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T R A C T S

ON

P O L I T I C A L

AND

O T H E R S U B J E C T S,

PUBLISHED AT VARIOUS TIMES

BY

JOSEPH TOWERS, L.L.D.

AND NOW FIRST COLLECTED TOGETHER,

IN THREE VOLUMES.

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OBSERVATIONS

ON THE

RIGHTS AND DUTY

OF

JURIES,

IN

TRIALS FOR LIBELS:

TOGETHER WITH

REMARKS ON THE ORIGIN AND NATURE

OF THE

LAW OF LIBELS.

[FIRST PUBLISHED IN THE YEAR 1784.]

P R E F A C E.

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

nical

nical 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 subtleties 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 duties 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

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

THIS doctrine, though not very antient, 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

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 antient common law of the land, nor 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

liver 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

tection.

tection 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 antient, 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

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
 ‘ prose.

‘ prosecution and trial can only be had for
 ‘ a crime ; now the mere simple publica-
 ‘ tion of any thing not libellous (there be-
 ‘ ing 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 de-
 ‘ cursive argument to the same purpose may
 ‘ be drawn from the conduct of the law-
 ‘ yers 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.

‘ proceeding. The King’s Bench, in grant-
 ‘ ing 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 per-
 ‘ son accused should be put upon his trial
 ‘ before a jury, whose business it will be to
 ‘ enter thoroughly into the matter, hear
 ‘ 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,

“ 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 conse-
 “ quence than what merely affects our pro-
 “ perty ‘.’ The same writer also says, ‘ In
 “ all criminal matters, where law is blended
 “ with fact, juries, after receiving the in-
 “ struction of the judge, must determine
 “ the whole, by finding the defendant ge-
 “ nerally guilty or not guilty ‘.’”

SERJEANT Salkeld says, ‘ In all cases, and
 ‘ in all actions, the jury may give a general,
 ‘ or special verdict, as well in causes cri-

¹ Letter concerning libels, warrants, the seizure of papers, &c. p. 10, 11. 4th edit.

² Another letter to Mr. Almon in matter of libel, p. 58.

‘ minal as civil, and the court ought to re-
 ‘ ceive 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.’ 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 pro-
 ‘ nounce 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 con-
 sequence 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

³ Salkeld's Reports, vol. III. p. 373.

• Historia Placitorum Coronæ, vol. II. p. 313.

discretion.

discretion, by judges appointed by the crown. The most venal partizan 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 subtilly 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 we do not see in
 ‘ most general issues, as upon not guilty—
 ‘ pleaded in trespass, breach of the peace,
 ‘ or felony, though it be a 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

‘ for murder, the jury not only find them
 ‘ guilty, or not guilty; but many times,
 ‘ upon hearing, and weighing of circum-
 ‘ stances, bring them, either guilty of mur-
 ‘ der, MANSLAUGHTER, PER INFORTU-
 ‘ NIUM, OR SE DEFENDENDO, as they see
 ‘ cause? Now do they not, herein, com-
 ‘ plicatively 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 institu-
 ‘ tion. For then, if a person should be in-
 ‘ dicted for doing any common innocent
 ‘ act, if it be but clothed and disguised, in
 ‘ the indictment, with the name of trea-

‘ son, or some other high crime, and
 ‘ proved, by witnesses, to have been done
 ‘ by him; the jury, though satisfied in con-
 ‘ science, that it is not any such offence as
 ‘ 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 know-
 ‘ ledge 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 know-
 ‘ ledge of the law, may give a general
 ‘ verdict; yet it is dangerous for them so
 ‘ to do, for if they do mistake the law,

3 Englishman's Right, p. 14, 15, 17. edit. 1771.

‘ they

‘ they run into the danger of an at-
 ‘ taint ; therefore to find the special matter
 ‘ is the safest way, where the case is doubt-
 ‘ ful.’ 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
 LAW, 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, *nil tort*, *nil 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 par-
 ‘ ticular cases in issue ; yet the jury find
 ‘ not (as in a special verdict) the fact of
 ‘ every case by itself, leaving the law to

‘ Institutes, Part I. Lib. III. §. 368.

‘ 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 it-
 ‘ self; 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 de-
 ‘ fendant guilty of the fact, but vary in
 ‘ the manner. If a man be indicted of
 ‘ burglary, “ quòd felonice 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

’ Vaughan’s Reports, p. 150.

‘ robbery

‘ robbery with putting the party in fear,
 ‘ the jury may find him guilty of the fe-
 ‘ lony, but not guilty of the robbery. The
 ‘ like where the indictment is “ *clàm et*
 ‘ *secretè a personâ* ”.’

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
 ‘ is it necessary to find the special matter,
 ‘ or may the party be found NOT GUILTY?
 ‘ I think, and so I have known it con-
 ‘ stantly practised, the party in these cases
 ‘ may be found NOT GUILTY, and the jury
 ‘ need not find the special matter.’

’ *Historia Placitorum Coronæ*, vol. II. p. 301, 302.

’ *Ibid.* p. 303.

