrary to the laws; they ought, in such case, to acquit him for want of sufficient evidence; nor ought they ever to bring in a man guilty of a crime, merely because he is proved to have committed the simple fact with which he is charged, unless

they are convinced, that the commission of that fact is a crime, a violation of the laws. "If merely in compliance (says Sir John Hawles) because the judge says thus, or thus, a jury shall give a verdict, though such a verdict should happen to be right, true, and just, yet they, being not assured it is so, from their own understanding, are forsworn, at least in *foro conscientiæ* ." Nor ought any jury, in libels, or in other cases, to be influenced by either judges, or counsel, who torture sentences in any book, or paper, stiled a libel, into a bad sense, when they are capable of bearing a good one; for it is a maxim in law, that *Verba accipienda sunt in mitiori sensa*; words are to be taken in that sense which is most innocent. And every jury should remember, that they may presume nothing but innocency; and that they ought to do, until the contrary be proved.

IN the well-known case of Penn and Mead, Sir John Howel, the then Recorder, in summing up the evidence, said to the jury: "Now we are upon the matter of fact, which you are to keep to, and observe, as what hath been fully sworn, at your peril.'* As this jury were not convinced, that the fact, with which Pen and Mead were charged, was in itself a crime, they were unwilling to condemn them: though, attending to the matter of fact only, they could not avoid it, because the fact was fully proved. Willing therefore to follow the instructions of the court, and, at the same time, to clear their own consciences, they brought in their verdict only, Guilty of speaking in Grace-church-street. This verdict the court would not take, nor another much to the same purpose, which they gave into the court in writing; and though the court was twice adjourned, yet the jury, being determined not to condemn men whom they believed to be innocent of any crime, did, at last, bring in their verdict simply, not guilty, which was recorded, and approved of. Here, it is plain, the jury had respect, in their last verdict, entirely to the matter of Law; for of the Fact they had no doubt. And though this jury were afterwards fined by the court, and ordered to be imprisoned till they paid their fines; yet this fining and imprisonment were declared, by the court of Common Pleas, to be Illegal; and the jurors were released, and left to the common law, for remedy and reparation of the damages which they had sustained.

THIS jury certainly deserved great commendation for their courage and constancy; but yet, if they had been better advised, they might have brought in their verdict simply, Not Guilty, at first. For as they were not convinced, that Penn and Mead had been guilty of any criminal or illegal action, they could not honestly and conscientiously do any thing but acquit them: for to say, that any man is guilty of an innocent action, is absurd. But the example of Penn and Mead's jury in their first verdict; namely, bringing in their verdict as to the fact only, as guilty of speaking in Grace-church-street, has been, though very wrongly, followed by later juries. Thus a jury, in the case of a libel, have brought in their verdict in this manner: Guilty of publishing the Freeholder, N°. 40. "Such a verdict (says Hawks) hath generally been refused by the court, as being no verdict; though, it is said, it was lately allowed somewhere in a case that required favour." We have a much more recent instance of a verdict of this kind being accepted; but, perhaps, that also was a case that required favour. But jurymen should consider the absurdity of endeavouring to clear their consciences by such verdicts; because if such a verdict be taken and allowed, the accused person is subject to the same pains and penalties, as if the jury had brought in their verdict simply guilty; that is, guilty of the whole indictment.

IF a jury are not convinced, that any man is guilty of the whole that is exhibited in an indictment against him; at least of all which does materially constitute the offence with which he is charged, they have a right, nay, they are bound by their oaths, to acquit him. "Are you not sworn (says Hawles) That you will well and truly try, and true Deliverance make? There is none of this story of matter of Fact distinguished from Law in your oath. But you are well, that is, fully, truly, and. impartially to try the prisoner. So that if, upon your consciences, and the best of your understanding, by what is proved against him, you find he is guilty of that crime wherewith he stands charged; that is, deserving death, or such other punishment as the law inflicts upon an offence so denominated; then you are to say, he is guilty. But if you are not satisfied, that either the act he has committed was treason, or other crime, (though it be never so often called so) or that the act itself, if it were so criminal, was not done; then what remains, but that you are to acquit him? For the end of juries is to preserve men from oppression, which may happen, as well

by imposing or ruining them for that as a crime, which indeed is none, or at least not such, or so great, as is pretended; as by charging them with the commission of that, which, in truth, was not committed. And how do you well and truly try, and true deliverance make, when indeed you do but deliver him up to others to be condemned, for that which you do not believe to be any crime." IT has been said, that the usual epithets, which are in indictments or informations for libels, namely, that they are false, scandalous, and malicious; or seditious, and with a design to raise insurrections against the government, &c. are only words of course, and mere matter of form, which is not to be attended to: They have been compared by great personages in the law, to the usual phrase in indictments for murder, being moved by the instigation of the Devil, and others of that kind. But a very little consideration will convince any impartial man, that this is mere sophistry. Every man sees that that phrase just mentioned, and others of that sort, are mere words of course; but the other epithets, false, scandalous, malicious, seditious, &c. which are used in informations for libels, are manifestly essential words, which do either make, or, at least, aggravate the crime charged.

If any man is charged, in any information or indictment, with writing, printing, or publishing a scandalous, false, and malicious or seditious libel, and no evidence is kid before the jury of any thing but the barely writing, printing, or publishing such a book, can a conscientious and intelligent jury bring in any man guilty upon such evidence? They certainly cannot; for no evidence of guilt is laid before them. Writing, publishing, or printing books, are in themselves innocent actions: it must be proved, therefore, that the books themselves contain something, in its own nature, criminal, or there can be no guilt; and that the jury ought to determine, or they determine nothing. And it is indeed even a matter of Fact, as well as a matter of Law, whether any book or paper be false, scandalous, malicious, and seditious, or not.

THE following are some of the arguments made use of by Lord Chief Justice Jefferys, in his charge to the jury, on the trial of Sir Samuel Bernardiston, in the court of King's Bench, for a misdemeanour, in falsIy, scandalously, maliciously, and seditiously writing and publishing certain letters, against the peace of the King, his crown and dignity, &c. These letters were never printed; and all the publication which was endeavoured to be proved, was, that they were sent to the Post-office. "It hath been objected, (said Jefferys) that inasmuch as the words falsly, seditiously, maliciously, factitiously, and the like words, are in the information, they would have you believe, that there being no evidence of any such thing as Faction, Malice, and Sedition, or that the man did it maliciously, and advisedly, and seditiously, (which are the words in the premises, as I may call them, or the preamble of the information) therefore they must be acquitted of that part. Now as to that, I told them then, and tell you now, gentlemen, that no man living can discover the malicious evil designs and intentions of any other man, so as to give evidence of them, but by their words and actions.

No man can prove what I intend but by my words and actions. Therefore if one doth compass and imagine the death of the king, that, by our law, is High-treason; but whether or no he be guilty of this treason, so as to be convicted of it by another, is not provable, or discoverable, but by some words or actions, whereby the imagination may be manifested. And therefore my imagining, my compassing, which is private in my own mind, must be submitted to the judgment that reason and the law passeth upon my words or actions; and then the action itself being proved, that discovers with what mind the thing was done. — Suppose any man, without provocation, kills another; the words of the indictment are, That he did it maliciously, feloniously, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil. Now all these things, whether he had the fear of God before his eyes, or not; or whether he were moved by the instigation of the Devil, and of his malice fore-thought, or no; these cannot be known, till they come to be proved by the action that is done. So in case any person doth write libels, or publish any expressions, which in themselves carry sedition, and faction, and ill-will towards the government; I cannot tell well how to express it otherwise in his accusation, than by such words, that he did it seditiously, factiously, and maliciously. And the proof of the thing itself, proves the evil mind it was done with. If, then, gentlemen, you believe the defendant, Sir

Samuel Bernardiston, did write and publish these letters, that is proof enough of the words maliciously, seditiously, and factiously, laid in the information."

ARGUMENTS similar to these, and almost in the same words, have been delivered in later times from the same bench. But every man must see the fallacy of them. In the case Jefferys mentions,
of compassing and imagining the death of the king, there must be a proof of some overt act, or words, or writing, to evidence such a treasonable design. In the case of murder, the proof of the act itself is a sufficient evidence of guilt; because to kill any man, unless it be by accident, or in self-defence, is an illegal arid wicked act. But the case of libels is essentially different. If, in a trial for a libel, nothing is proved but what is called the fact, namely, the writing, printing, or publishing of a book or paper, there is no guilt of any kind proved; because these things are, in themselves, innocent and indifferent actions. There must, therefore, in any book or paper, which is stiled a malicious or seditious libel, be some evidence of malice or sedition laid before the jury in such book or paper, otherwise the Fact itself is not proved to them; for proving simply, that a man has published a book or paper, and proving that he has published a seditious or malicious libel, are two distinct things. As writing, printing, and publishing books or papers are, in themselves, innocent and lawful actions; if it be not proved, that such books or papers are malicious or seditious there is no evidence of any guilt at all. Nor ought it to satisfy a jury, that the judge tells them, that any book or paper is a seditious or malicious libel; they ought to be convinced themselves that it is so, or they cannot honestly and conscientiously pronounce any man guilty, whom they are appointed to try for such an offence.

WE have one late instance, and that a very noble one, of an English jury's asserting this their right, to determine the matter of Law, as well as the matter of Fact. In 1752, Mr. William Owen, bookseller, was tried, in the court of King's Bench, before Lord Chief Justice Lee, for publishing a pamphlet, intituled, The Case of Alexander Murray, Esq; in an Appeal to the people of Great Britain. This piece had been voted by the House of Commons to be an impudent, malicious, scandalous and seditious libel; and the House had thereupon addressed the King to prosecute the author, printer, and publisher thereof, and the author having left the kingdom, the prosecution fell upon the bookseller. The Fact of the publication was, in the course of the trial, very clearly proved; and the judge, in summing up the evidence, gave it as his opinion, that the jury ought to find the defendant guilty, for he thought the publication was fully proved; and if so, they could not avoid bringing the defendant in guilty. But the jury, thinking they had a right to determine the matter of Law, as well as the matter of Fact, and being determined to assert that right, did, notwithstanding the opinion of the judge, and the Vote of the House of Commons, acquit the bookseller, by bringing him in, Not guilty.

NOTHING can be more certain, than that a custom of leaving the determination of what books or pamphlets are or are not libels entirely to the judge, must have the most fatal tendency with respect to the liberty of the press. Should, in any future period, the people of England be governed by a corrupt, oppressive, and infamous ministry; which, however far it may be from being the case at present, is certainly a possible and a supposeable case; and any honest Englishman should have courage and patriotism enough to expose the bad measures of such a ministry, and to guard his countrymen against their designs; any performance of this tendency, though written with the most upright and patriotic intentions, would, by such a ministry, be most certainly deemed a seditious libel; and it is no great improbability to suppose, that they might, in such a case, should a prosecution be commenced, get some Justice of the Court of King's Bench, to pronounce that it was so.

There have been formerly judges, who were at the beck of the court, and there may be again. If then the Jury are not to judge of the Law, as well as of the Fact, but to follow implicitly the Judges opinions; they would have nothing to do in such a case, but to find the author of any such production guilty. And thus a man would be legally punished for an action as a crime, for which he would deserve the esteem, and the thanks of all his countrymen.

WE have a remarkable instance of this sort in the reign of James the Second. James having made large strides towards the introduction of Popery and Arbitrary Power, and having assembled an. army of fifteen thousand men upon Hounslow-heath, in a time of profound peace, Mr. Samuel Johnson, a clergyman, published a paper, addressed to the Protestant officers and soldiers of the army; in which he represented to them the baseness and infamy, of serving as instruments to destroy the religion and constitution of their country. Whereupon, as this paper was very disagreeable to the court, Mr. Johnson was prosecuted in the Court of King's Bench for writing a seditious libel, and his Jury thought proper to bring him in guilty; upon which he was sentenced to stand three times in the pillory, to be whipped from Newgate to Tyburn, and to pay a fine of five hundred marks; which sentence, after he had been solemnly degraded, was accordingly executed with great rigour.

IT is obvious, that if the position be admitted, that Judges only are to determine the matter of Law in the case of libels; every man is liable to prosecution, and to punishment, for writing, printing, or publishing any book or paper whatever, which any Judge of the Court of King's Bench may think proper to deem a libel, by whatever motives he may be actuated. No man could write or publish any thing of a political kind without manifest danger, however upright his intentions might be in so doing. Ministers of state will ever deem all writings, which oppose their measures, libellous and seditious; and the more truth there is in any publications of that sort, the more commonly will they be irritated by them. If then the power of pronouncing what are libels, and what are not, rests solely in the breasts of the judges, can it be a difficult rnatter for a minister to punish any man, who writes with any degree of freedom upon the public measures? Or is it impossible to suppose, that a bad minister may find some judge of the Court of King's Bench, who may be influenced by the court? We have had a Jefferys preside in that court, and we may have again. And is there any Englishman, who thinks the liberty of the press of the highest national importance, who ran think calmly of such a power being lodged in such hands?

IN short, the most innocent book or paper whatever, may be deemed a libel. Baxter's Paraphrase on the New Testament was deemed, in the Court of King's Bench, a seditious libel; and the author was punished as a seditious libeller. No impartial man, who ever read the Crisis of Sir Richard Steele, can ever think it consistent with any just pretensions to the freedom of the press, that such a performance should be deemed punishable; and yet the Crisis was voted a libel, and the author expelled the House of Commons for writing it, How ridiculous is it to pretend, that the people of England have the liberty of the press, if it be admitted, that the judges can pronounce any book a libel that they think proper? Must not every intelligent foreigner laugh at such a pretension? It is true, authors and booksellers may, notwithstanding, write and publish what they please; but if this principle be admitted, they must always do it at their peril.

IF then this be the certain consequence of admitting this proposition, That Juries, are only judges of matters of Fact, and not of the matter of Law, as it most evidently appears to be, must not every friend to liberty be alarmed at so dangerous a position? and more especially when it is advanced from our benches of justice, and by those whose eloquence and abilities render them the more capable of maintaining a false hypothesis?

But as it appears manifestly to be inconsistent with the original design and institution of juries, to suppose that they have not a right to judge of Law, as well as Fact; as it appears to have been the opinion of some of the best and ablest lawyers, that they have that right; as it is notorious, that, in many cases, such as in trials for murder, &c. juries do constantly determine the Law, as well as the Fact; as it is certain, that they have actually exerted this right in the case of libels, and other similar cases, when they have had spirit and honesty enough to do their duty; and as the leaving the determination of the matter of Law to the Judges only, is manifestly attended with consequences so fatal to the liberty of the press; surely a right of such importance ought not to be given up upon the mere dictum of any lawyer, how great, how eminent, how powerful soever.

IT is easy to conceive why some judges may have been willing to advance this position, because it tends to encrease their power; and may enable them the better, on many occasions to carry a favourite point But the bare assertion of any judge, any more than of an inferior lawyer, does not make Law, And certainly the mere opinions and assertions of many lawyers, if many could be produced, ought not to balance against the consequences, which seem naturally to result from admitting the doctrine which has here been controverted; especially if those opinions do not appear to be really founded in Law; but to be contrary to the spirit of it, and to thole principles of right reason, upon which all law is, or ought to be, founded.

JURIES have the more reason to be upon their guard in cases of this nature, against any incroachments on their rights, since the custom of prosecutions, in the Court of King's Bench, by informations only, in criminal cases, has unhappily arisen to such a height; by which means the subject is drawn into hazard of liberty and estate, without presentment or indictment of a Grand-jury; and is thereby deprived of that great and good out guard of his liberty and property, the Inquest by oath of twelve men, before he should be brought to trial.

IF the principles which have been advanced in this little piece are just; and i£ the consequences which have been pointed out, do, in reality, naturally result from the doctrine which hath been here opposed; every uncorrupted Englishman, every friend to treedom, of whatever party, must be alarmed at the propagation of it; and be heartily and warmly disposed to oppose whatever hath a tendency so fatal to the public liberty.

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PREFACE

THE Writer of the following Observations not being a lawyer by profession, some apology may seem necessary, for his attempting to write upon a subject, which may be thought more peculiarly the province of the professors of the law. But it is a subject, as he conceives, of great importance to the general interests of liberty, a subject in which every Englishman is concerned, and in which some of the gentlemen of the long robe, from the habits

of their profession, and from their connexions and future prospects, are, perhaps, not perfectly impartial. It is, however, a subject, which should be generally understood by men of all ranks, and especially by those who are liable to serve on juries; for the liberty of the press is essentially connected with it, and with that liberty every other branch of public freedom.

As the writer of these Observations has read most of the pieces that have been published relative to the law of libels, and perused almost every trial of this kind that has been published, he is not unacquainted with the language of the law upon that subject, and could have expressed himself with a greater conformity to the technical phrases of that profession. But as he writes not for lawyers, but chiefly for men of other professions and employments, he thought it best to make use of language that should be generally intelligible. Every man, who is liable to serve on a jury should endeavour, as far as his other avocations will admit, to make himself acquainted with the duties of that important office: and it is not possible for this knowledge to be too generally disseminated.

IN any incidental expressions that may be used, in the course of these Observations, relative to the gentlemen of the law, the Writer hopes it will not be imagined, that he meant any thing disrespectful to the members of that profession in general. For many of them he has a great personal esteem and regard. He considers it as a very honourable profession; and he has a high sense of the Worth of many of those who are engaged in it. He has not forgotten, that if the profession of the law has been disgraced by a JEFFERIES and a SCROGGS, it has also been adorned by a HALE, a SELDEN, a SOMERS, and a CAMDEN.

OBSERVATIONS, &c.

AMONG the several great and distinguished privileges, of which the inhabitants of this country are possessed, none is more important to their personal security, than the right of trial by jury. But this right has, in particular instances, been rendered less beneficial to the subject than it might have been, by the ignorance or timidity of those who have served on juries; and by the arts which have been employed, to confine them within narrower limits than was intended by the constitution, and to bewilder their understandings by the subtilties of legal sophistry. It is, therefore, of great consequence to the interests of public freedom, that the rights of jurymen should be resolutely maintained, and their business and duty clearly explained and generally understood. In the observations now offered to the public, the rights and duty of juries in trials for libels is the particular object of attention; as it is apprehended, that doctrines have been recently advanced upon that subject, by men whose offices naturally give weight to their opinions, which are highly derogatory to the rights of juries, inconsistent with the purposes for which juries were evidently appointed, and totally subversive of the freedom of the press.

BY the doctrine which has lately been maintained upon this subject, juries have no business, or right, in trials for libels, to enter at all into the merits of any book, pamphlet, or paper, which any man is tried for writing, printing, or publishing, but merely to inquire into the fact of publication, and into the innuendoes, or application of the blanks, if there be any; and if the publication be proved, they are to find the defendant guilty, leaving the innocence, or criminality, of the book or paper styled a libel, wholly to the determination of the court. Whether such book or paper be in law a libel, is, we are told, a question of law upon the face of the record; and to the determination of this the jury are not competent.

THIS doctrine, though not very ancient, is certainly not new. It was maintained, in the last century, by some of those judges, and crown lawyers, who were enemies to the rights of juries, and to the freedom of the press; and their example has been copied since, and much legal dexterity exerted, in order to prevail on juries to submit to this diminution of their power and importance. The doctrine, however, has been repeatedly and strongly opposed, by those who were friends to a free press, and to general liberty. It was, indeed, manifest to every man, who thought coolly and impartially upon the subject, and who could divest the doctrine of the technical obscurity,

in which it appeared to be intentionally involved, that it would render juries useless in cases, in which, of all others, their interference was the most necessary to the security of the subject; and that it could not justly be considered in any other light, than as an extension of the power of the judges, to the prejudice of the most sacred and important rights of English juries.

NEITHER by the ancient common law of the land, or by any statute, have juries ever been deprived of the power of bringing in a general verdict, in trials for libels, any more than in any other cases. All that is called law upon the subject is only the opinion of certain judges, occasionally delivered, and manifestly calculated to extend their own jurisdiction. But no usurpation on the rights of juries ought to be submitted to, and particularly in criminal prosecutions for libels, as in these cases the influence of the crown is especially to be apprehended. In the ordinary cases that come before the judges, as they have no interest on either side, it is natural for them to deliver their opinions, in general, with impartiality. But, in trials for libels, it has been no uncommon thing to see in the judge, before whom the cause was tried, a manifest: desire to convict the defendant; a desire that has been apparent to every man in the court. It is in such cases as these, therefore, that English juries should exert their right of judging for themselves; and in which they should resolutely refuse to bring in a verdict of guilty, against those whom they are appointed to try, unless they have a full conviction that they have been guilty of some criminal act. It was in order to give the subject this security, that juries were appointed; and if they do not exert the power, which the constitution has given them in such cases, they violate the trust reposed in them, and are themselves unworthy of the protection afforded by the laws of a free country.

THAT judges, appointed by the king, may have an improper bias on their minds, in causes between the crown and the subject, is a very ancient, and certainly a very rational idea. It has, therefore, ever been thought a great advantage, that, in such cases, the subject should be protected from any undue influence in the mind of a judge, by the interposition of a jury. But the subject would be wholly deprived of this protection, in trials for libels, if juries were only to inquire into the fact of publication, which is seldom doubtful, or difficult to prove, and entirely to leave the merits of the publication to the determination of the court. It may also be observed, that it would be the more improper to invest the judges with the exclusive power of determining the criminality of libels, because they are at present invested with a power of discretionary punishment. This is, perhaps, too much; but surely, in a free country, the same men ought not to be invested with the sole power of determining what may, or may not, be innocently written or published, and also with a power of discretionary punishment.

JURIES, in all criminal prosecutions, have an undoubted right to try the whole matter in issue before them; and nothing can be more absurd, than to suppose that juries, in trials for libels, are to find a fellow-citizen guilty of a crime, though they have no conviction of his having done any thing criminal; for if they find nothing but the mere facts of writing, printing, or publishing, they find nothing that necessarily involves in it the least degree of criminality. It is observed by an ingenious and able writer upon this subject, that 'a criminal prosecution and trial can only be had for a crime; now the mere simple publication of any thing not libellous (there being no public licenser) is no crime at all; it is then the publication of what is false, scandalous, and seditious, that is the crime, and solely gives jurisdiction to the criminal court; and that therefore is what must, of necessity, be submitted to the jury for their opinion and determination.

A decisive argument to the same purpose may be drawn from the conduct of the lawyers themselves in this very matter. For it is agreed, on all hands, to be necessary for the crown-pleader to set forth specially some passages of the paper, and to charge it to be a false or malicious libel. Now, this would never be done by the law-pleaders, submitted to by the attorney-general, or endured by the judges, if it was not essential to the legality of the proceeding. The King's Bench, in granting the information, only act like a grand jury in finding a bill of indictment, and in effect say no more than this, That, so far as appears to them, the paper charged seems to be a libel, and therefore the person accused should be put upon his trial before a jury, whose business it will be

to enter thoroughly into the matter, heat the evidence examined, and what the counsel can say on both sides, and form a judgment upon the whole, which, after such a discussion, it will not be difficult for any man of common understanding to do. Whether the contents of the paper be true, or false, or malicious, is a fact to be collected from circumstances, as much as whether a trespass be wilful or not, or the killing of a man with malice forethought. "Whether any act was done, or word spoken, in such or such a manner, or with such or such an intent, the jurors are judges. The court is not judge of these matters which are evidence, to prove or disprove the thing in issue." This is our law, both in civil and criminal trials, although the latter are by far the most material, because what affects our person, liberty, or life, is of more consequence than what merely affects our property[11.' The same writer also says, 'In all criminal matters, where law is blended with fact, juries, after receiving the instruction of the judge, must determine the whole, by finding the defendant generally guilty or not guilty.'

SERGEANT Salkeld says, 'In all cases, and in all actions, the jury may give a general, or special verdict, as well in causes criminal as civil, and the court ought to receive it, if pertinent to the point in issue, for if the jury doubt they may refer themselves to the court, but are not bound so to do[31.' And it is observed by Sir Matthew Hale, that 'If the judges opinion must rule the matter of fact, the trial by jury would be useless;' and that 'it is the conscience of the jury that must pronounce the prisoner guilty or not guilty.' But juries can be no check whatever upon judges, in trials for libels, if they are confined to the mere fact of publication. If this be admitted, the consequence is, that any man who has written any book, pamphlet, or paper, containing any animadversions or remarks on public men, or public measures, or on any other subject, may be condemned, and punished at discretion, by judges appointed by the crown. The most venal partisan of courtly power will hardly have the confidence to pretend, that this is compatible with a state of national freedom.

SIR John Hawles says, "'Tis most true, juries are judges of matters of fact: that is their province, their chief business; but yet not excluding the consideration of matter of law, as it arises out of, or is complicated with, and influences the fact. For to say, they are not at all to meddle with, or have respect to, law in giving their verdicts, is not only a false position, and contradicted by every day's experience; but also a very dangerous and pernicious one; tending to defeat the principal end of the institution of juries, and so subtly to undermine that which was too strong to be battered down.'

THOUGH the direction, as to matter of law separately, may belong to the judge, and the finding the matter of fact does, peculiarly, belong to the jury; yet must the jury also apply matter of fact and law together; and from their consideration of, and a right judgment upon both, bring forth their verdict: For do we not see in most general issues, as upon not guilty — pleaded in trespass, breach of the peace, or felony, though it be matter in law whether the party be a trespasser, a breaker of the peace, or a felon; yet the jury do not find the fact of the case by itself, leaving the law to the court; but find the party guilty, or not guilty, generally? So as, though they answer not to the question singly, what is law? yet they determine the law, in all matters, where issue is joined. So likewise is it not every day's practice, that when persons are indicted for murder, the jury not only find them guilty, or not guilty; but many times, upon hearing, and weighing of circumstances, bring them, either guilty of murder, manslaughter, *per infortunium,* or *se defendendo,* as they see cause? Now do they not, herein, complicatively resolve both law and fact? And to what end is it, that when any person is prosecuted upon any statute, the statute itself is usually read to the jurors, but only that they may judge, whether, or no, the matter be within that statute?

As juries have ever been vested with such power by law, so, to exclude them from, or disseize them of the same, were utterly to defeat the end of their institution. For then, if a person should be indicted for doing any common innocent act, if it be but clothed and disguised, in the indictment, with the name of treason, or some other high crime, and proved, by witnesses, to have been done by him; the jury, though satisfied in conscience, that it is not any such offence

at it is called, yet because (according to this fond opinion) they have no power to judge of law, and the fact charged is fully proved, they shall, at this rate, be bound to find him guilty.

LITTLETON says, 'In such case where the inquest may give their verdict at large, if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally as is put in their charge.' To this Coke adds, 'Although the jury, if they will take upon them (as Littleton here saith) the knowledge of the law, may give a general verdict; yet it is dangerous for them so to do, for if they do mistake the law, they run into the danger of an attaint; therefore to find the special matter is the safest way, where the case is doubtful[61.' This caution appears to refer to very abstruse points of law, and is not justly applicable to the case of libels. But the right of the jury to determine the Iaw, as well as the fact, even in the most difficult cases, is not here disputed.

LORD-CHIEF-JUSTICE Vaughan observes, that 'upon all general issues, as upon not culpable, pleaded in trespass, nil debet in debt, nul tort, nul disseisin in assize, ne disturba pas in quare impedit, and the like; though it be matter of law, whether the defendant be a trespasser, a debtor, disseizer, or disturber in the particular cases in issue; yet the jury find not (as in a special verdict) the fact of every case by itself, leaving the law to the court, but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately, and not the fact by itself; so as though they answer not singly to the question what is the law, yet they determine the law in all matters, where issue is joined, and tried in the principal case, but where the verdict is special.

SIR Matthew Hale says, 'The jury may find a special verdict, or may find the defendant guilty of part, and not guilty of the rest, or may find the defendant guilty of the fact, but vary in the manner. If a man be indicted of burglary, quòd felonicè et burglariter cepit et asportavit, the jury may find him guilty of the single felony, and acquit him of the burglary and the burglariter. So if a man be indicted of robbery with putting the party in fear, the jury may find him guilty of the felony, but not guilty of the robbery. The like where the indictment is clàm et secretè a personâ.'[8] IN an indictment for murder, 'suppose the prisoner killed the party, but yet in such a way as makes no felony, as if he were of non sane memory, or if a man kills a thief, that comes to rob him, or to commit a burglary, or if an officer in his own defence kills one, that assaults him in the execution of his office, which are neither felony nor forfeiture, whether it is necessary to find the special matter, or may the party be found not guilty? I think, and so I have known it constantly practised, the party in these cases may be found not guilty, and the jury need not find the special matter.

HALE also says, 'What if a jury give a verdict against all reason, convicting or acquitting a person indicted against evidence, what shall be done? I say, if the jury will convict a man against or without evidence, and against the direction or opinion of the court, the court hath this salve to reprieve the person convict before judgment, and to acquaint the king, and certify for his pardon. And as to an acquital of a person against full evidence, it is likewise certain the court may send them back again, and so in the former case, to consider better of it before they record the verdict; but if they are peremptory in it, and stand to their verdict, the court must take their verdict and record it, but may respite judgment upon the acquittal.'

INDEED, the right of the jury to determine the law, as well as the fact, or to bring in a general verdict, appears to be clearly ascertained by express statute. In the statute of the 13th of King Edw. I. Westm. cap. 30. it is said: 'All justices of the benches from henceforth shall have in their circuits clerks to enrol all pleas pleaded before them, like as they have used to have in time passed. And also it is ordained, that the justices assigned to take assizes shall not compel the jurors to say precisely whether it be disseizin, or not, so that they do shew the truth of the deed, and require aid of the justices. But if they of their own head will say, that it is disseizin, their verdict shall be admitted at their own peril.' It appears from the marginal notes to the Statutes, Cay's edition, that this clause is considered as declaratory of the right of juries to bring in a

general verdict, and this even in matters of property, in which the law, in many cases, may be considered as more intricate and obscure than in criminal cases. The word Disseizin signifies "an unlawful dispossessing a man of his land, tenement, or other immoveable, or incorporeal right." When, therefore, a jury took upon themselves to say, "It is disseizin," they determined a point of law, as well as a question. of fact. It is declared by this statute that they have a right to do this, and that they are not to be compelled to bring in a special verdict.

IN trials for murder, it is a point of law whether the act, by which the person was killed, be murder, or manslaughter, or chance-medley, or self-defence; but this point of law, as well as the truth of the fact itself, is almost always finally determined by the jury. In such cases, the judge explains to the jury the several kinds of homicide, and may give them his opinion under what denomination the particular act comes which is the subject of their inquiry. But they are not obliged to adopt his opinion: they have an undoubted right to bring in a general verdict. In some cases, an act of homicide may be attended with such circumstances, that it may be a very nice and difficult point of law to determine, whether it was murder, or whether it was manslaughter, But even in such cases, the final determination is left by law to the jury; for special verdicts in trials for murder are extremely uncommon, and depend entirely upon the option of the jury. Indeed, the very practice of bringing in special verdicts clearly implies, that juries are judges of law, as well as of fact. This is observed by the author of the Trial per Pais, or Law of Juries, who says, 'A special verdict is a plain proof that the jury are judges of law, as well as facts; for leaving the judgment of the law to the court, implies, that if they pleased they had that power of judgment in themselves.'

It is observed by Blackstone, that there are two different kinds of special verdicts, one, grounded on the statute Westm. 2. 13 Edw. I. c. 30. § 2. wherein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant.' Another, wherein the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge or the court above, on a special case stated by the counsel on both sides with regard to a matter of law.' 'But in both these cases,' he says, the jury may, if they think proper, take upon themselves to determine at their own hazard, the complicated question of fact and law; and, without either special verdict, or special case, may find a verdict absolutely either for the plaintiff or defendant.

IT is certain, that no jury should ever find a fellow-citizen guilty, or should bring in any verdict in which the word guilty is included, without a conviction of his having been guilty of some criminal action. But writing, printing, or publishing a book or pamphlet, is no more a criminal action, than riding in a post-chaise, or walking in a man's own dining-room. It must, therefore, be the contents of such book or pamphlet that must determine its innocence or criminality. And if the jury attend not to the tendency of the publication, to the subject-matter of it, they determine, in general, nothing that is of the least consequence.

WHEN a jury are restrained from inquiring into any thing, but the mere fact of publication, in a trial for a libel, they certainly have not much to do, as that fact is generally sufficiently clear, and frequently not in the least disputed. It has, however, been thought proper, that the jury might not be wholly destitute of something to do, that upon them should devolve the important office of filling up the blanks, if any should occur in a libellous production. Thus, In the case of the King against the Dean of St. Asaph, though the jury were not, it seems, able to decide, whether the Dialogue, for the publication of which that gentleman was tried, was, or was not a libel, yet they were competent to the business of deciding, whether F. stood for Farmer, and G. for Gentleman. This, however, could as well have been determined by a school-boy of ten years of age, as by the most respectable jury in the kingdom. But upon this momentous point the jury were repeatedly interrogated by the court; and this point they dearly decided. In truth, in the generality of cases, no business can be more trifling than the application of the blanks, about which so much has been lately said. But it answers the purpose of throwing dust in the eyes of

the jury, and of leading them to suppose, that they are really engaged in somewhat serious, though they wholly neglect an inquiry into the innocence or criminality of the publication, which is the only important object of their attention.

NOTWITHSTANDING the attempts which have been occasionally made by some of the judges, to deprive juries of the right of determining the law, as well as the fact, in criminal prosecutions, yet the doctrine laid down upon this subject seems never to have been implicitly assented to by the people. The claim on the part of the judges has been sometimes very peremptorily made, but appears to have been justly considered as an usurpation. The famous John Lilburne, at his trial, addressing himself to the judges, said, The jury by law are not only judges of fact, but of law also; and you that call yourselves judges of the law, are no more but Norman intruders; and in deed, and in truth, if the jury please, are no more but cyphers, to pronounce their verdict. And he afterwards said, 'To the jury I apply, as my judges, both in the law and fact.' The jury having acquitted Lilburne, they were afterwards examined before the council of state concerning the verdict. In general their reply was, That they had discharged their consciences in the verdict, and that they would give no other answer.' But Michael Rayner, one of the jury, said, 'That he, and the rest of the jury, took themselves to be judges of matter of law, as well as matter of fact; although he confessed that the bench did say, that they were only judges of the fact. And James Stephens, another of be jurymen, said, that 'the jury having weighed all which was said, and conceiving themselves (notwithstanding what was said by the counsel and bench to the contrary) to be judges of law, as well as of fact, they had found him not guilty.

OF law merely made by the judges, and not founded upon the ancient common law, or derived from any statute, or ever formally assented to by the representatives of the people, there is, perhaps, at present, a great deal too much in this country. The business of a judge is jus dicere, not jus dare; and in no cases should they be less allowed to make law, than in those which concern the extension of their own jurisdiction, and the limitation of that of juries. It would, perhaps, be as reasonable, that kings should be suffered themselves to determine the bounds of their own prerogative, as that judges should be permitted finally to decide, when the point in contest is, what is the extent of their own jurisdiction, and what is the extent of that of juries.

IT has been determined, that in an information, or indictment, the slightest variation, a variation even of a single word, if it affected the sense, would vitiate such information or indictment. Can it then be supposed, when the very forms of our legal proceedings require such exactness in criminal prosecutions, that it was ever intended by our ancestors, that the jury should make no inquiry into the subject matter of a libel; or that the innocence, or criminality, of any book or paper styled a libel, the writer or publisher of which they are appointed to try, should be to them a matter of indifference? It is impossible. The authority of no judge, however great his abilities, can ever make such an absurdity credible.

IN the case of the Queen against Drake, judgment was given for the defendant, because in the information against him, for a libel, the word nec was inserted instead of non; and in that cause, lordchief-justice Holt said, that 'every word in the information is a mark of description of the libel itself.'[16] From whence it may reasonably be presumed, that his lordship could hardly be of opinion, that the words false, and scandalous, and malicious, are merely words of course, or inferences of law.

IN the opinion of the court of King's Bench, on a motion for arrest of judgment, in the case of the King against Woodfall, which was delivered by lord Mansfield, it was said, 'That where an act, in itself indifferent, if done with a criminal intent, becomes criminal, there the intent must be proved and found.' Let this doctrine be applied to the case of libels in general. Surely the writing, printing, or publishing, a book or pamphlet, are acts in themselves perfectly indifferent; and, therefore, the criminality of such books or pamphlets, or some evidence of criminal intention, should be apparent to a jury, or they ought not to bring in a verdict of Guilty against any defendant. IN the case of the King against Horne, on a motion made in arrest of judgment, it was said by lord Mansfield, 'It is the duty of the jury to construe plain words, and clear allusions to matters

of universal notoriety, according to their obvious meaning, and as every body else who reads must understand them.'[17] This surely seems to imply, that it is the business of the jury to inquire into something else, besides the mere fact of publication, or even filling up the blanks. But the truth is, that the doctrines which have lately been laid down respecting juries, are so incongruous to the general principles of English law, and to the proper modes of proceeding in our courts of justice, that those who have advanced such doctrines, have found it extremely difficult to preserve any appearance of consistency upon the subject.

ENGLISH juries have been in possession, time immemorial, of the right of giving a general verdict, of determining both the law and the fact, in every criminal case brought before them. They have exercised this right in innumerable instances. And there is no case in which it is more important to the security of the subject, that they should continue to exercise this right, than in the case of libels. But on this subject some of the gentlemen of the law, probably from prudential considerations, seem to have been unwilling to speak out clearly and explicitly: and others of them have appeared too ready to imbibe prejudices against the institution and the rights of juries. From whence this has arisen, it is not necessary here to inquire: but it may be observed, that every barrister may have some hopes of being a judge; and may, therefore, not feel any violent repugnance to the extension of the power of a judge. Somewhat of professional pride may also make them unwilling to acknowledge, that common jurymen are capable of determining what they call a point of law. But the truth is, that it requires very little knowledge of law, to form a judgment of the design and tendency of such books or papers as are brought into our courts of law under the denomination of libels. They are generally addressed to men of all professions, and such of them as can be understood only by lawyers, are not very likely to produce tumults or insurrections.