HALE also says, ' What if a jury give a
 verdict against all reason, convicting or
 acquitting a person indicted against evi-
 dence, what shall be done? I say, if the
 jury will convict a man against or with-
 out evidence, and against the direction or
 opinion of the court, the court hath this
 salve to reprieve the person convict be-
 fore judgment, and to acquaint the king,
 and certify for his pardon. And as to an
 acquittal 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 per-
 emptory in it, and stand to their verdict,
 the court must take their verdict and re-
 cord it, but may respite judgment upon
 the acquittal¹⁰.

¹⁰ Historia Placitorum Coronæ, Vol. II. p. 309, 310.

INDEED,

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 plead-
 ‘ ed before them, like as they have used to
 ‘ have in time passed. And also it is or-
 ‘ dained, 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 edi-
 tion, that this clause is considered as decla-
 ratory of the right of juries to bring in a
 general

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 disposing 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

plains 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 the 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 spe-
 ‘ cial

• eial 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 them-
 • selves.’

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 plain-
 • tiff; if otherwise, then for the defend-
 • ant.’ 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

' 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, there-
 fore, be the contents of such book or

'' Commentaries, Book III. ch. 23.

pamphlet

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

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 clearly 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 verdict¹².’ And he afterwards said, ‘ To the jury I apply, as

¹² State Trials, vol. II. p. 69. second edition.

‘ my judges, both in the law and fact ¹³.’
 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 ¹⁴.’ And James Stephens, another of the 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

¹³ State Trials, vol. II. p. 69. second edit.

¹⁴ State Trials, vol. II. p. 81. 2d. edit.

‘ well as of fact, they had found him not
‘ guilty ’¹⁵.

OF law merely made by the judges, and not founded upon the antient common law; or derived from any statute, or even 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 jurif-

¹⁵ State Trials, vol. II. p. 81. second edit.

diction,

dition, 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.

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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, lord-chief-justice Holt said, that ‘ every word ‘ in the information is a mark of description of the libel itself¹⁶.’ 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 in- ‘ different, if done with a criminal intent, ‘ becomes criminal, there the **INTENT** must

¹⁶ Salkeld’s Reports, vol. III. p. 225.

‘ 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

¹⁷ Cowper’s Reports of Cases adjudged in the Court of King’s Bench, p. 680.

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
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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

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 there-
 ‘ fore, of necessity, to be left to the de-
 ‘ termination of the judges. Almost every
 ‘ opinion has some little foundation for
 ‘ it; and, I think, the present must have
 ‘ arisen from the judges having formerly
 ‘ determined the matter. But it could not
 ‘ then be otherwise; because the prosecu-
 ‘ tions for state libels were always carried
 ‘ on in the Star-chamber, where there was
 ‘ no jury. And it is self-conviction to my-
 ‘ self,

self, that this gave rise to so strange a
conceit¹⁸.”

THE same writer observes, that “ Any
“ words almost may be used to convey a
“ libel. There are no technical or particu-
“ lar words appropriated to the purpose;
“ nor is there any peculiar form of sen-
“ tence requisite. A man may render the
“ same words libellous or not, by the ap-
“ plication he gives them, whether direct,
“ ironical, or burlesque, in jest or in ear-
“ nest. The subject is generally political,
“ not legal; and a jury, particularly a spe-
“ cial jury, can collect the drift of the
“ writer, or publisher, as well as the ablest
“ civilian, or common lawyer in the
“ land¹⁹.”

¹⁸ Another Letter to Mr. Almon, in matter of
Libel, p. 41.

¹⁹ Ibid. p. 49.

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 FACTS * to be considered are, first, the making

* Since the above was written, having examined a later edition of the COMMENTARIES, I find that Blackstone has altered the passage here cited, and inserted the word POINTS instead of FACTS. This is an evident accommodation to the doctrine that has lately been so zealously propagated upon this subject; and the passage is also now better adapted to that GLORIOUS UNCERTAINTY in the law, the promotion of which seems to be one great object of some of its pages.

‘ making or publishing of the book or writ-
 ‘ ing; and secondly, whether the matter
 ‘ be criminal: and if both these points are
 ‘ against the defendant, then the offence
 ‘ against the public is complete ²⁰.’

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 writ-
 ing 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 acute-
 ness, would not implicitly follow their di-
 sages. But it is manifest, that the original and uncor-
 rupted opinion of Blackstone was, that the criminality
 of a book or paper, whether it was, or was not, a libel,
 was a question of FACT, and not a question of LAW.

²⁰ Commentaries, Book IV. ch. 11. § 13. edit. 4to.
 Oxford, 1769.

reflections.

reactions. For it has been common for them, as well as the council 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,

‘ 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 them²¹: 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 re-
 citing 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 go-
 ‘ vernment²².’ It is evident from hence,
 that, in the opinion of this great judge, the

²¹ State Trials, vol. IV. p. 392. ²² Ib. vol. V. p. 546.

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 pre-
 ‘tended Hague letter is a libel; and, I may
 ‘say, a very malicious and seditious one
 ‘too²³.’ 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

²³ State Trials, vol. IX. p. 258.