AN ingenious writer says, 'It has often been matter of astonishment with me, how a notion could ever obtain, that whether any paper was a libel or not, was a matter of law, and was therefore, of necessity, to be left to the determination of the judges. Almost every opinion has some little foundation for it; and, I think, the present must have arisen from the judges haying formerly determined the matter. But it, could not then be otherwise; because the prosecutions for state libels were always carried on in the Star-chamber, where there was no jury. And it is self-conviction to myself, that this gave rise to so strange a conceit.

THE same writer observes, that "Any words almost may be used to convey a libel. There are no technical or particular words appropriated to the purpose; nor is there any peculiar form of sentence requisite. A man may render the same words libellous or not, by the application he gives them, whether direct, ironical, or burlesque, in jest or in earnest. The subject is generally political, not legal; and a jury, particularly a special jury, can collect the drift of the writer, or publisher, as well as the ablest civilian, or common lawyer in the land."

BLACKSTONE, though he has too implicitly copied former law-compilers, in what he has said on the subject of libels, yet considers the criminality of a publication not only as the principal object of inquiry, but also as a matter of fact. 'In a criminal prosecution,' he says, the tendency which all libels have to create animosities, and to disturb the public peace, is the sole consideration of the law. And, therefore, in such prosecutions, the only fails to be considered are, first, the making or publishing of the book or writing; and secondly, whether the matter be criminal: and if both these points are against the defendant, then the offence against the public is complete.

NOTWITHSTANDING the pains which judges have Sometimes taken, to persuade juries that they had nothing to do but to find the mere fact of publishing, or of writing or printing, they have often discovered something that appeared very much like an internal consciousness, that they were at least upon doubtful ground, and that juries, if they possessed any degree of spirit or acuteness, would not implicitly follow their directions. For it has been common for them, as well

as the counsel for the crown, to dwell upon the criminality of the publications styled libels, in order to induce the jury to bring in a verdict of Guilty against the defendant.

IN the case of the seven bishops, the jury determined both the law and the fact; the fact of their being the authors of the petition called a libel was clearly proved; and yet the jury found a general verdict of not guilty. But it should be remarked, that, even in that memorable case, Sir Robert Wright, the chief justice, though very desirous of convicting the bishops, yet, in his charge to the jury, did not choose to tell them, that they were not to consider whether it was a libel; but said, after having gone through the evidence respecting the publication, Now, gentlemen, any body that shall disturb the government, or make mischief, and a stir among the people, is certainly within the case of Libellis Famosis; and I must in short give you my opinion, I do take it to be a libel,' And when the jury withdrew, to consider of their verdict, he agreed that they should have the statute-book with them: from which it may be inferred, that even he thought the point of law a matter which was not wholly out of their cognizance.

ON the trial of John Tutchin for a libel, at Guildhall, in the year 1704, lord-chief-justice Holt, in his charge to the jury, after reciting some passages from the supposed libel made use of the following words: 'You are to consider, whether these words I have read to you, do not tend to beget an ill opinion of the administration of the government. It is evident from hence, that, in the opinion of this great judge, the jury were not confined to an inquiry concerning the mere fact of publication, or the innuendoes, or the application of the blanks: but that it was their business to examine into the nature and tendency of the publication.

SIMILAR sentiments appear also sometimes to have been avowed by crown lawyers, even when pleading for the crown. Thus in the trial of Richard Franklin for a libel, before lord-chief-justice Raymond, the then solicitor-general, Mr. Talbot, said to the jury, 'Gentlemen, I hope it now plainly appears to you, that this pretended Hague letter is a libel; and, I may say, a very malicious and seditious one too.'[23] It is, however, certain, that by crown lawyers, even since the revolution, the most slavish doctrines have been frequently maintained. Thus in the trial of John Tutchin, for a libel, in the reign of Queen Anne, it was declared by Sir E. Northey, the attorney-general, that he would always prosecute any man who should assert, "that the people have power to call their governors to account.

THE doctrines which are propagated concerning libels, and the extent of the power of juries in trials for the publication of them, involve in them various absurdities. Thus though it is affirmed, that juries are incapable of determining what is, or what Is not a libel, yet in every prosecution of a bookseller or printer for a libel, it is always taken for granted, that they are capable of determining this intricate and knotty point. For they are never, in any case, allowed to plead ignorance on this subject, as an exculpation of themselves for having sold or printed what is called a libel. No bookseller or printer is permitted to urge in his own justification, that he did not know that any book or pamphlet, with the publication of which he is charged, was a libel. Now to take it for granted, that every common bookseller, or printer, is a judge of what is, or of what is not a libel; and yet to assert, that twelve jurymen, persons of the same rank, are incapable of determining if, is to the last degree preposterous and absurd. But many booksellers have been pilloried, and otherwise severely punished, for selling seditious libels; and some printers have been hanged for printing treasonable libels.

WE are told, that neither common, nor special juries, are competent to the decision of what is, or what is not a libel. But grand juries, it seems, possess more sagacity. They must certainly possess some knowledge upon this subject: for it is allowed, that they have a right to find bills of indictment against libellers. In 1785, a grand jury at Wrexham, in the county of Denbigh, found a bill of indictment against the Dean of St. Asaph for the publication of a libel. The piece so denominated was a dialogue on the principles of government, written by sir William Jones, and which had been, before its publication in Wales, printed and dispersed at the expense of a public society; who were of opinion, that the principles it contained were so just, and so

favourable to the interests of national liberty, that they could not be too generally disseminated, In the indictment found at Wrexham, it was, however, stated, that this publication was a "false, wicked; malicious, seditious, and scandalous libel." Now a plain man may be puzzled to discover, how it should happen, that the grand jury at Wrexham should be so learned in the law of libels, and that the special jury at Shrewsbury, who afterwards tried the cause, and who were men of the same rank, should have been so incompetent, as they were informed they were, to determine the innocence or criminality of this publication. But the whole doctrine of libels, and the modes of proceeding concerning them, are attended with profound mysteries, to the comprehension of which common understandings seem not to be competent. It has been said in divinity, that "where mystery begins, religion ends;" and perhaps it may be said of law, with equal truth, that, whenever mystery is introduced into it, there is an end of reason and of justice.

Whatever is intended for the regulation of all men's conduct, ought to be made intelligible to all. Mystery in law can answer no purposes, but those of knavery, or of oppression. But, from whatever cause it has proceeded, abundant pains appear to have been taken, in trials for libels, to bewilder the understandings of jurymen, and to involve the business in the darkness of legal jargon, and professional sophistry.

IN indictments, or informations for libels, certain epithets are introduced, which are intended to be descriptive of the offence with which a person is charged who is prosecuted as a libeller. If it be a public libel, or supposed public libel, it is generally stated, in the information, or indictment, to be a "false, wicked, malicious, seditious, and scandalous libel." If a book or paper styled a libel be not proved to deserve those epithets, or if it does not appear to the jury to deserve those epithets, no evidence is produced to them that a libel has been published. For a book or paper that is not entitled to these epithets is not a libel. Whether a book or paper be false, or wicked, or malicious, or seditious, or scandalous, or whether they be otherwise, whether they are innocent or criminal publications, are facts, and facts undoubtedly to be inquired into by the jury. But whether they are questions of fact, or questions of law, in either case they come within the cognizance of the jury: for the jury has nothing else to determine, that is in the least worthy the attention of a court of justice. The publication of a book or pamphlet is not a crime, independently of the criminal matter which it may contain; and if a jury find a man guilty without a conviction of the criminality of the publication with which he is charged, they convict a fellow-citizen without the least reason or justice.

BUT clear as these principles are, much legal sophistry has been employed, to persuade juries, that they are to pay no attention to the epithets, in informations or indictments for libels, and that they are mere words of course, or inferences of law. The epithets false, wicked, malicious, seditious, and scandalous, have been compared by lord chief justice Jefferies, and other judges since, to the phrases in indictments for murder, that the murder was committed by the party accused, not having the fear of God before his eyes, and being moved and seduced by the instigation of the devil. But surely it is the most contemptible sophistry, to compare, and to confound, phrases that are evidently words of course, and which from their nature are incapable of proof, with others that are capable of proof, and which are descriptive of, and characteristic of the offence with which the accused party is charged. If a murder be committed, it cannot be necessary to prove, that the murderer committed the fact at the instigation of the devil; but if a man be charged with writing, printing, or publishing a libel, the jury ought to be convinced, that the book or paper so styled is false and scandalous, or malicious and seditious; or otherwise they condemn a man without the least evidence of criminality; for writing, printing, or publishing, are acts in themselves perfectly innocent and indifferent.

EVEN in the case of homicide, a man is not convicted of murder, if he has killed another by accident, and without intending it, or without being engaged in some unlawful act; and of all this the jury are judges. But we are told, that juries have nothing to do with the intention of a libeller. They are only to find the fact of publication. Thus it was said by Jefferies, on the trial of Sir Samuel Bernardiston, The proof of the thing itself, proves the evil mind it was done with. If,

then, gentlemen, you believe the defendant, Sir Samuel Bernardiston, did write and publish these letters, that is proof enough of the words maliciously, seditiously, and factiously, laid in the information.

'WHEN I reflect,' says an able writer, who has been before quoted, 'that the declaration, information, or indictment for a libel, charges the paper complained of with malice and sedition, that the jury are sworn well and truly to try this charge, and true deliverance make, — and that if the jury find him guilty, the verdict is drawn up; "The jurors say, upon their oaths, that the defendant maliciously and seditiously published the paper in question;" it is impossible for me not to declare, that the whole of the proceeding, and the only legal form of drawing up both information and verdict, give the lie to those who tell a jury, that the epithets false, scandalous, and malicious, are at present (before any verdict finding the defendant guilty, which establishes the fact) all words of course; but if the writing be found a libel, they are inferences of law;" or else that "the epithets of malicious and seditious are inferences in law, with which they have nothing to do, and that whether the paper be criminal or innocent, is to them a subject of indifference."

IN the notion of the epithets respecting libels being immaterial, or merely words of course, the opinions even of the crown lawyers seem not to be uniform. On the trial of Richard Franklin for a libel, in 1731, the solicitor general told the jury, that it was not material, whether the matters or things published in the libels were true or false, "if the publication thereof was detrimental to the government, and of a malicious, injurious, and seditious design," &c. Here the truth or falsehood of the libel are spoken of as a matter of indifference; but the malicious, injurious, and seditious design of it, appears to be considered as an object of inquiry to the jury.

THE general practice of introducing the term false, in indictments or informations for libels, seems sufficiently to prove, that it was the opinion of our ancestors, that falsehood was necessary to constitute a libel. Nor is it easy to conceive, that a conscientious jury can return upon their oaths, that a man has published a false and malicious libel, which they must do when they convict a public libeller, if they are not in their own minds convinced of the falsehood and the malice. With respect to private libels, their truth or falsehood has always been considered as a matter of so much importance, that it has been laid down as a rule in the court of King's Bench, that the court will not grant an information for a private libel charging a particular offence, unless the prosecutor will deny the charge upon oath.

IT has been said, that juries are not to judge of the intention of a libeller, because intention in this case is incapable of proof. But upon this it has been justly remarked, that 'Criminal intention in the publication of a libel may be proved by two sorts of evidence; one internal, arising from the nature of the paper; the other external, from the circumstances accompanying the act of publication.'[28] And of the whole of this the jury are the true and proper judges. It was certainly the opinion of lord chief justice Holt, that the intention of the writer was a proper subject for the jury in matter of libel. In the case of the King against Brown, that judge said, 'An information will be for speaking ironically. And Mr. Attorney said, 'twas laid to be wrote ironicè, and he ought to have shewed at the trial that he did not intend to scandalize them; and the jury are judges quo animo this was done, and they have found the ill intent.'[29] It is also said in Viner of a libel, that "the mind with which it was made is to be respected."

To be regardless of the intention with which an act was done, is not consonant to the maxims of English law. *Omne actum ab agentis intentione est judicandum.* Every act is to be judged from the intention of the agent. Mr. Justice Holloway, one of the judges of the court of King's Bench, in the case of the seven bishops, evidently considered the jury as judges of intention, and that they should attend to the evidence of sedition, in a trial for matter of libel. For he said to the jury, 'If you are satisfied, there was an ill intention of sedition, or the like, you ought to find them guilty.' And Mr. Justice Powell, in the same cause, said to the jury, Gentlemen, to make it a libel, it must be false, it must be malicious, and it must tend to sedition.

IN many instances, the conduct of the judges, in trials for libels, has manifested a most shameful partiality to the crown; and this has happened, not only during the reigns of the princes of the house of Stuart, but since the Revolution, and since the accession of the house of Hanover. But, according to the found maxims of English law, any partiality, manifested by the judge against the person accused, is a violation of the duty of his office. Coke says, 'The court ought to be instead of counsel for the prisoner, to see that nothing be urged against him contrary to law and right. Nay, any learned man that is present may inform the court, for the benefit of the prisoner, of any thing that may make the proceedings erroneous. And herein there is no diversity between the peer and another subject. And to the end that the trial may be more indifferent, seeing that the safety of the prisoner consisteth in the indifferency of the court, the judges ought not to deliver their opinions before-hand, of any criminal case that may come before them judicially, But, in libel causes, it has been no uncommon thing to see the judges acting as counsel against the persons under trial; which shews the extreme danger and impropriety of leaving the innocence, or criminality, of such publications as are termed libels, wholly to the determination of the court. To suppose, from motives of delicacy, that the judges will always be impartial, and that they will never be under any undue influence, in causes between the crown and the subject, would be extremely weak and absurd; and, indeed, no man can be of that opinion, who has ever read the State Trials, or who has been a frequent attendant in the courts in crown Causes.

THAT there have been many instances of judges, who have given very erroneous judgments, and whose conduct has been extremely criminal, is a fact too notorious to be denied. Lord chief justice Vaughan says, 'If any man thinks that a person concerned in interest, by the judgment, action, or authority exercised upon his person or fortunes by a judge, must submit in all, or any of these, to the implied discretion and unerringness of his judge, without seeking such redress as the law allows him, it is a persuasion against common reason, the received law, and usage both of this kingdom, and almost all others. If a court, inferior or superior, hath given a false or erroneous judgment, is any thing more frequent than to reverie such judgments by writs of false judgment, of error, or appeals, according to the course of the kingdom?

'IF they have given corrupt and dishonest judgments, they have in all ages been complained of to the king in the Star-chamber, or to the parliament. Andrew Horne, in his Mirror of Justices, mentions many judges punished by king Alfred, before the conquest, for corrupt judgments, and their particular names and offences, which could not be had but from the records of those times. Our stories mention many punished in the reign of Edward the First: our parliament rolls of Edward the Third's time, of Richard the Second's time, for the pernicious resolutions given at Nottingham castle, afford examples of this kind. In latter times, the parliament journals of 18 and 21 Jac. the judgment of the ship-money, in the time of Charles the First, questioned, and the particular judges impeached.

THAT the conduct of the judges, even in their collective capacity, may sometimes be as censurable and corrupt as that of any other class of men, the decision of the judges in the cafe of ship-money, affords, indeed, a very memorable instance. Lord Clarendon himself, though both a lawyer and a royalist, expresses great indignation at the iniquitous conduct of the judges at that period, and speaks of their decision as having been productive of the most pernicious consequences. He remarks, that the payment of ship-money was more firmly opposed, after the judges had declared it to be legal, than it had been before. 'That pressure,' says he, was borne with much more cheerfulness before the judgment for the king, than ever it was after; men before pleasing themselves with doing something for the king's service, as a testimony of their affection, which they were not bound to do; many really believing the necessity, and therefore thinking the burthen reasonable; others observing, that the advantage to the king was of importance, when the damage to them was not considerable; and all assuring themselves, that when they should be weary, or unwilling to continue the payment, they might resort to the law for relief, and find it. But when they heard this demanded in a court of law, as a right, and found it, by sworn judges of the law, adjudged so, upon such grounds and reasons as every stander-by was able to swear was not law, and so had lost the pleasure and delight of being kind and dutiful to the king; and,

instead of giving, were required to pay, and by a logic that left no man any thing which he might call his own, they no more looked upon it as the case of one man, but the case of the kingdom, not as an imposition laid upon them by the king, but by the judges; which they thought themselves bound in conscience to the public justice not to submit to' — And here the damage and mischief cannot be expressed, that the crown and state sustained by the deserved reproach and infamy that attended the judges, by being made use of in this and like acts of power; there being no possibility to preserve the dignity, reverence, and estimation of the laws themselves, but by the integrity and innocency of the judges.

IN no cases have the judges behaved with more shameful partiality, than in trials for libels, and in trials for high treason. In many instances, in such cases, their conduct has been so notoriously indefensible, that the State Trials have been pleasantly termed, "a libel upon the judges." Indeed, the unfavourable statement of their conduct, in that collection, is so much the more libellous, as it is unquestionably true. Hence, however, sufficient evidence may be adduced of the extreme folly and absurdity, which would be manifested by the people of this country, if they were to suffer juries to be deprived of any part of their ancient power and authority in such cases. These are the cases, in which judges are the most likely to be under an undue influence on the part of the crown; and these, therefore, are the cases, in which the subject has the most occasion for the protection of a jury.

NOTHING can be more infamous, nor more inconsistent with a free constitution, than the doctrines which have been maintained by some of the judges concerning libels. Mr. Justice Allybone, in the case of the seven bishops, laid down the following doctrine respecting libels. 'I think, in the first place, that no man can take upon him to write against the actual exercise of the government, unless be have leave from the government, but he makes a libel, be what he writes true or false; for if once we come to impeach the government by way of argument, 'tis the argument that makes the government or not the government: so that I lay down that in the first place, that the government ought not to be impeached by argument, nor the exercise of the government shaken by argument; because I can manage a proposition in itself doubtful, with a better pen than another man: This, say I, is a libel. Then I lay down this for my next position, That no private man can take upon him to write concerning the government at all; for what has any private man to do with the government, if his interest be not stirred or shaken? It is the business of the government to manage matters relating to the government; it is the business of subjects to mind only their own properties and interests. If my interest is not shaken, what have I to do with matters of government? They are not within my sphere. If the government does not come to shake my particular interest, the law is open for me, and I may redress myself by law; and when I intrude myself into other men's business, that does not concern my particular interest, I am a libeller.

These I have laid down for plain propositions; now let us consider farther, whether if I will take upon me to contradict the government, any specious pretence that I shall put upon it shall dress it up into another form, and give it a better denomination; and truly I think it is the worse, because it comes in a better dress; for by that rule, every man that can put on a good vizard, may be as mischievous as he will to the government at the bottom: so that whether it be in the form of a supplication, or an address, or a petition, if it be what it ought not to be, let us call it by its true name, and give it its right denomination, it is a libel.

ON the trial of Henry Carr at Guildhall, for a libel, before lord-chief-justice Scroggs, in 1680, Sir George Jefferies, then recorder of London, in his speech, as counsel for the crown, said, All the judges of England having been met together, to know whether any person whatsoever may expose to the public knowledge any manner of intelligence, or any matter whatsoever that concerns the public: They give it in as their resolution, that no person whatsoever could expose to the public knowledge any thing that concerned the affairs of the public, without licence from the king, or from such persons as he thought fit to entrust with that affair.'[36] And he afterwards said, uncontradicted by the court, It is the opinion of all the judges of England, that it is the law

of the land, that no person should offer to expose to public knowledge any thing that concerns the government, without the king's immediate licence.'[37] The chief justice Scroggs, in summing up the evidence to the jury, on the same trial, expressed himself in the following terms: "I must recite what Mr. Recorder told you at first, what all the judges of England have declared under their hands. The words I remember are these: "When by the king's command we were to give in our opinion what was to be done in point of the regulation of the press; we did all subscribe, that to print or publish any news-books or pamphlets of news whatsoever, is illegal; that it is a manifest intent to the breach of the peace, and they may be proceeded against by law for an illegal thing."

IN the trial of the seven bishops, Sir William Williams, the solicitor-general, said to the jury, If any person, in any paper, have slandered the government, you are not to examine who is in the right, and who is in the wrong, whether what they said to be done by the government be legal or no; but whether the party have done such an act. It is a circumstance not unworthy of notice, that this learned lawyer had himself acquired his knowledge in the law of libels at no inconsiderable expence. He had been fined 10,000l. by the court of King's Bench, in the first year of the reign of king James the Second, for publishing a libel called "Dangerfield's Narrative." He paid 8000l. of it, whereupon satisfaction was acknowledged upon record. He was speaker of the house of commons when he published the libel, and published it by order of the house.

IT is observed by an acute writer, who has been repeatedly quoted, that the whole doctrine of libels, and the criminal mode of prosecuting them by information, grew with that accursed court the Star-chamber. All the learning intruded upon us de *libellis famosis* was borrowed at once, or rather translated, from that slavish imperial law, usually denominated the civil law. You find nothing of it in our books before the time of queen Elizabeth and sir Edward Coke.

THE matter of libel, independent of the statutes *de scandalis magnatum*, was scarcely heard of in this island, until the time of Coke; and the short case of Lamb, by him reported, states the law as resolved upon this head, in the reign of a Stuart, by the severest of all courts, the Star-chamber, the fountain of this sort of prosecution. And yet this dreadful court, upon solemn argument, rules, "that every one who shall be convicted, either ought to be a contriver of the libel, or a procurer of the contriving of it, or a malicious publisher of it, knowing it to be a libel."

THE notion of pursuing a libeller in a criminal way at all, is alien from the nature of a free constitution. Our ancient common law knew of none but a civil remedy, by special action on the case for damages incurred, to be assessed by a jury of his fellows. There was no such thing as a public libel known to the law. It was in order to gratify some of the great men, in the weak reign of Richard the Second, that some acts of parliament were passed to give actions for false tales, news, and slander of peers, or certain great officers of state, which are now termed *de scandalis magnatum.*

ONE maxim concealing libels, of which we have lately so frequently heard, namely, that it is of no consequence whether a libel be true or false, is so little consonant to common sense, that one is tempted to inquire, how this maxim came to be a part of the law of England? and upon inquiry it appears, that this admirable maxim derived its origin from a court truly worthy of it. In Viner's Abridgment, we find it stated, that 'the court held, that a libeller was punishable, though the matter of the libel is true. But when we examine into the authority for this, and the court by which it was decreed, we are referred, as to the earliest authority, to Want's case in the court of Star-chamber. Thus it appears, that this maxim originated in the infamous court of Star-chamber, and being retailed from one law reporter or compiler to another, we are at length gravely and confidently informed, that this is a part of the law of England.

THE fact is, that there is very little law upon the subject of libels to be found in the books, and what there is appears to be, for the most part, of no legitimate origin. In Viner's "General Abridgment of Law and Equity," in twenty-three volumes, folio, there are not more than seven pages on the law of libels; and a great part of the cases referred to are cases in the Star-chamber.

There being, therefore, such a scarcity of real law upon the subject, the Star-chamber code was received by some of the judges, as no other happened to be fabricated. Accordingly the present system of libel law, is manifestly little more than a collection of maxims retailed from the court of Star-chamber, and having no other legal sanction than the occasional adoption of some of the judges. In short, almost the whole of what is now called the law of libels, is the mere fabrication of the professors and officers of the law, and was never ratified by the parliament, or the people of England, nor any part of the ancient common law of the land.

MODERN precedents, and the mere opinions of judges, ought not to be implicitly received as law, when they tend to the diminution of the liberty of the subject, and relate to points which may be contested between the subject and the crown. Matters in which the interests of general liberty are concerned, are of too sacred and important a nature, to be entirely submitted to the determination of magistrates appointed by the crown. In affairs relative to private property, in which the judges may be presumed wholly disinterested, there is less danger in permitting them to make the law; though, perhaps, upon inquiry it will be found, that it is to this species of law that we are much indebted for that variableness, and that uncertainty in the law, which is so profitable to its practitioners, and so prejudicial to the people at large.

THE doctrines concerning libels, which are to be found in some of our law-books, are so destitute of any legitimate origin, so evidently sprung from the court of Star-chamber, and so inconsistent with every principle of a free constitution, that they deserve much more to be scouted, than some of those black letter cases, which have been treated with such extreme contempt by the present chief justice of the King's Bench. Lord Mansfield long ago decided for common sense against Dyer; and it would be well if juries would acquire so much spirit and acuteness, as to decide, in trials for libels, for common sense, and common justice, even against Hawkins, or any other solemn reporter or compiler of Star-chamber law.

OF the doctrines concerning libels, which are to be found in some of our law compilations, it may not be improper here to give a few specimens. Of the nature of a libel the following definition has been given: A libel, called *famosus libellus, seu infamatoria scriptura*, is taken for a scandalous writing, or act done, tending to the defamation of another. And this may be, and sometimes is, against a public, and sometimes against a private person; sometimes against the living, sometimes against the dead.

HAWKINS says, It seemeth, that a libel, in a strict sense, is taken for a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and to expose him to public hatred, contempt, or ridicule.

SUCH scandal as is expressed in a scoffing and ironical manner, makes a writing as properly a libel, as that which is expressed in direct terms.' —— 'Nor can there be any doubt, but that a writing which defames private persons only, is as much a libel as that which defames persons intrusted with a public capacity, inasmuch as it manifestly tends to create ill blood, and to cause a disturbance of the public peace. However, it is certain, that it is a very high aggravation of a libel that it tends to scandalize the government, by reflecting on those who are entrusted with the administration of public affairs, which doth not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also has a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition.

THE taking of a copy of a libel is a libel, because it comprehends all that is necessary to the making of a libel; it has the same scandalous matter in it, and the same mischievous consequences attending it at first. For it is by this means perpetuated, and it may come into the hands of other men, and be published after the death of the copier; and if men might take copies with impunity, by the same reason printing of them would be no offence; and then farewell to all government.

He who disperses libels, though he does not know the effect of them, nor ever heard them read, is punishable.

SIR Edward Coke maintained, in the case of Edwards against Wootton, that 'a person libelling himself is punishable by the civil law; and it seemed to him, that he should be so in the Starchamber.

IF one finds a libel against a private man, he may either burn it, or deliver it to a magistrate immediately; but if it concerns a magistrate, or other public person, he ought immediately to deliver it to a magistrate, that the author may be found out.

HAWKINS says, That it is far from being a justification of a libel, that the contents thereof are true, or that the person upon whom it is made has a bad reputation, since the greater appearance of truth there is in any malicious invective, so much the more provoking it is.
SHEPPARD says, 'The offence, if it be against a public person, a magistrate, a lord, or eminent man, is greater, and the punishment will be greater, than where it is against a private person, or meaner man.

COKE informs us, in his Reports, that it was observed, in a case which he recites, that Job, who was the mirror of patience, became *quodammodo impatient* when libels were made of him; and therefore it appears of what force they are to provoke impatience and contention.

IN order, however, to give us some consolation with respect to the doctrine of libels, sergeant Hawkins informs us, that it hath been resolved, that he who barely reads a libel in the presence of another, without knowing it before to be a libel, or who hearing a libel read by another, laughs at it, or who barely says, That such a libel is made upon such a person whether he speaks it with or without malice, shall not, in respect of any such act, be adjudged the publisher of it.

WE also learn from Mr. sergeant Salkeld, that though we may not speak truth of a minister of state, or arraign the proceedings of any administration, however justly, yet we may abuse all mankind collectively, or the divines, or lawyers, as bodies, though not individually, without being guilty of a libel. 'Where a writing inveighs against mankind in general, or against a particular order of men; as for instance, men of the gown, this is no libel, but it must descend to particulars and individuals to make it a libel.

FEW things are more extraordinary in the history of this country, than that such doctrines should ever have been allowed to prevail in it as law, even for an hour, as those which are to be found in some of our law compilations under the denomination of the law of libels. But in justification of the honour of our ancestors, it should be observed, that this is a species of law never framed by the parliament of England, nor ever formally assented to or ratified by the people. These legal innovations were not, indeed, sufficiently attended to at their introduction; and the people were much bewildered by those technical phrases, and that legal jargon, in which this subject has been so studiously enveloped.

IT was in the year 1641, that the court of Star-chamber was abolished by act of parliament; and in the act for its abolition it was stated, that 'the proceedings, censures, and decrees of that court, had by experience been found to be an intolerable burden to the subjects, and the means to introduce an arbitrary power and government.' When this court was abolished, its doctrines should have been abolished with it. At least, no decisions of that court should ever afterwards have been urged in this country as authorities. But though the Star-chamber, from its despotic nature and tendency, was abolished by express statute; yet its doctrines were so pleasing to crown lawyers, and prerogative judges, that they afterwards occasionally ventured to broach them in the courts, and they also found their way into some law compilations. In this irregular and surreptitious manner did these contemptible dogmas obtain the name of law; and the supineness and inattention of the people, and their ignorance of the various modes of legal artifice and

chicanery, prevented them from being sufficiently aware of the injury and the insult that were offered them.

THE positions concerning libels, which are laid down in Coke's Reports, are evidently those doctrines which were maintained upon this subject in the court of Star-chamber, and are much the same with those that are to be found in Viner and in Hawkins. It is, indeed, certain, that, notwithstanding the very resplendent professional merit of Coke, yet, as a crown lawyer, he sometimes acted in a manner that will ever reflect dishonour on his memory. This was particularly the case when he appeared as attorney-general against Sir Walter Raleigh, whom he treated with great insolence, injustice, and brutality. It was after he was disgraced at court, that he chiefly distinguished himself as a constitutional lawyer, and a friend to the liberties of his country. He was then principally concerned in framing the famous Petition of Right, and in other spirited exertions in support of the constitution. It is, indeed, sometimes a considerable benefit to the public, when great lawyers are ill used by kings, or ministers of state. In such cases they are led to employ those abilities, and that knowledge, in support of the liberty of the subject, which might otherwise be employed to its extreme injury.

IT is an incontrovertible fact, that in consequence of the doctrines concerning libels, which have been propagated by prerogative judges, and crown lawyers, and the power which judges have assumed in such cases, and to which juries have too implicitly submitted, men have been found guilty, and received very severe sentences, for writings, or publications, in which there was not the least degree of criminality. Of this sir **SAMUEL BERNARDISTON, Mr. RICHARD BAXTER, BENJAMIN KEACH**, and **HENRY CARR,** all whose cases are recorded in the State Trials, are striking instances.

IT was in 1683, that sir **SAMUEL BERNARDISTON** was tried before sir George Jefferies, for the publication of several scandalous and malicious libels. These pretended libels were nothing but private letters, written in confidence to his friends, and containing the news which then happened to be in circulation, and some remarks on the state of public affairs at that period. As he was known to be a friend to the liberties of his country, his letters were intercepted at the post-office; and their being sent thither was considered as a publication. On this charge he was found guilty by the jury, and fined ten thousand pounds.

IN the year 1685, **Mr. RICHARD BAXTER,** a man of distinguished piety and virtue, and who, from motives of conscience, had refused a bishopric, was tried before the same judge for the publication of his "Paraphrase on the New Testament," which was styled a scandalous and seditious libel against the government. Several passages were selected, which were stated to contain reflections on the prelates of the church of England, and he was therefore charged with having been guilty of sedition. The fact was, that he had really written with so much moderation concerning the bishops, that he incurred some censure, from warm men among the Dissenters, on that account. This respectable man was, however, treated by the chief-justice with the utmost brutality of reproach; and the jury were mean and servile enough to find him guilty: upon which he was sentenced to pay a fine of five hundred pounds, to be imprisoned till he had paid it, and to give sureties for his good behaviour for seven years.[58] As he was unable to pay the fine, be remained more than a year and a half in the King's Bench prison; but his fine was afterwards remitted, and he was set at liberty.

IN 1664, Mr. BENJAMIN KEACH was tried at the assizes at Aylesbury, before lord-chief-justice Hyde, for writing a little book called "the Child's Instructor," in which he had opposed the doctrine of infant baptism, and maintained that laymen might preach the gospel. These were the most dangerous doctrines contained in his book; but the chief-justice mentioned it as an aggravating circumstance, that Keach had spoken of infant-baptism in his performance in such a manner, as implied that the child of a Turk or a Heathen was "equal with the child of a Christian."[59] His lordship accordingly pronounced it to be a libel, and bullied the jury till they

brought in a verdict of guilty, which they appear to have done very unwillingly. However, on this contemptible charge, Mr. Keach was fined, and twice pilloried.

HENRY CARR was tried in the court of King's Bench, at Guildhall, in 1680, for a libel, entitled, "The Weekly Packet of advices from Rome." The libellous passage dated in the information, and upon which he was convicted, contained only a kind of allegorical representation of the powerful effects of money, and of its tendency to "make justice deaf as well as blind," but without any application to any particular person or persons. The jury, however, found Carr guilty; and the judge, Sir William Scroggs, assured them, that in so doing they had acted like honest men.

IT may, perhaps, be alleged, that these instances of oppression were before the Revolution; but if the same doctrines are maintained now, that were maintained by the prostituted crown lawyers of those times, it is necessary to point out whither they would lead, and what is their tendency. And the fact is, that the doctrines concerning libels, which are now propagated, are the same that were maintained before the Revolution. There has been no new law upon the subject; and it is only the spirit of the times, and in consequence a more moderate exercise of the powers of government, that has occasioned that freedom of the press which has actually appeared in this country. The same doctrine, that the epithets false, and scandalous, and malicious; and seditious, in indictments or informations for libels, are mere words of course, or inferences of law, and not at all to be attended to by the jury, which was asserted by Jefferies and Scroggs, by the worst judges, and most prostituted lawyers, during the reigns of the Stuarts, has been repeatedly asserted even in the present reign. None of the Star-chamber doctrines concerning libels have ever been formally disavowed; they are still brought forward whenever it is thought proper or expedient; the attorney-general may still prosecute whom he pleases, and when he pleases; and the judges of the court of King's Bench still possess the power of discretionary punishment. If prosecutions are less frequent, and if sentences are less severe, this arises merely from the spirit of the times, and not from any change in what is called the law upon the subject. And they who suppose, that there have been no instances of oppression and injustice, in prosecutions for libels, since the Revolution, must be little read in the history of such prosecutions.

IT is a matter well worthy the serious consideration of the people of this country, whether they will continue to have doctrines obtruded upon them as law, or whether they will receive them as such, which are repugnant to every principle of freedom, which appear to have been coined in the Star-chamber, or introduced into it from the imperial code, which were never authorized by the legislature, and which have no legal sanction but the occasional adoption of some of the judges.

IN truth, most of the doctrines concerning libels, which are to be found in Viner and in Hawkins, are entitled to no other reception from the people of England, but that of the most indignant contempt. They are totally inconsistent with every principle of a free constitution, they never formed any authentic part of the legal code of this country, they were never ratified by parliament, they were never authorized by our ancestors.

IF these doctrines are suffered to prevail, we shall not be permitted in this free country to speak truth, either of the dead, or of the living. No history can be written; for no true history of any country has ever appeared, in which the dead were not libelled; that is, in which some evil was not spoken of them. No man can publish any animadversions on the measures of government, however iniquitous, but he publishes a libel. The conduct of no minister, however wicked, can be arraigned by any publications from the press. If the facts which are stated be unquestionably true, the greater is the criminality of the publication. At least, the truth of the facts can never be alleged in justification of what is published. But these doctrines are no part of the ancient common law of England, nor have they ever been ratified by the legislature. It is a species of law repugnant to the principles of a free constitution; it is law only made by the judges; and which the people should firmly and unanimously oppose. In many instances the judges, under the pretence of declaring what the common law is, have actually made the law. This has been particularly the

case with respect to most of the doctrines which have been advanced concerning libels; and the law which has been made by them upon this subject has been highly injurious to the rights of the people, and totally inconsistent with national freedom. These doctrines were not, indeed, invented by the judges; they were derived from the court of Star-chamber; but it is the adoption of them by some of the judges, which has alone given to these doctrines the venerable denomination of the law of England. To their authority too implicit an acquiescence has been given. The judges are very high and respectable magistrates, appointed to assist in the administration of the laws; but it was never intended by the constitution that they should be legislators. The latter character has, however, been too much assumed by them; and to this assumed power a submission has been paid, to which it undoubtedly never had a constitutional claim.

IF the Star-chamber doctrines concerning libels be the law of England, they are an extreme disgrace to this country, and ought to be immediately abolished by express statute. But they never received the sanction of the legislature, they are adverse to every principle of our free constitution, and can derive no authority from the infamous court to which they owe their origin. Nor ought any maxims to be received as law in this country, which have not a better source, and which are not more congenial to the general spirit of our constitution.

MANY hardships and oppressions which have been suffered, by those persons who have undergone prosecutions for libels, and some of whom have been men of as much integrity as any this country has produced, have been the result of the gross partiality of the judges in crown causes. It may also be observed, that the sentences for libels in the court of Star-chamber were extremely rigorous and cruel; and after the abolition of that court, the Star-chamber sentences, as well as the Star-chamber doctrines, were too closely copied by the courts of law. In the worst times, gross injustice has been committed by the judges in such cases; and these instances are urged as precedents,[61*] in better and more moderate times.

IN the reign of queen Anne, the celebrated Daniel Defoe, for writing a pamphlet, entitled, "The shortest Way with the Dissenters," was sentenced to stand three times in the pillory, to pay a fine of 200 marks, and to find security for his good behaviour for seven years. Salmon observes, that 'the design of this book was to insinuate that the parliament were about to enact sanguinary laws, to compel the Dissenters to conformity. It was an ironical attack upon the high-church party.

IN 1717, Mr. Redmayne, a printer, was tried and convicted for publishing a libel, written by Mr. Howel, and entitled, "The Case of Schism in the Church of England truly stated." He was sentenced to pay a fine of five hundred pounds, to remain a prisoner five years, and to find sureties for his good behaviour during life.

IN very late times, the judgments pronounced against libellers, or those who have been deemed to be such, have been, to say the least, sufficiently severe: and they were sometimes more severe in reality, than in appearance. They were attended with great expenses, and the mode of prosecution has been peculiarly burdensome and oppressive. It will hardly be thought, by any impartial man, that sentences for libels, even in the present reign, have been too much characterized by gentleness and mildness. In 1777. **Mr. JOHN HORNE**, now **Mr. HORNE TOOKE**, was tried in the court of King's Bench at Guildhall, for two libels, on an information filed against him by the attorney-general. These libels were advertisements published in the newspapers, in which it was stated, that a subscription was entered into by some members of the "Constitutional Society," for raising one hundred pounds for the widows, orphans, and aged parents of those Americans who had been "inhumanly murdered by the king's troops at Lexington." Mr. Horne defended himself with uncommon spirit, acuteness, and ability. The jury, however, thought proper to bring him in guilty; and he was sentenced to pay a fine of 200l. to be imprisoned for twelve months, and to find sureties for his good behaviour for three years, himself in 400l. and two sureties in 200l. each. The advertisements had been published more

than two years before Mr. Horne was brought to trial. Several printers had been before tried, and convicted, for the publication of the same advertisements.

THE manifest design of the advertisements published by Mr. Horne, was, to impress upon men's minds a conviction of the wickedness of that war, which we had then unhappily commenced against the Americans. Of the complicated iniquity and folly of that war, it is probable that few men now entertain a doubt: and if the nation, at its commencement, could have been excited, by publications from the press, to have put an immediate end to it, the consequences to Great Britain would have been beneficial in a very high degree; it would have prevented an immense expence of blood and of treasure; and would have preserved the nation from many of those taxes, and other burdens, which are now found so grievous and so oppressive.

IN Mr. Horne's defence of himself, in which to obtain an acquittal seemed evidently not to be his chief object, he very clearly and ably pointed out to the jury the unconstitutional powers that were exercised by the attorney-general in filing informations ex officio for libels; the hardships that attended this mode of prosecution; and the disadvantages that attended the defendant in such a cause, from the mode that was adopted, in London and Middlesex, of forming special juries, who are generally preferred to common juries, by the crown officers, for trying such causes. As to the power assumed by the attorney-general, of filing informations for libels at his pleasure, it is certainly a power inconsistent with the principles of a free constitution: and it is reported to have been long ago said by sir Matthew Hale of this species of informations, that "if ever they came into dispute, they could not stand, but must necessarily fall to the ground."[651 To prevent all future disputes upon the subject, an act for the abolition of this power, claimed by the attorney-general, would be in every respect strictly proper; it would be a popular act, and would do honour to a British parliament; nor could such an act be discountenanced by any minister, who was a friend to the rights of the people, or who could have any just claim to their confidence.

IN the case of the King against Almon, that bookseller was prosecuted by the attorney-general, and convicted of publishing a libel, in a miscellaneous collection, called "The London Museum," though it was sold at his shop by his servant, without his knowledge or approbation. Before judgment was given, several affidavits were admitted in the court of King's Bench, by which it was proved, that the libels were sent to his shop without his knowledge; and that, when he was acquainted with their being in his house, he immediately stopt the sale of them. Notwithstanding these favourable circumstances, he received sentence, in the court of King's Bench, to pay a fine of ten marks, and to be bound himself in a recognizance of 4001. for his good behaviour for two years, and to find two sureties in 2001. each, under pain of imprisonment. His expenses also amounted to more than 2001.

AMONG other privileges claimed by the attorney-general, in trials for libels, one is, that of not only enforcing the charge against the defendant at the opening of the cause, but also of replying, after the person accused has made his defence. On the trial of Mr. Horne, this claim was opposed by that gentleman with great spirit; but he was over-ruled, and the claim of the attorney-general was admitted, and declared to be law. When it has been asked, how this practice came to be law, no satisfactory answer has been returned. But the fact seems to be, that, from the partiality with which judges have frequently acted in crown causes, the persons holding the office of attorney-general have been several times permitted to reply; these instances are exalted into precedents; and we are at length informed, that the practice is law. But if it be law, it is surely not equal justice. If the prosecutor be allowed to speak twice, the defendant ought to have the same liberty. The contrary practice can only be a servile compliment to the crown, to the prejudice of the subject, and in opposition to the dictates of reason and of justice. If the attorney-general is to speak first, and to speak last, and if the judge, which is no very improbable thing, should also have a strong disposition to convict the defendant, and should adapt his speech to the jury accordingly, the unfortunate libeller, or pretended libeller, would have very little chance of obtaining an acquittal. If he had not the good fortune to have a spirited and enlightened jury, he

might be condemned, and suffer heavy penalties, though his publication might not deserve the censure of his countrymen, but be entitled to their approbation and applause.

THE proceedings in trials for public libels, and the sentences which are passed upon conviction, are attended with various circumstances, that seem studiously intended to render such prosecutions peculiarly grievous and oppressive. Among other appendages to the sentences upon libellers, one commonly is, obliging the person convicted to give security for his future good behaviour. The reason of this seems not very apparent. It has been observed, that security for the peace is calculated as a guard from personal injury; and articles of the peace can only be demanded from a man, who by some positive act has already broken the peace, and therefore is likely to do so again; or where any one will make positive oath, that he apprehends bodily hurt, or that he goes in danger of his life.'[671 But a person who has written a libel, or pretended libel, is not on that account supposed to be a man who would bruise, or maim, or knock down his neighbours. Security for the peace, therefore, seems no necessary part of the punishment of a libeller. If he should write another libel, and be again convicted, he will of course be again punished, and there can be no doubt but that the penalties will be amply sufficient. In truth, as there is no reason for requiring sureties of the peace from a supposed libeller previously to his conviction, neither does there appear any just ground for annexing sureties for the behaviour to the sentence of a libeller.

But it considerably increases the difficulties of the libeller, and especially if he be a man of a high and unconquerable spirit: and such men, if they engage in support of the rights of the people, are always objects of great aversion to crown lawyers and prerogative judges.

JURIES have been sometimes so much puzzled by the directions from the bench, and the contrary pleadings of the counsel, in trials for libels, that they have several times given irregular and incomplete verdicts. Instead of bringing in a general verdict of guilty, or not guilty, they have brought in the party accused guilty of the particular fact charged, specifying the fact. in their verdict. It is observed by sir John Hawles, that "such a finding hath generally been refused by the court, as being no verdict;" though, he adds, it had been received, "in a case that required favour,"[681 That is, not a case in which the party tried was to be favoured, but in which the prosecution was to be favoured; and in which it was thought a desirable thing to obtain a verdict of guilty, at any rate, and in any manner.

IN the case of the King against Williams, the jury, instead of bringing in a general verdict of guilty, or not guilty, brought the defendant in guilty of printing the particular paper with the publication of which he was charged. Their verdict was, "Guilty of printing and publishing the North Briton, No. 45." The Writer of these Observations was present in court during that trial; and he remembers, that it then appeared evident to him, that the jury, by the manner of bringing in their verdict, meant to find the mere facts of printing and publishing, without determining whether the paper was, or was not a libel. It also appeared, to him, to be a verdict that the jury ought not to have given, and that the judge ought not to have taken. He did not, however, know, till he was. informed by the publication of the "opinion of the court of King's Bench, in the case of the King against Woodfall," that the clerk had taken upon him to alter the verdict. But we now know, from the most unquestionable authority, that the clerk altered the verdict, and entered it up as a general verdict of guilty. But whatever irregularity there might be in the verdict, or whatever injustice in the alteration of it by the clerk, it is certain, that the bookseller stood in the pillory, and suffered other penalties, in consequence of that verdict. The writer also well remembers, that, at, the trial of Mr. Williams, he was much struck at the strong resemblance which there was, both in point of sentiment and language, between the charge delivered on that occasion, and some parts of the charge delivered in the case of Sir Samuel Bernardiston.

THE irregular verdict, in the case of the King against Williams, was urged by the court, in the case of the King against Woodfall, as a justification for taking a verdict of similar irregularity in the latter case. This shews the necessity of guarding against incroachments, and such dangerous

innovations, as are likely to be prejudicial to the liberty of the subject; as such encroachments and innovations are afterwards produced as precedents. It should, however, be observed, that the same judge tried both these causes; and the same judge, on a motion for arrest of judgment in Woodfall's case, delivered the opinion of the court.

THE opinion of the court, in the case of the King against Woodfall, was drawn up with great legal subtilty. It had not the perspicuity, which lord Camden has sometimes displayed, on giving important decisions; nor was it intended for common readers, or for common auditors. It was calculated only for the initiated. The dexterity of it was, however, sufficiently manifest, to all those who were capable of understanding it. It is well known, that the doctrines concerning juries, which are conveyed in this opinion, have been publicly questioned by lord Camden.

No jury ought to find any man guilty of writing, printing, or publishing a libel, unless they are convinced it is a criminal production. If the criminality be not apparent to them, or if they are doubtful, they ought to acquit the defendant. In that case, the information or indictment has not been proved to them; and where the matter is doubtful, in criminal prosecutions, an acquittal is always most consonant to the spirit of the law of England. In many cases, when a jury bring in a verdict of Not guilty, the meaning is not, that they are assured that the accused party is innocent, but that his guilt has not been proved to them: and this is always sufficient ground for an acquittal. Nor should incomplete verdicts ever be given in such cases; or any judgments be pronounced in consequence of such verdicts. In the case of the King against Simons, upon a rule to shew cause why a new trial should not be had, it was said by Mr. Justice Denison, that 'if the verdict had been taken as the jurors intended to give it; namely, guilty of the fact, but without any evil intention, it would have been an incomplete verdict, and consequently, no judgment could have been given upon it.'[70] And in sundry cases, it has been held by law writers, to be extremely improper in juries to bring in special verdicts. Thus it is said in Jenkins's Reports, that 'where fraud, covin, or other doubtful matter of fact occurs to the jurors, they ought not to make a special verdict of it, but give a positive and categorical verdict.

IT appears, that attempts have been made to establish the Star-chamber doctrines concerning libels even in America, and to deprive jurymen there, as well as in England, of the right of determining the law, as well as the fact, in trials for libels. Thus in the case of **JOHN PETER ZENGER**, who was tried at New York, in 1735, for printing and publishing two libels against the government, it was contended, by the attorney-general of that province, that, as the defendant's counsel admitted the publication of the papers, stated in the information to be libels, the jury must find a verdict for the king: "for," said he, supposing they were true, the law says, that they are not the less libellous for that; nay, indeed, the law says, their being true is an aggravation of the crime." The chief-justice of New York also maintained similar doctrines; and told the jury, in his charge, that whether the papers were libels was a matter of law, which they might leave to the court. The pretended libels were news-papers, containing passages, in which the conduct of the governor of New York was arraigned. The printer was defended with great spirit and ability by ANDREW HAMILTON, Esq; of Philadelphia, who went from that city to New York, on purpose to act as counsel in this cause. Mr. Hamilton firmly maintained, that the jury had a right "to determine both the law and the fact." The jury asserted that right; and accordingly, though the defendant's counsel admitted the facts of printing and publishing, they found the printer Not guilty. Mr. Hamilton refused to accept of any fee for his services on this occasion; but the mayor, and corporation of New York, presented him with the freedom of that city in a gold box, for "his generous defence of the rights of mankind, and the liberty of the press, in the case of John Peter Zenger."

As the inhabitants of the United States of America, in consequence of having obtained their independence, have a power of making their own laws, it may be hoped, that they will be too wife to adopt the whole system of our law of libels in their new governments; and that they will preserve unviolated, and in their full extent, the rights of juries. There are many particulars in the law of England, and in the proceedings of our courts, so truly excellent, as to be highly worthy

of then: adoption; but there are other particulars, in the law and in the practice of the courts, so extremely burthensome and expensive, and of so little advantage to any but the practitioners of the law, that the Americans will act wisely in adopting different maxims of law, and different modes of practice. Indeed, the uncertainty of the law, in a variety of instances, and its enormous expence, are objects highly worthy the attention of the parliament of England. In many cases, the expence attending law-suits is so great, that it is better to submit to injustice than to appeal to the law; which is an evil that certainly ought not to subsist in a well-regulated state. Among other things, it may also possibly be doubted, whether the practice is a beneficial one, of readily and frequently granting new trials, because a judge happens not to like a verdict, or because it was given contrary to his direction, though perhaps strictly conformable both to law and equity. This practice contributes much to increase the uncertainty of the law; though it must be acknowledged to be advantageous to its practitioners, however inconvenient it may be to the public in general.

NOTWITHSTANDING the attempts which have been made by some judges, and crown lawyers, to deprive juries of those powers which have been given them by the constitution, there have always been some lawyers, and such as have been distinguished for their integrity, and the extent of their legal knowledge, who have asserted the rights of juries, and particularly in the case of libels. Among others, Lord CAMDEN is understood always to have maintained the right of juries to determine both the law and the fact. Even when attorney-general, Mr. Pratt, now Lord Camden, in moving, before lord Mansfield, for leave to file an information against Dr. Shebbeare for a libel, publickly said, and was not contradicted: 'It is merely to put the matter in a way of trial; for I admit, and his lordship well knows, that the jury are judges of the law as well as the fact, and have an undoubted right to consider, whether, upon the whole, the pamphlet in question be or be not published with a wicked, seditious intent, and be or not a false, malicious, and scandalous libel.

As the late case of the Dean of St. Asaph has particularly excited the attention of the public to the law of libels, and to the rights and power of juries in such cases, it may not be improper here to make some farther observations relative to that cause. The Dialogue, for the publication of which the Dean was prosecuted, was originally printed, and distributed gratis, at the expence of the "Society for Constitutional Information." After a bill of indictment had been found against the Dean of St. Asaph, for the publication of that edition of it which was printed in Wales, **Sir WILLIAM JONES**, who was then in England, and who was a member of the society by which it was originally published, sent a letter to Lloyd Kenyon, Esq; then chief-justice of Chester, and now master of the rolls, in which he avowed himself to be the author of the Dialogue, and maintained, that every position in it was strictly conformable to the laws and constitution of England.

The trial of the Dean, however, came on at Wrexham, on the 1st of September, 1783; and a special jury was empannelled to try the cause, consisting of some of the most respectable gentlemen in Wales. But before they were sworn, an affidavit was offered, and received by the court, in which it was stated, that papers had been dispersed at Wrexham, which were calculated to prejudice the minds of the jury in this cause. These papers consisted of several extracts from the sixth volume of British Biography, octavo, containing certain passages, asserting the right of juries to determine the law, as well as the fact, in trials for libels. That volume of this biographical work, from which these extracts were made, was printed in 1770, thirteen years before the trial of the Dean of St. Asaph; and no addition was made to these extracts, but a vote of the "Society for Constitutional Information," for their publication, in which no mention was made of the trial of the dean of St. Asaph. However, in consequence of the dispersion of these papers, an immediate stop was put to the trial, and it was ordered to stand over to the next grand session for the county of Denbigh. But whether it was in any respect just, or reasonable, or proper, thus to suspend the trial, at a great expence to the defendant, merely because papers had been dispersed in the neighbourhood, asserting the general rights of juries, but in which not a single syllable was advanced, relative to the particular cause of the dean of St. Asaph, must be left to

the decision of the impartial public, who will probably think and speak as freely of judges, or of masters of the rolls, as they do of kings and ministers of state.

AT the great session held at Wrexham, in the September following, the cause of the dean of St. Asaph was to have come on again; but a writ of certiorari was then obtained, by which the indictment was removed into the court of King's Bench, and the cause was ordered to be tried at the next assizes at Shrewsbury. It was accordingly brought on before Mr. Justice Buller, and tried by a special jury, on the 6th of August, 1784. **Mr. ERSKINE**, who was counsel for the dean of St. Asaph, defended the cause of his client with much spirit and eloquence; and, in a very manly manner, avowed his own personal conviction, that the doctrines contained in the dialogue were just and constitutional. He also asserted the right of the jury to determine whether the dialogue was a libel, as well as to inquire into the fact of publication. But the jury were instructed by the judge, that whether the pamphlet was, or was not a libel, was a question of law, to the determination of which they were not competent. It was also somewhat singular, that the learned judge himself, before whom the cause was tried, did not choose to give any opinion whether the dialogue was, or was not a libel. It was not for him, he said, a single judge, sitting at Nisi prius, to say whether the pamphlet was, or was not a libel.

ONE reason assigned for declining to give any opinion whether the Dialogue was, or was not a libel, was, that, if this were done, the prosecutor would thereby be deprived of that valuable birth-right, a writ of error. This sentiment had at least the merit of novelty, as it does not appear that such a sentiment was ever before advanced in such a case. Another reason was, that it was not yet the proper stage of the business, to determine whether the pamphlet was, or was not a libel. This also seems an idea perfectly original. It was formerly thought, that when a man was brought to be tried before a judge and jury, it was their business to acquit or to condemn him. But now, it seems, if he be a libeller, he is to go through several stages. A robber, or a murderer, may, unless the jury bring in a special verdict, which is very seldom done, be either acquitted or condemned at once: but a libeller is to go through a variety of stages, to the great entertainment of himself and the public, and very much to the comfort and emolument of the gentlemen of the law.

THE cause of the dean of St. Asaph was first brought on at Wrexham. It was then put off, because papers had been distributed in the neighbourhood relative to the rights of juries. It was brought on again at Wrexham, but was removed by writ of certiorari from the court of King's Bench, by which the cause was to be brought to trial in an English county. It was then tried by a special jury at Shrewsbury. But it was not yet to be finally determined. It had not gone through the necessary stages. Besides the prospect of the judgment which might be passed, the dean might have the additional felicity of an application to the court of King's Bench, and an appeal to the House of Peers. If all this did not satisfy him, he must be a man eminently unreasonable; and if he were not satisfied, it is at least probable that the lawyers would.

THE dean of St. Asaph, being a man of fortune, might indulge himself in this luxury of law: but to a libeller, or one who might be termed such, whose circumstances were less affluent, it would not be quite so pleasant or convenient. Such a man might wish to meet with a jury, who should have sufficient spirit and discernment to do justice to their fellow-citizen themselves, as was originally intended by the very institution of juries, and not leave him to seek it, either from the judges of the court of King's Bench, or from the House. of Peers.

THE cause of the dean of St. Asaph is now over; but though several hundred pounds have been expended on the part of that gentleman, it has not yet been determined, by the courts of law, whether the pamphlet, which he was prosecuted for publishing, was, or was not a libel. It has, however, been probably decided, by the most enlightened part of the nation, that it was a production which contained no sentiments, but what were perfectly consonant to the genius of the English constitution. It was a speculative pamphlet on the general principles of government, and on the right of the people to bear arms, and to qualify themselves for the use of them. As to the right of the people to bear arms, this is a right which the inhabitants of this country will hardly

suffer to be wrested from them. Should they ever be. thus tame and servile, the purposes for which the Revolution was effected will be defeated, and the English nation will no longer have any claim to be considered as a free people.

SIR WILLIAM JONES, the author of the dialogue for the publication of which the dean of St. Asaph has been prosecuted, is now one of the judges of his majesty's supreme court of judicature in Bengal. It was said of this gentleman, by the judge before whom the cause came on at Wrexham, in 1783: 'It is very true, as has been stated by Mr. Erskine, that he is gone in a judicial capacity into a country, where it would be unwise to send a man in that character who has any thing seditious about him. Whether it will be proper to review that appointment, or not, is not for me to say: it is certainly a thing fit to be considered, and seriously and soberly to be considered, by those to whom it belongs to consider it.' I confess, that I perfectly agree with this learned judge, that the appointment of men to judicial offices, in any part of the British dominions, is a matter that deserves to be considered, and very seriously and soberly considered, by those who are admitted into his majesty's councils. If men are raised to the office of judges, who are known to be possessed of arbitrary and unconstitutional principles, this is a just ground of alarm to the nation: and if men, who have distinguished themselves by judicial decisions that are repugnant to the principles of a free and limited government, are preferred to still higher offices, this must afford abundant reason for the people to entertain suspicion and distrust of any administration by which such appointments are made. There can, however, be no occasion for reviewing, or reconsidering, the promotion of Sir **WILLIAM JONES**. His appointment did honour to the administration by which it was made. If this country has any right to send judges to the East Indies, no man could be more proper for that office, than a gentleman distinguished not only by his skill in the laws of England, but by a very extensive acquaintance with oriental languages, and oriental literature, and also possessed of an enlarged and liberal mind, and a sincere attachment to the interests of justice and humanity.

ONE of the most memorable cases, in which English juries have asserted their right of judging of the law, as well as the fact, in trials for libels, is that of Mr. **WILLIAM OWEN,** who was tried in the court of King's Bench, by a special jury, in 1752, on an information filed by the attorney-general, for publishing a pamphlet, entitled, "The case of the Hon. **ALEX. MURRAY,** Esq; in an appeal to the people of Great Britain." This pamphlet contained a narrative of the rigorous treatment which Mr. Murray had received from the House of Commons, in consequence of some charges exhibited against him respecting his behaviour at the Westminster election, in 1750, and on account of his having refused to receive the sentence of the house upon his knees. In this publication were also some severe strictures on the conduct of the house in this business. Of the charge against Mr. Murray, who was brother to lord Elibank, it is observed by lord Melcombe Regis, who was present in the house at the time, that he "never saw an accusation worse supported by any thing but numbers. Indeed, the treatment which Mr. Murray received was violent, arbitrary, and oppressive, and such as will ever reflect extreme disgrace on that parliament.

The pamphlet, therefore, containing an account of his case, was naturally a severe attack upon the House of Commons; but though it was severe, it was just. For the conduct of the house in this affair was more suitable to the character of a court of inquisition, than to that of a British House of Commons. After the publication of the pamphlet, the house voted it to be "an impudent, malicious, scandalous, and seditious libel:" and presented an address to the king, requesting his majesty to order his attorney-general to prosecute the author, printer, and publisher. Mr. Murray having now quitted the kingdom, the prosecution fell upon the bookseller. The trial came on at Guildhall, before sir William Lee, lord-chief-justice of the court of King's Bench. Mr. Murray, now lord Mansfield, as solicitor-general, was one of the counsel for the crown against Owen; and Mr. Pratt, now lord Camden, was one of the counsel for the bookseller. Mr. Murray contended, that the question was, 'Whether the jury were satisfied, that the defendant, Owen, had published the _pamphlet? If the fact was proved,' he said, 'the libel proved itself, the sedition, disturbance, &c.

MR. FORD, one of the counsel for the defendant, maintained, on the contrary, that proving the publication, was not proving the charge stated in the information. 'Only proving the sale of the book,' said he, does not prove all those opprobrious and hard terms laid in the charge against the defendant.' He added, 'I must observe one thing, which is, the danger of your finding a verdict specially. Suppose you find him Guilty of publishing and selling this book. Guilty includes guilt: then guilty of what? Selling paper. Where is the guilt? Take care, gentlemen, of being deceived, by finding him guilty any way. By bringing in your verdict any way against him, you render him liable to the consequences of the whole; that is, to the same penalties that he would have been liable to, if he had committed the whole crime laid to his charge, and that charge fully proved against him! By finding him guilty, you do all that you can against him; and then it will be out of your power to serve him. And Mr. Pratt also contended, that if that part of the information against the defendant was not proved, that he had published the book maliciously, seditiously, scandalously, &c. that the jury ought to acquit him.

THE fact of publication was clearly and circumstantially proved; and the chief-justice, in his charge, gave it as his opinion, 'that the jury ought to find the defendant guilty; for he thought the fact of publication was fully proved; and, if so, they could not avoid bringing in the defendant guilty. The jury, however, thought otherwise; and nobly resolved to assert their right of judging of the law, as well as of the fact. The pamphlet styled a libel contained a real state of facts, and was such an appeal to the public as an injured and oppressed man had a right to make. They, therefore, notwithstanding the opinion of the chief-justice, and the vote of the House of Commons, and though the fact of publication was fully proved, brought in the bookseller Not guilty. At the desire of the attorney-general, the chief-justice asked the foreman of the jury, "Whether they thought the evidence laid before them, of Owen's publishing the book by selling it, was not sufficient to convince them, that the said Owen did sell that book." The foreman, without answering the question, said Not guilty, Not guilty; and several of the other jurymen said, "That is our verdict, my lord, and we abide by it."[791 The attorney-general desired the chief-justice to put some other questions to the jury; hut this his lordship thought proper to decline. Thus did reason, justice, and common sense, obtain a clear and decided victory over the efforts of abused power, and the arts of legal sophistry: and, in every similar case, the conduct of Owen's jury is a proper model for future juries.

As the greatest part of what is now called the law of libels has been made or introduced by the judges; so they have declared themselves to be the sole interpreters of it; and they are also to inflict punishments for the breach of it at their discretion. No pretended independence of the judges can be a sufficient security to the subject in such a state of things. No constitutional question of more consequence has been agitated since the Revolution, than that of the right of juries to determine the law, as well as the fact, in criminal prosecutions. It has been justly observed by Mr. Erskine, that the nation in general are not sufficiently aware of the importance of this great question. That freedom of the press, to which this country owes much of its reputation among foreign nations, must be for ever abandoned, it will be eventually given up, if the Star-chamber doctrines concerning libels are suffered to prevail, and if juries, in trials for libels, are confined to the mere fact of publication, and deprived of the right of determining the innocence, or criminality, of those books or papers which may be denominated libels.

THE question has never yet been put to the twelve judges, respecting the power of juries in trials for libels; and should it ever be put to them, I cannot believe that they would determine, that juries are confined to the mere fact of publication, and to filling up the blanks. But should they ever come to such a determination, if there be a case, in which even the opinion of the judges collectively is not implicitly to be submitted to, this is that case. It is a case in which they are parties, the point in contest being the extent of their own jurisdiction. They cannot be properly possessed of the power that is claimed, unless it can be proved to be a part of the ancient common law of the land, or unless it has been granted to them by the legislature. The former cannot be proved; and as to the latter, there are not the least traces of its having been granted to them, at

any period, by the legislature; nor will it ever be conferred upon them by any legislature, that has any just regard to the rights of the subject, or to the freedom of the press.

IF twelve men, assisted by the opinion of the judge, and the pleadings of the counsel, cannot find out that a book, or paper, the writer, printer, or publisher of which they are appointed to try, really contains any thing criminal; if they do not find that it is entitled to the description given of it in the information or indictment; they ought, in every such case, to acquit the defendant. No book can be publickly pernicious which a jury cannot comprehend, and of which they cannot discern the criminality. If it be so dark and mysterious, that a jury cannot understand it, it can be productive of little mischief.[79*1 If the judge does not choose to give any opinion upon the subject, it is, notwithstanding, the duty of the jury to determine for themselves, and to find that man Not guilty, of whose criminality they are not convinced. And if the judge does venture to give his opinion, and to pronounce of any book or paper that it is libellous, the jury have still a right to determine for themselves, and to acquit the defendant, if no evidence has been produced that is satisfactory to their own minds, that the defendant has been guilty of some criminal action, or of a breach of some known and positive law. As to the mere facts of writing, printing, or publishing, these are actions as perfectly innocent and indifferent as riding or walking; and if nothing else be proved to a jury, it is extremely unjust, and absurd, in them, to pronounce a fellow-citizen Guilty, in any form of words whatever. It is certainly contrary to the dictates of reason and justice, that it should be taken for granted by a jury, that any book or paper is a libel, without some satisfactory evidence to them that it is so. *Nullum iniquum in jure præsumendum est,* is an ancient maxim of the law of England. No injurious thing is to be presumed in the law. Nor should any jury find any man guilty of having published a libel, till they are not only convinced of the fact of publication, but also of the criminality of the production.

A JURY has an undoubted right to bring in a general verdict, nor can they be compelled to explain upon what grounds their verdict is founded. If, therefore, they are apprehensive of being entrapped by the court, or of affording some pretence for a new trial, and if they are convinced in their own miinds, that the persori accused has not published any thing really criminal, they have a right to bring in a general verdict of Not guilty. And by such a verdict, they do not necessarily find upon their oaths, as some have supposed, that the party accused has not written, printed, or published such a book or paper, but that he is not guilty of the crime laid in the information or indictment; that he has not written, printed, or published, a false, scandalous, and seditious libel; or that whatever he has written, printed, or published, has not been done maliciously, or with an evil or wicked design. In short, that he is not guilty, in manner and form, as laid in the information or indictment.

IT seems reasonable that juries, in trials for libels, should insist on reading themselves, and deliberately, the information, or indictment, as was done in the case of the seven bishops. In that case, they had the copy of the information, as well as the pretended libel, out with them for that purpose. A jury should carefully examine, whether all the substantial parts of the charge against the defendant have been proved to them; and if not, they ought to acquit him. It is their duty to inquire for themselves; they are sworn well and truly to try the cause on which issue is joined; and they ought not to bring in their verdict from an implicit acquiescence in the opinion of the judge. 'A man cannot see,' says sir John Vaughan, 'by another's eye, nor hear by another's ear; no more can a man conclude, or infer the thing to be resolved, by another's understanding or reasoning; and though the verdict be right the jury give, yet they being not assured it is so from their own understanding, are forsworn, at least in *foro conscientiæ*.

ADMITTING juries to be judges of the law, as well as of the fact, in matter of libel, any man who is charged with writing, printing, or publishing, a libel against the government, may, if a jury, from a conviction of the criminality of the publication, find him guilty, be punished at the discretion of the court. Any private individual, against whom any thing libellous has been published, has a right to bring his action against the party offending, and to recover such damages as shall be given him by a jury. These restraints upon the press are surely amply sufficient, and

all that ought to be submitted to in a free country. Farther restraints would be inconsistent with the liberty of the press, and highly detrimental to the public.

THERE can be no reason for asserting, that juries are so partial to the liberty of the press, that they will wantonly acquit those persons in whose publications there shall be evident criminality, or what may appear to them to be so. Even in the case of Mr. WILKES, popular as that gentleman was, he was found guilty by a jury, both for the North Briton, No. 45, and for the Essay on Woman. And in the late case of the dean of St. Asaph, though the jury were avowedly not convinced, that the dialogue, with the publication of which that gentleman was charged, was a libel, they yet declined to bring in a clear verdict of acquittal. There can, therefore, be no reason whatever for depriving the subject of the protection of a jury, in the case of libels, any more than in other cases; and he is in fact deprived of it, if the jury determine only the point of publication, which is seldom a matter of much doubt, and leave the innocence or criminality of what is published wholly to the determination of the court.

IN truth, the great fault of juries has always been, not a propensity to bring in verdicts, without reason, against the directions or opinions of the judges; but too much obsequiousness to the court, too great a readiness to comply implicitly with its directions, and too little firmness and spirit in asserting their own rights. It is also a great public evil, that persons in good circumstances, and of some education, are so apt to decline serving on juries, especially on what is called the petit jury, though they are the most likely to discharge the duties of the office with propriety and integrity. The petit jury is the most important jury, that by which matters of life and death, and some of the most important concerns of men in civil society, are finally determined. The mode of trial by jury would be rendered still more beneficial than it is, if those men who are the fittest for the office were more ready to engage in it. Such men would not be brow-beaten by the court, but would feel the weight that the constitution has given them, and would firmly maintain their rights. Men of property, and persons of education and knowledge, ought not to decline serving on juries in their turn, unless prevented by some real impediment. Those men are unworthy of the privileges of Englishmen, and of the security of a free constitution, who will not take their part in those public offices that are necessary for their support and preservation.

THE right of trial by jury is of infinite importance to the liberty of the subject. It cannot be guarded with too much vigilance, nor defended with too much ardour. No part of the power of juries should be given up to the claims, or usurpations, of any body of men whatever.

The rights of jurymen should in all cases be resolutely asserted, whether they be attacked by open violence, or whether the arts of legal chicane be adopted, in order to render them useless and nugatory. But if juries should ever be tame and senseless enough to give up the right of determining the law, as well as the fact, in libel causes, the liberty of the press is then wholly at the discretion of the judges.

BLACKSTONE says of the mode of trial by jury, that it 'was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it;' and that in Magna Charta it is more than once insisted on as the principal bulwark of our liberties.'[81] He also says, that 'it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals. But if juries are ignorant of their own rights, and timid in the exercise of those powers that the constitution has given them, the value of this great privilege is exceedingly diminished. There can, however, be no ground for timidity in juries, in the upright discharge of the duties of their office: for, since the famous determination in Bushel's case, juries are in no danger of being fined, or imprisoned, or suffering any other penalty in consequence of their verdicts, however contrary they may be to the direction of the court.

No parliament of this country has ever conferred upon the judges a power of determining the matter of law in trials for libels, or the criminality or innocence of publications, independently of a jury. No evidence can be produced, that this is any part of the ancient common law of England. We may, therefore, venture to affirm, that it is not the law of the land; but is a mere assumption of some of the judges, calculated for the extension of their own jurisdiction, to the prejudice of that of juries, to the prejudice of the subject, and to the subversion of the freedom of the press.

IT is manifest, that if the Star-chamber doctrines concerning libels are suffered to prevail, if juries are restrained from entering into the merits of such publications as are termed libels, and if prosecutions for them are frequent, there will be a total end to the freedom of the press in this country. Whether the people of England, after the blood and treasure that have been expended for the establishment of national liberty, will suffer themselves to be deprived of it by the tricks, the arts, and the chicanery of law, is a point to be determined by themselves. If they surrender up the freedom of the press, and the rights of juries, either to open violence, or to legal subtilty and craft, their other rights will inevitably follow. They will no longer hold their present rank among the nations of the world; and must bid an eternal farewell to the honour, the dignity, and the felicity of public freedom.

FINIS.

AN
ENQUIRY
INTO THE
EXTENT
OF THE
POWER OF JURIES,
ON
TRIALS OF INDICTMENTS OR INFORMATIONS, FOR PUBLISHING SEDITIOUS, OR OTHER CRIMINAL WRITINGS, OR LIBELS,
EXTRACTED FROM
A MISCELLANEOUS COLLECTION OF PAPERS THAT WERE PUBLISHED IN 1776,
INTITULED,
ADDITIONAL PAPERS CONCERNING THE PROVINCE OF QUEBEC.
[Francis Maseres]
LONDON;
PRINTED FOR J. DEBRETT, OPPOSITE BURLINGTON HOUSE, PICCADILLY.
1792.

AN
ENQUIRY, &c.

AS I highly esteem and reverence the Trial by Jury, which forms one of the most distinguishing bulwarks of the civil liberty which Englishmen enjoy, I am always anxious to see Jurymen exert their power with such discretion and moderation, as to give their fellow-subjects continually fresh cause to rejoice at their being invested with it. And, with this view, I always wish them to avoid two mistakes into which they are sometimes apt to fall. The one is, the giving the plaintiff, in an action of trespass, a greater sum of money, by way of compensation for the injury he has sustained, than is, in their opinion, sufficient for that purpose; which they are sometimes inclined to do through a laudable spirit of indignation against the practice of such oppression as is the subject of the complaint before them, and with a design to deter other persons from being guilty of the like. But this is departing from the business that is referred to their decision, and taking upon them to be criminal judges, that inflict punishment

by way of terror and example, instead of assessors, or appretiators, of the magnitude of the particular injury that is the subject of the action which they are called upon to try. Every instance of an irregularity of this kind in the exercise of their authority, I am fully persuaded, lessens the respect and confidence which the public entertains for their decisions, and thereby tends, in some degree, to undermine and weaken their authority. The other manner of deviating from the line of their duty (of which, however, I believe, there are very few instances) is an obstinate resolution to determine a matter of law, that happens to be involved in the issue, or question, referred to their decision, in a manner contrary to the direction of the judge who tries the cause. This, I confess, they have a legal right to do, because the whole matter contained in the issue joined between the parties, whether it be fact or law, is brought before them and referred to their decision. But, surely, common sense must teach us, that, if they mean to do justice between the parties, they ought, with respect to such points (in which they must know themselves to be unskilled), to be guided by the opinion of the judge; or, if they think that may be partial or insufficient, to find a special verdict, to the end that the law may be rightly determined, upon full argument by the judges of the court in which the action was brought.

There is, however, one subject upon which, I imagine, all lovers of public liberty would be inclined to think, that juries ought to have the whole power of determining the matter in contest. The subject, I mean, is the doctrine of seditious libels, and the criminal prosecutions carried on against the writers and publishers of them. These prosecutions are attended with so much danger to that most valuable privilege of English subjects, the Liberty of the Press, or the right of animadverting freely and publicly (but with a strict adherence to truth) on the pernicious tendency of public measures, that one would wish them to be entirely under the control of the people themselves, so as never to be carried on with success but when the people themselves are satisfied of the falsehood and mischievous tendency, or, at least, of the mischievous tendency of the writings which are the occasion of them.

And for this purpose it would be necessary, that the whole determination of these prosecutions should be vested in the juries, who are a part of the people, and may be supposed to entertain the same sentiments with them. For, if the event of these prosecutions was to depend upon the inclinations of the judges, there would be reason to apprehend, that they would meet with success much oftener than would be consistent with that spirit of free enquiry and examination of the measures of government, which is necessary to the correction of the abuses of power, and the preservation of public liberty. Those magistrates must naturally be supposed to be, in some degree, partial to government in cases of this kind, even from respectable motives. Their friendship and their gratitude would often contribute to make them so; —— not to mention their self-interest and ambition, which would lead them to hope for future favours from the crown. For, who would be the object of the censures contained in the writings under prosecution? Probably the king's ministers of state, by whose favour and patronage they, perhaps, would have obtained their offices of judges, and might hope to gain still higher honours for themselves, or preferments for their families.

In these cases, therefore, a jury of men of ordinary rank, as, for example, of substantial house-keepers in the city of London, would be much less likely to interpret the intentions of the writers and publishers of such writings in a severe manner, and to consider the tendency of them as of dangerous consequence to the public, than a bench of judges would be: and yet, they would be sufficiently interested in the preservation of the public peace (upon which the continuance of their own liberty, trade, and property, would depend) to be free from any undue bias of favour towards those persons, if the writings, they had published, had a real and manifest tendency to disturb it: and therefore, upon the whole, they would be a safer and more impartial tribunal for the determination of these matters than the judges. It is reasonable, therefore, that all lovers of public liberty should wish, that the whole power of determining the merits of prosecutions upon these subjects should be veiled in the juries. But, in order to its being so, it is by no means necessary, in my apprehension, to depart in any degree from the rules above mentioned, concerning the distinct provinces of judges and juries in the decision of law suits, and the moral

obligation, under which jurymen have been supposed to lie, to keep strictly within the bounds of their own province, without ever presuming to determine any matters of law. All these rules may, as I conceive, be most inviolably adhered to, and yet juries will remain in possession of the whole of this important power of deciding all the matters in contest upon prosecutions for seditious libels. For in these prosecutions all the matters in contest between the crown and the defendant upon an issue of Not guilty are mere matters of fact, without any the least mixture of matters of law. This I shall now endeavour to prove, by considering the several allegations which go to the composition of a criminal charge for writing a seditious libel.

An indictment, or information against a man for writing a seditious libel, consists of the four following allegations, and of nothing more; to wit, first, That the defendant wrote the paper in question, which is always set forth, word for word, in the indictment or information; secondly, That he published it; thirdly, That he published it with a bad intent; and fourthly, That the paper has a tendency to disturb the public peace. I speak of an indictment or information in which the seditious paper is not charged to be false, but only scandalous and malicious, and tending to cause a breach of the peace. For, if the charge of falsehood is inserted in the information, that must be reckoned as a fifth allegation contained in it. This was formerly thought a necessary part of a charge for publishing a seditious libel, but was omitted (for the first time, as I have heard) in the information brought by Sir Fletcher Norton in 1764, against Mr. Wilkes, for publishing the 45th number of the paper called the North Briton, and has been omitted in most of the informations that have been brought for such publications since that time. The reason for omitting it was, to avoid the altercation which it used constantly to occasion at the bar upon the trial of these informations, and the plausible, if not just, pretence it afforded to the defendant's counsel to insist, that the charges contained in them were not proved. For, though this charge of falsehood used to be inserted in the informations, no attempts were ever made to support it by proof, and the judges who tried these informations, would neither require the counsel for the crown to prove that the writings in question were false, nor even permit the counsel for the defendants to bring proof that they were true; so that every information that was brought for a seditious libel, was defectively proved in this article of the falsehood of it. Yet the juries used often to find verdicts for the crown against the defendants, notwithstanding this defect in the proof of the charges brought against them; and the court of King's-bench used, in consequence of these verdicts, to pass judgments, and inflict punishments upon them.

This, however, was sometimes complained of as an irregular way of proceeding, that was not consistent with the rules of law observed in other cases, and more especially in criminal proceedings, in which, in all other instances, the greatest strictness is required. And it was often made use of at the trial, by the defendant's counsel as an argument to the jury, to persuade them not to find the defendant guilty, since the counsel for the crown had not made good the whole of the charge against him, but had failed with respect to so material an article as the falsehood of the paper complained of. "For," said they, "if the law be really so severe as to consider the publication of a truth as a public crime, and deserving of public punishment, it must at least be allowed, that it is a less crime than the publication of the same things would be if they were false; and therefore, the defendant, who is only proved to have published the writings in question without any proof that they are false, ought not to be considered in the same light, and made liable to be punished in the same manner, as if it had been proved that the said writings were false, as he will be, if the jury should find him guilty upon this information."

This argument (which I take to be unanswerable) was frequently made use of by the counsel for the defendants upon the trial of these informations, while the charge of the falsehood of the libel or writing complained of used to be inserted in them: and it probably might sometimes prevail with the juries (notwithstanding the directions of the judges to the contrary), to find the defendants not guilty. Sir Fletcher Norton, therefore, seeing that the insertion of this charge of falsehood in these informations tended only to hamper the the proceedings of the officers of the crown against the publishers of seditious libels, resolved to leave it out for the future in all the informations of that kind of which he was to have the management; in doing which he thought himself sufficiently

warranted by the preceding declarations of the judges on various occasions, that this charge of falsehood was an immaterial part of every information for a seditious libel, which the prosecutor was not bound to prove, nor the defendant permitted to disprove. And it is said, that Sir Fletcher's successors in office have followed his example. And thus, ever since that prosecution of Mr. Wilkes for the publication of the famous number 45 of the North-Briton, those informations have been drawn up without alledging that the writings complained of in them were false; and the prosecutions of these offences have gone on, in this respect, more smoothly than before, being rid of all the difficulties, which the insertion of that charge of falsehood used to give rise to.

I say then, that in an information for writing and publishing a seditious libel, which is not charged to be false as well as malicious and scandalous, there are only the four allegations before mentioned, to wit, first, that the defendant wrote it; 2dly, that he published it; thirdly, that he had a bad intention in publishing it; and 4thly, that the paper has a mischievous tendency, or a tendency to produce certain bad effects that are described in the information, such as alienating the affections of his Majesty's subjects from his Majesty's person and government, or raising jealousies in their minds against the parliament or the courts of justice, and the like. Now these allegations, I conceive, to be all matters of fact. The two first of them, to wit, the having writ the paper, and the having published it, are universally allowed to be so: but the two latter, to wit, the intention of the publisher, and the tendency of the paper to produce the mischievous effects described in the information, have been sometimes declared by the judges to be matters of law, or (as they have expressed it) inferences of law drawn from the fact of publication, and fit only to be considered and determined by the judges, without the interference of the juries. But this seems to be a modern doctrine of the judges, that has been adopted by them only since the time when Lord Raymond was chief justice of the king's bench. For, before that time, we find many judges (and those too, some of them men of great character for abilities and learning in the law, and others of them great friends to the royal prerogative, and to a rigorous method of government) who were of opinion, that both the intention of the writer or publisher of the paper, and the tendency of the paper to produce certain ill effects, were proper objects of the jury's consideration. And this opinion, I conceive, to be agreeable to the truth, for the following reasons.

In making this enquiry into the true distinction between matters of law and matters of fact, in the law-sense of those words, that is, between matters which are fit only for the consideration of the judges, and matters which are fit objects of the consideration and determination of a jury, I think, we may assume it as an axiom, or fundamental maxim, which every body must allow the truth of, that every thing that can be proved by the testimony of witnesses, is a fit object of the jury's consideration. For of this sort of evidence, this external evidence, they are universally allowed to be the proper judges: and the oath they take, when they arc impanneled, "to try the issue joined between the parties and a true verdict give according to the evidence," plainly makes them so; and indeed, it gives them a power of judging and determining according to other evidence, besides the testimony of witnesses, when such other evidence is produced before them. But it is sufficient for the present purpose, that they should be allowed to be the true and proper judges of all that external evidence that consists in the testimony of witnesses.

We must, therefore, enquire, whether or no the intention of a man in publishing a writing, and the tendency of the writing to produce a particular ill effect, are matters which are capable of being proved, or disproved, by the testimony of witnesses. Now it appears to me, that they most manifestly are capable of being so proved, or disproved. For, first, as to the intention. Who can doubt but that proof may be given by witnesses, that the paper was published with an innocent, or even a good intent, or, in some cases, with an absence of the bad intent alledged in the information, and without which there can be no guilt in the publisher? This may be easily illustrated by the following examples. It is allowed upon these prosecutions, that the delivery of a single paper from one person to another (whether the paper be in print or manuscript), is an act of publication. Suppose, therefore, that it could be proved, that the defendant, who was prosecuted for publishing a seditious paper, and who had been already proved to have delivered it to another person, that is, to have published it, was an illiterate man, who could neither write

nor read, and that he knew nothing of its contents, and that he was a servant to a printer or bookseller (as for instance, their porter), and had delivered the paper, by his master's order, amongst other papers, or parcels of goods.

Certainly this proof would be material to the question, whether the defendant was guilty or not of the crime imputed to him by the information, and would be sufficient to shew, that he had not that ill intention in publishing the paper, which was necessary to make him guilty of that crime, and consequently would be a ground for his acquittal. And, as this proof would be extraneous to the paper itself, and could only be given by witnesses, it could be given only to the jury, who are confessedly the judges of all the evidence that is delivered by witnesses in every cause. If, therefore, the information were brought against such servant or porter, he ought evidently to be acquitted by the jury on account of this absence of the criminal intention imputed to him in the information. If, indeed, the information was brought against the bookseller himself, instead of his porter, and the same proof was to be produced against him, as has been just now supposed to have been brought against his porter, to wit, that be had delivered the paper to another person with his own hand, but that (though he was skilled in reading and writing) he had not read it, and did not know its contents at the time he delivered it, this, perhaps, might not be deemed sufficient to excuse him from the charge of publishing it with a criminal intention, because it was his duty, as a master bookseller, to attend to the nature of the things be published, and examine them, or cause them to be examined by other proper persons, before he ventured to make them public.

I say, it is possible that he might, in such a case, be held guilty of the criminal intention imputed to him in the information; though I must confess, I do not think it quite clear that he ought to be so. And even if, upon an information against a bookseller for publishing a seditious libel, it should be proved, that the servant, or shopman, of such bookseller, had delivered a seditious paper to a purchaser, by virtue of his master's general directions to him to attend in the shop, and sell books to his customers, such a delivery by the servant might, perhaps (though I am not without same doubts about it), be held good presumptive evidence of an intention in the master to publish it, although it should be proved that the master himself knew nothing of the contents of it; because it might be said in this case, as well as in the former, that the master had been guilty of a criminal negligence, in not previously examining it, or causing it to be examined, before he ventured to make it public.

But if, in this last instance of the delivery of the paper by the servant of the bookseller, it should be proved, not only that the master knew nothing of its contents at the time of its delivery or publication, but that, at that time, and for a week before the said delivery of it, or even before it had been received into his shop, or ordered to be sent to it, he had been sick in bed, and delirious, and that the whole business of his shop had been conducted by his foreman, he must, I presume, in consequence of such evidence, be esteemed free from the intention of publishing it imputed to him in the information, notwithstanding it had been published in consequence of his general directions to his servant to sell books to his customers; because he would, in such a case, have been incapable, at the time of the publication of such paper, of superintending the business of his shop, and examining the books that were brought into it, and consequently would not have been guilty of the criminal negligence above mentioned: and therefore, in such a case, he must, I presume, be acquitted. Now, in all these cases, the proofs here mentioned (which relate to the intention of the defendant in publishing the paper in question) could be given only by witnesses, and consequently could be given only before a jury; and therefore, the intention of the defendant in publishing the paper is a proper object for the jury's consideration.

Many more instances might be brought to shew, that the intention of a man in writing, or publishing a paper (or indeed in doing any other act, of which a moral agent is capable), may be proved, or disproved, by the testimony of witnesses, and consequently is a fit subject for the consideration of a jury. And in most cases it can be proved no other way. Witnesses may prove, that the writer of a libel confessed to them, or declared to them with triumph, that he wrote the

paper in question on purpose to raise such or such a disturbance, to cause a mutiny in the army or the fleet, or a resistance to a new tax, or to some other act of government. Or they may prove, that certain praises given to particular persons in the libel, are meant ironically, and contain the severest censures; — that they heard the writer confess he meant them so, and declare that he hoped that the world would understand them so; — that they know that the persons spoken of in the paper, are not usually commended for the virtues therein ascribed to them, but are reproached by their enemies for the want of them, and consequently, that the passage is to be understood ironically. Such evidence would be highly proper and useful towards ascertaining the criminal intention of the writer of the paper in question; and without some such evidence, it will often be impossible for either the judge or jury rightly to understand the meaning and drift of the paper, or the intention of the writer in publishing it.

Now, such kind of evidence, as it can be given only by witnesses, can be given only before a jury; and therefore, the jury must have a right to determine, how far it tends to prove or disprove the point to which it relates, to wit, the criminal intention of the publisher of the paper. This seems to me to be so plain, that I am somewhat afraid my readers will blame me for dwelling so long upon the proof of it, and be apt to say in the words of Cicero, concerning a man who should take great pains to prove that Alexander alone, without the assistance of his soldiers, could not have won the battle of Arbela, *uteris in re non dubiâ argumentis non necessariis*, And indeed I should not have thought it needed any proof, if I had not seen it denied by persons of great authority, who have asserted, that the criminal intention of the publisher of a libel is not a matter of fact, or matter fit for the consideration of a jury, but merely a matter of law, or an inference of law from the naked fact of publication, which the judges only ought to make. Yet these very persons of authority acknowledge, that the right of determining what the writer of the libel meant by the blanks and initial letters, and the feigned names that are often to be found in seditious libels, belongs to the jury only; which is not very consistent with the said assertion, since these are a part of the writer's intention, which those persons contend to be a mere inference of law. I hope, therefore, upon the whole, that the reader who dares to make use of his own judgment, and is not disposed *jurare in verba magistri*, will be fully convinced that the intention of a man, in publishing a seditious paper, is a matter of fact, in the law-sense of the word, that is, an object of the evidence of witnesses, and of the consideration and determination of a jury, as well as the very act of publication itself.

It remains that we examine the fourth and last allegation that is contained in one of these informations, to wit, the tendency of the paper complained of to disturb the public peace, or produce the other ill effects that are set forth in the information. Now this point, I confess, is of a more subtle nature than either of the former three, and may be more easily represented as a mere point of law, or inference of law (as it is called) to be collected from the perusal of the paper itself. And yet, I think, upon a close examination, it will appear to be a matter of fact, or a proper subject for the consideration of a jury, as well as the three former points.

In order to discover whether or no the tendency of a particular paper is a matter of fact, or a fit object of the consideration of a jury, we must enquire whether or no it can be proved or disproved by the testimony of witnesses. For, if it can, it is a matter of fact, and the jury have a right to consider and determine it. Now it is certain, that this tendency can in most, if not in all cases, be either proved or disproved by witnesses; though it may also, in some cases, be collected from the mere perusal of the paper. If the paper contains blanks and initial letters (as most of these papers do), then it is most evident that, till the meaning of those blanks is ascertained, the tendency of the paper cannot be known; and the right of ascertaining the meaning of these blanks is confessed on all hands to belong to the jury.

Therefore, in these cases, the right of determining the tendency of the paper must belong to the jury. And, if the paper contains no blanks, but is full of allusions to persons of great rank and power described under feigned names by circumstances that are peculiar to them, it is necessary to have witnesses to prove that those circumstances relate to the said persons, and consequently

that they are the persons meant to be pointed out to the scorn and indignation of the public by the writer of the paper. Or in such a case, the witnesses may testify that they heard the defendant, the writer of the paper, himself, say, that he meant the said persons by the said description, and that he hoped the public would not fail to understand him. Or they may testify that they have often heard him utter the same invectives against those persons as are contained in the paper in question, though without confessing that he meant to describe those persons in the said paper, or even that he was the writer of it.

All these various kinds of evidence would be admissible, in such a case, to prove, that the allusions in question did relate to the said persons of rank and power; without which relation, the said paper would be quite innocent and inoffensive, and have no tendency to disturb the public peace. This tendency, therefore, of the paper complained of to disturb the public peace, or produce the other bad effects set forth in the information, is in all these cases a thing capable of being proved by witnesses, and which, indeed, can be proved no other way, and consequently is a fit object of the consideration of a jury, or, in the law-sense of the words, a matter of fact. And even, if we suppose the paper in question to contain neither blanks, nor initial letters, nor allusions to particular persons under feigned names, nor any other sort of disguise whatsoever (which seldom happens), but to name all the persons it means to speak of by their known names and offices, yet even in this case it is certain, that witnesses may be admitted to prove or disprove the tendency of the paper, that if, to confirm, or to control and refute, that internal evidence of its tendency, which, I acknowledge, will in some degree result from the bare perusal of it. For witnesses may be brought to prove, that it has actually occasioned that disturbance which it seemed to be intended to create, as, for instance, that it has excited a spirit of dissatisfaction in the fleet or the army, or against the administration of justice by the king's courts, or the like. Such evidence of the paper's having produced such ill effects would be the strongest evidence possible of its tendency to produce them. And, on the other hand, if a paper was writ that contained a real panegyric upon a great man, couched under the form of a severe invective, ascribing to him those vices from which he was known to be peculiarly exempt, and denying him those virtues in which he was known most to excel (as, for example, calling the great Duke of Marlborough an ill-bred, passionate, tyrannical man, that was utterly ignorant of the art of war, and quite given up to drunkenness, when he was known to be the calmest-tempered, mildest, best-bred gentleman of his age, of great skill in the art of war, and very temperate), and an information should be brought against the writer of it, for writing and publishing a seditious libel, it would in such a case be lawful for the defendant to call witnesses to prove, that the great man spoken of in the paper was so eminently free from the vices imputed to him in it, that it could only be understood, by all persons who had any knowledge of his character, as a panegyric upon him, conveyed under the form of an invective, and that it had been generally so understood by all the world, and consequently could have no tendency to excite those disturbances which a belief of his having those vices would probably occasion.

And if the jury believed these witnesses, and consequently were of opinion, that the paper had not the pernicious tendency ascribed to it in the information (and which from the mere perusal of it, without a knowledge of the character of the person spoken of in it, one would be apt to think belonged to it), it would be their duty to find the defendant Not guilty. In the next place, I will suppose the opposite case to the former, to wit, that of a severe invective against a great man, conveyed under the form of a panegyric, commending him for virtues which he was generally thought to want, without any blanks, initial letters, or feigned names. In such a case, it would be lawful for the prosecutor to produce witnesses to prove, that the writer of the paper was a bitter enemy of the great man thus ironically commended in it; — that they had often heard him express a very bad opinion of him, and deny him the virtues ascribed to him in the paper, and ascribe to him the opposite vices; — that they themselves therefore understood the paper to be meant ironically, and that they had met with several other persons, who had all understood it in the same manner; — that not only the writer, and the other enemies of the great man, but even most of his friends were of opinion, that he was not intitled to the praises bestowed on him in the paper, and that they, therefore, on that account (as well as on account of the known enmity

of the writer against the great man), believed those praises to be meant ironically, and intended to bring him into public odium and contempt; — and that they actually had produced that effect, and raised a great disgust against: him in the persons who were most connected with him, and whose cheerful obedience, assistance and concurrence, were most necessary to his discharging the duties of his great office with success and advantage to the public. If these things were made out to the satisfaction of the jury, it would be their duty to find the writer of the paper guilty of publishing a seditious libel, notwithstanding the apparent inoffensiveness of the paper, or its want of tendency to produce any ill effect, so far as its tendency could be collected from the mere perusal of it: so that in this, as well as in all the former instances, the tendency of the paper would be ascertained by the testimony of witnesses, and would consequently be the object of the consideration and determination of the jury.

We may therefore, I think, safely conclude, that this fourth and last allegation, contained in an information against a man for writing and publishing a seditious paper or libel, to wit, its tendency to disturb the public peace, or to produce the other bad effects set forth in the information, is a proper object of the consideration and determination of a jury, or, in the law-sense of the phrase, a matter of fact, as well as the three former allegations, of the writing the paper, the publishing it, and the intention with which it was published.

I have hitherto considered those things only as being matters of fact, or objects of a jury's consideration, which are capable of being proved or disproved by witnesses; because this is the plainest and clearest mark of distinction between them and matters of law that can, as I apprehend, be given. But I conceive that the province of the jury extends a degree further than this, and that they have a right to make all such inferences from facts as may be made without any skill or knowledge of the law, even if no new evidence could be given by witnesses in support of such inferences. For such inferences from facts are merely operations of reason, which is a talent common to all men, to jurymen as well as to judges: and, with respect to the meaning of seditious papers, and the intentions of the publishers of them, and their tendency to produce certain bad effects slated in an information, it often happens that jurymen are better able to make these inferences than judges, even where no evidence should be given by witnesses concerning them; because they have often a more extensive intercourse with the rest of mankind, and a greater knowledge of the business and conversation of the world, than judges (who are men of retired lives, given up to the study of the law, and the discharge of the duties of their respectable offices) can be supposed to have.

Those inferences, therefore, ought not to be called inferences of law, but inferences of fact, being a secondary or subordinate species of facts, derived from the more simple and direct facts, of which they are the circumstances or properties. For facts may be divided into two classes, which it may perhaps be of some use, in considering this subject, to distinguish by the names of primary and secondary facts. The former, or primary facts, are those plain and simple facts which are the objects of the senses, and are generally proved by the positive testimony of witnesses; such as, whether such a man gave such another a blow, or a wound with a sword, or fired a pistol at him, or whether such an one delivered a particular paper to such another; though even these may sometimes be collected by inference from circumstances.

These things are so plainly matters of fact, that no sophistry in the world can make them appear to any body to be matters of law. But the latter, or secondary facts, are facts of a more abstract or remote kind, and may often be collected from the former by mere reasoning, without the help of external testimony. Such is the intention of a man in breaking open and entering a house by night; which, if it be to commit a felony, makes the breaking and entering the house amount to the crime of burglary, which is punished with death; but if it be to commit a trespass only (as, for instance, to beat or frighten somebody in the house), makes it only a misdemeanour, which is punishable by fine and imprisonment. And such is the intention of a writer, in writing and publishing a paper against the measures of government; which, if it be to raise a spirit of discontent in the people against their governors, is criminal, and makes the writer and publisher

liable to punishment; but, if the paper is intended only as a petition to the king, or any inferior magistrate, praying him to desist from a measure by which the petitioner thinks himself aggrieved, and it is delivered only to the person from whom the redress is prayed, it is an innocent intention, and cannot make the act of publishing the paper the object of punishment.

In all these cases, the intention of the party accused is a matter of fact, as well as the giving a blow, or a wound with a sword, or firing the pistol, or breaking and entering the house; and the writing and publishing the paper, though it is of a less gross and obvious nature than those other facts, and less capable of being proved by the positive testimony of witnesses, and sometimes can only be collected from those other facts, by reasoning upon them; I say sometimes, because, for the most part (as we have seen above), it will also admit of confirmation and explanation by the testimony of witnesses. These facts, therefore, from their being concomitant circumstances of the former, or more simple facts, may, with some propriety, be called secondary facts, if the former be called primary ones. And this distinction may, perhaps, be useful to prevent these secondary facts from being confounded with matters of law, with which they agree only in this point, to wit, that some degree of reasoning is to be used in discussing and investigating them both. But the difference between the cases is this.

The reasoning to be used in the investigation of matters of law, is grounded on the knowledge of the law, and can only be used by persons who are possessed of that knowledge; whereas, in the case of these secondary facts, the reasoning to be used is grounded on common sense, and a knowledge of the world, and the present transactions of it, and the stories that are told of persons in active life, and in offices of great rank and power; all which (as we before observed) are things that are often better known to jurymen than to judges. And therefore we may conclude, that if no evidence could be produced by witnesses, to confirm or disprove these secondary facts, yet the jury would still have a right to judge of them, and to infer them from the primary facts, by the exercise of their own reason. But it almost always (or, perhaps, absolutely always) happens, that these secondary facts, though they may in some degree be inferred from the primary facts by mere reasoning, yet may be also confirmed, or controuled and disproved, by the positive testimony of witnesses; which distinguishes them still more clearly from matters of law (in determining which the testimony of witnesses is wholly inadmissible), and proves them beyond a doubt, to be matters of fact, in the law-sense of the phrase, or objects of the consideration and determination of a jury, according to the fundamental position above laid down, to wit, that such matters are proper objects of the consideration and determination of a jury, as are capable of being proved or disproved by the evidence of witnesses. I conclude, therefore, that both the intention of the writer and publisher of a paper charged to be a seditious libel, and the tendency of the paper to disturb the public peace, or produce the other mischievous effects set forth in the information (which are secondary facts in the sense herein before defined), are proper objects for the consideration and determination of a jury, or, in the usual law-phrase, matters of fact, as well as the actual writing and publication of it.

If this conclusion is just, the whole business of a jury, upon the trial of an information for writing and publishing a seditious libel, may be said, in few words, to be this: "To enquire into the conduct of the person charged with having written and published the paper in question, by the means of the evidence of witnesses, and of such fair inferences as they, the jury, by their natural reason and good sense, are able to derive from the said evidence; and, having thus discovered what the conduct of the said defendant, with respect to the said charge, has been, to compare it with the conduct imputed to him in the information; and, if they find it to be the same with the conduct imputed to him in the information in all points, to affirm the information, by finding the defendant guilty of the charge in the manner and form set forth in the information (for those are the words used in a verdict of conviction); and, if they find his conduct, as proved by the evidence, to fall short of the conduct imputed to him in the information, in any of the four points above-mentioned, to deny the information, by finding the defendant Not guilty of the charge in the manner and form set forth in the information, which are the words used in a verdict of

acquittal." This seems to me to be an accurate and plain description of the duty of a jury on the trial of one of these informations.

When the jury have thus exercised their office of enquiring whether the defendant's real conduct has been commensurate with the conduct imputed to him in the information, and have determined that it has been so, by finding him guilty of the charge in the manner and form set forth in the information, there still remains another point to be considered before judgment can be given against the defendant, which is, whether the offence so charged and found by the jury is a public offence, or an object of legal punishment. For, if it shall be made appear by just and legal reasonings at the bar, that the writing and publishing the paper in question, though it was done deliberately, and has the tendency ascribed to it in the information, yet is not an offence of such great and public consequence as to be an object of legal punishment, it will be the duty of the court to forbear giving judgment against the defendant, and to dismiss him with impunity, notwithstanding the verdict of conviction found against him by the jury.

But this I apprehend, is a matter which the judges only have a right to determine, either upon a motion made before them on the behalf of the defendant in arrest of judgment, or of their own accord, without such a motion, if they of their own accord come to be of opinion that the facts charged in the information do not constitute a legal offence. For this is really and truly a matter of law, and not a secondary fact, or inference from other facts, nor a matter to which the testimony of witnesses is in any degree applicable (like the intention of the writer, and the tendency of the paper, and other such secondary facts as have been above mentioned), and therefore is not a fit object of the consideration and determination of a jury. An instance or two will make this matter very plain. It is certainly a public and punishable offence to publish a paper tending to disgrace and vilify the King upon the throne, and alienate the affections of his subjects from his person and government, more especially if the imputations thrown out against him are false. This was the offence committed by Doctor Shebbeare in the reign of our late gracious Sovereign, George II. for which, in the opinion of most people, he was deservedly punished. But, if the same abuse were now to be republished against the same good monarch, it may be doubted whether the publisher of it would be an object of legal punishment, though he would justly incur the censure, and excite the indignation of all good men, that remembered the just and prudent government, and respected the memory of our late Sovereign. For, as it can no longer tend to produce the same bad effects as formerly, the monarch, who was the object of it, being no longer among the living, it seems unreasonable to suppose that it could be the object of that legal censure which was grounded on its tendency to produce those bad effects.

Yet it might be said, on the other hand, that it still had a tendency to produce some bad effects, though not the same as before, nor of so great importance; and that, on account of its said tendency to produce these lesser bad effects, it ought still to be the object of some, though a lesser legal punishment. And to this it might be replied, on the behalf of the re-publisher, that every act that in a small degree has a tendency to produce some ill effect, ought not to be the object of a legal punishment, and is not so by the law of England; — that, for example, the most scurrilous words spoken (but not written), even of a person now alive, are not the object of such punishment, but only of a civil action; and many scurrilous words are not even the object of a civil action, but only of a proceeding in the ecclesiastical court of the bishop of the diocese, carried on *pro salute animæ, et correctione morum;* — that only those actions are the objects of legal punishment in the temporal courts, which have a tendency to produce some very pernicious public consequences, and disturb the administration of the government; and that this was not likely to be the effect of a re-publication of the abuse upon our deceased sovereign; and consequently that such a re-publication was not the object of legal punishment.

Now in all this argument the testimony of witnesses is evidently quite inadmissible; nor can mere reason, or common sense determine on which side the truth lies; but it is plain, that this can only be determined by the principles of the criminal law of England, and the decisions of former judges, upon solemn arguments, in cases of the same kind, or that are nearly similar to it, if such

are to be found; and therefore, it is truly a matter of law, and must be determined by the judges only. But this does not at all interfere with the right that has been above ascribed to the jury, of determining the truth of all the charges contained in the information, or declaring whether, or no, the conduct of the defendant, as proved by the witnesses, agrees, or is commensurate with the conduct imputed to him in the information, with respect to all the allegations of which the information is composed.

I have now gone through all I had to offer in the way of reason and argument, concerning the extent of the province of the jury, in the trial of an information for publishing a seditious libel. I am sensible I have used a great number of words on this occasion, and even seme repetitions, which I knew not well how to avoid, and which, I therefore hope, the reader will excuse; more especially as the reason of my treating this matter so fully was, that he might clearly see the grounds upon which I have presumed to differ in opinion from those learned and respectable persons who have declared, that the intention of the publisher of a seditious paper is a matter of law, which the jury have no right to consider.

The great respect due to those eminent persons, made me at first almost afraid to differ from them, and excited me to examine the subject with as much care and attention as I was capable of bestowing on it; in consequence of which, I became perfectly convinced that their opinion was not well grounded. And the same respect to their authority made me afterwards cautious of expressing the opinion I had formed in opposition to that which they had declared, without, at the same time, setting forth, in the fullest manner I could, the reasons upon which I had presumed to differ from them, and adopt the other opinion. And now, that I have ventured to state and maintain that other opinion, I shall (from the same motive of respect to those great persons) endeavour to confirm and support it by the authority of other great persons who formerly held the same high offices of judicature with themselves, opposing judge to judge, and chief justice to chief justice, in at least equal numbers, and marshalling on my side of the argument, Pares aquilas, et pila minantia pilis; lest the weight of these great modern authorities should be thought to overbear the arguments, which, in the course of this enquiry, have been deduced from reason only, in favour of what I take to be the true opinion upon the subject.

In the famous trial of the seven Bishops, who were prosecuted in the last year of the reign of King James II. by an information in the Court of King's Bench, for publishing a seditious libel, Sir Robert Sawyer (who had been Attorney General), Mr. Finch, and Mr. Somers (who was afterwards Lord Chancellor), were of counsel for the Bishops, and Sir Thomas Powys (the then Attorney General), and Sir William Williams (the then Solicitor General), were of counsel for the Crown: Sir Robert Sawyer contended, "That both the falsity of the paper, and that it was malicious and seditious, were all matters of fad to be proved;" and made this the first head of his speech to the jury; so that here we see, that the falsehood of the paper, the malicious intention of the writer, and the seditious tendency of the paper, are all asserted by this learned lawyer to be matters of fact, and objects of the consideration of the jury. His brother counsel held the same language.

Mr. Finch expressed himself thus: "If you, gentlemen, should think that there is evidence to prove the delivery, by the Bishops, of the paper set forth in the information, yet, unless their presenting it to the King in private may be said to be a malicious and seditious libel, with an intent to stir up the people to sedition, and to diminish the King's prerogative and authority; unless all this can be found, there is no man living can find the Bishops guilty upon this information." This was asserting, that the ill intention of stirring up discontents in the minds of the people against the King, was an essential part of the charge, and one that the jury ought to take into their consideration, and not leave to the judges as a mere inference of law. Mr Somers spoke next, and said, That "the paper could not possibly stir up sedition in the minds of the people, because it was presented to the King alone. False it could not be, because the matter of it was true. There could be nothing of malice: for the occasion was not sought; the thing was pressed upon them. And a libel it could not be, because the intent was innocent."

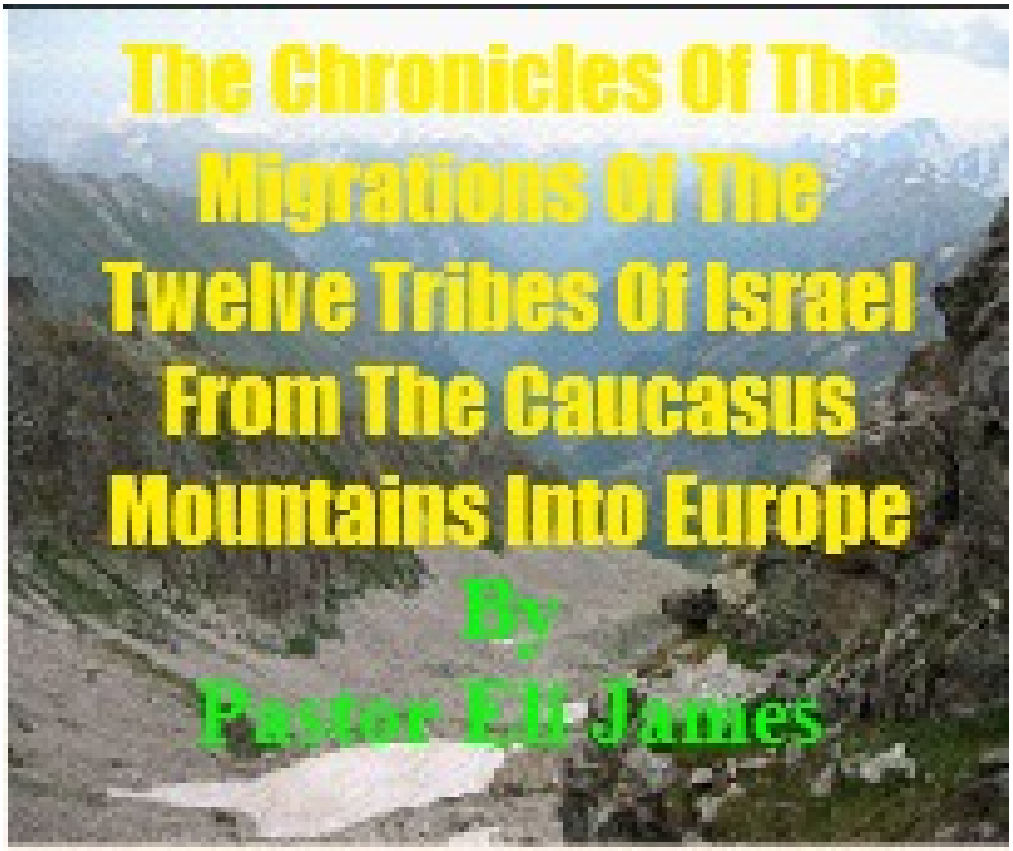
The Attorney General, Powys, thereon said, "That he should not now meddle with what the defendants' counsel had offered, because it was not pertinent." And then Sir Robert Wright, the Chief Justice, interposed with these remarkable words: "Yes, Mr. Attorney, I'll tell you what they offer, which it will lie upon you to give an answer to; they would have you shew how this has disturbed the government, or diminished the King's authority." Here then we have King James II.'s Chief Justice of the King's Bench expressly declaring in this celebrated trial at bar, that the tendency of the paper in question, to disturb the government, ought to be made out to the satisfaction of the jury. Mr. Justice Powell said, "The contrivance and publication are both matters of fad, and, upon issue joined, the jurors are judges of the fact, as it it laid in the information." Mr. Justice Holloway, after the evidence had been summed up to the jury, spoke these words: "The question is, whether this petition be a libel or no. Gentlemen, the end and intent of every action is to be considered; and likewise in this case we are to consider the nature of the offence that these noble persons are charged with. It was for delivering a petition, which, according as they have made their defence, was with all humility and decency that could be; so that, if there was no ill intent, and they were not men of evil lives, or the like, to deliver a petition cannot be a fault, it being the right of the subject to petition. If you are satisfied there was an ill intention of sedition, or the like, you ought to find them guilty: but, if there be nothing in the case of that kind, I think it is no libel. It is left to you, gentlemen; but that is my opinion."

The jury are here expressly directed to consider, whether the Bishops had any intention of sedition or not, in presenting their petition to the King, and to find them guilty or not guilty accordingly. So far was this judge from thinking, that the intention of the defendants was a mere inference of law, which the jury had no authority to make. Mr. Justice Powell went further still, and said, that the falsehood of the paper, as well as the malicious intention of the publisher of it, and its tendency to disturb the government, ought to be proved: by which we may observe, by the bye, that the modern opinion, "That the falsehood charged upon a libel in an information, is not a material part of the charge, and needs not be proved," was not at that time universally adopted by the judges. His words are as follow: "Truly, I cannot see, for my part, any thing of sedition, or any other crime, fixed upon these reverend Fathers. For, gentlemen, to make it a libel, it must be false, it must be malicious, and it must tend to sedition. As to the falsehood, I see nothing that is offered by the King's counsel, nor any thing as to the malice. Now, gentlemen, the matter of it is before you; you are to consider of it, and it is worth your consideration, &c." Such were the directions of Chief Justice Wright, and Justice Holloway, and Justice Powell, at this famous trial; by which we see, that the intention of the defendants in publishing the petition or paper, and the tendency of the paper to raise discontents in the minds of the King's subjects against his government, were so far from being considered by them as mere inferences of law, which they, the judges, only had a right to make, that they were recommended to the consideration of the jury, as the principal objects to which it was necessary for them to attend. And Chief Justice Holt appears to have been of the same opinion, when he summed up the evidence to the jury upon the trial of the information against Tutchin, the writer and publisher of certain papers, called The Observators, in the year 1704. His words, on that occasion, were as follows: "Gentlemen of the Jury, this is an information for publishing libels against the Queen and and her government." And then, after stating the proof of the publication, and reading some passages from The Observators, he goes on in this manner: "So that, now you have heard this evidence, you are to consider whether you are satisfied that Mr. Tutchin is guilty of writing, composing, and publishing these libels.

They say they are innocent papers, and that nothing is a libel but what reflects upon some particular person. But this is a very strange doctrine, to say it is not a libel reflecting on government to endeavour to possess the people, that the government is mal-administered by corrupt persons, that are employed in such and such stations, either in the navy or army. For it is very necessary for all governments, that the people should have a good opinion of it: and nothing can be worse than to endeavour to procure any animosities as to the management of it. This has been always looked upon as a crime; and no government can be safe, without it be punished. Now, you are to consider, whether those words, I have read to you, do not tend to

beget an ill opinion of the administration of the government." Here we find this able Chief Justice expressly directing the jury to consider the tendency of the papers in question, to wit, Whether they do not tend to beget an ill opinion of the administration of the government? How different is this conduct from asserting that this tendency is a mere inference of law, which the judges only have a right to make, without any concurrence of the jury? From these authorities, together with the reason above set forth, I flatter myself, that the reader will join with me in concluding, that, upon the trial of an information for writing and publishing a seditious paper, the jury have a right to determine all the particulars of the charge, the malicious intention of the writer, and the mischievous tendency of the paper, as well as the more simple facts of the writing and publication of it, and the meaning of the blanks and feigned names in it; and that the only question which the judges are to determine is, whether, if the whole information, with all the allegations contained in it, the malicious intention of the writer, and the mischievous tendency of the paper, be admitted by the defendant, or found by the jury to be true, the conduct so described and found is an object of legal censure.

I could wish, that even this last particular were also to be determined by the jury: but it rather, I must confess, appears to me to belong to the province of the judges.



The above PowerPoint presentation is available at Pastor Eli's website:

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Parts 1 - 6 plus a short introduction can now be viewed or downloaded - the latest addition part 6 covers the German people in relation to the migrations of the Tribes of Israel.

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