CONSIDERATIONS

ON THE RESPECTIVE

RIGHTS

OF

JUDGE AND JURY:

PARTICULARLY UPON

TRIALS FOR LIBEL.

OCCASIONED BY AN

EXPECTED MOTION

OF THE

RIGHT HON. CHARLES-JAMES FOX.

BY JOHN BOWLES, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

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ADVERTISEMENT.

THE peculiar importance of the queſtion diſcuſſed in the following ſheets, will, I hope, furniſh an excuſe for ſubmitting to the Public ſuch conſiderations thereon, as have been attended with ſatisfaction to my own mind. Every attempt to render this much and warmly-conteſted ſubject a matter of diſpaſſionate enquiry, whatever may be the ſucceſs, is ſurely entitled to candour. This is all I claim; and, conſcious that my ſentiments tend to encourage a zealous, though rational, attachment to the mode of Trial by Jury, I rely with confidence upon the indulgence of a Public, which ſo fully enjoys and ſo highly eſtimates that invaluable privilege.

A MOTION on the ſubject of Libels has been announced by a RIGHT HONOURABLE GENTLEMAN, whoſe notice muſt give a freſh importance to *any* ſubject. And as no direct communication has been made reſpecting the purport of the intended propoſal, may it not be permitted to hope that its ultimate object will be, to check the alarming and rapidly increaſing propagation of Libels? This is the evil which a view of the times points out, as calling for primary attention, ſince it tends to ſubvert, by rendering obnoxious, the freedom of the preſs, and threatens the very exiſtence of Society.

WHAT other effect a parliamentary conſideration of this ſubject can have, I am at a loſs to conjecture. Sure I am, the Right Honourable Gentleman does not wiſh to withdraw from juries the cognizance of facts. Equally confident, I hope I may be, that he does not wiſh to inveſt them with the deciſion of law. His penetrating mind cannot fail to diſcover that ſuch a meaſure would

would deſtroy the boundary between law and fact in judicial proceedings; that it would of courſe render the rule of action uncertain, and its application precarious.

THERE remains but one conſideration more—the meaſure of puniſhment. This in libels, as in every other crime where the law does not preſcribe the ſpecific penalty to be inflicted, is the diſagreeable province of the Court; particularly diſagreeable in the caſe of Libels, on account of the innumerable ſhades of criminality, which may diſtinguiſh the inſtances of that offence, and which render the taſk of aſcertaining the appoſite degree of puniſhment, always unwelcome, and often invidious.

It has never yet been ſuggeſted, that this truſt can be ſo advantageouſly placed in other hands. Experience, on the contrary, has long borne teſtimony to the honeſt, the liberal, the lenient diſcharge of it. Otherwiſe the active and public ſpirit of the Right Honourable Gentleman would doubt-

leſs diſtinguiſh, in a *proper* manner, the inſtances of an abuſe of ſo important a duty.

At all events it is to be hoped, that the conſideration of this ſubject will revive that intereſt which its magnitude and importance ought ever to excite; and I will venture to ſay, that in no reſpect can the public ſervices of the Great Character I allude to have a ſtronger claim to the gratitude and applauſe of his country, than in a ſucceſsful endeavour to ſecure the FREEDOM by curbing the LICENTIOUSNESS of the PRESS.

Temple, May 19, 1791.

J. B.

CON-

CONSIDERATIONS, &c.

THE adminiſtration of juſtice, in a free country, conſiſts in the certain application of law, previouſly eſtabliſhed, to ſuch caſes of fact, as are regularly brought forward for judicial inquiry. To effect this purpoſe in every inſtance two things are neceſſary; the inveſtigation of the fact, and the declaration of the law: accordingly, every caſe that comes before a court for deciſion depends upon two queſtions, in their nature perfectly diſtinct and unconnected, though they happen to concur upon the particular occaſion. Theſe queſtions reſpect the right and the wrong, the true and the falſe:—the firſt depends entirely upon a previous rule, which is called Law; the ſecond, upon the facts and circumſtances that collectively form the caſe in queſtion.

In moſt countries the offices of declaring the law and inveſtigating the fact are united in the ſame perſon. It has been long and deſervedly the boaſt of this country, that theſe offices are

here ſeparated: for to that ſeparation we owe one of our moſt valuable privileges, *TRIAL BY JURY*; the beſt mode of trial for the diſcovery of truth, that human ingenuity can deviſe.

It is evident that very different qualifications are required for the above offices. That which reſpects the determination of the law, demands great talents, profound ſtudy, extenſive knowledge, and a long profeſſional purſuit of legal enquiries; for the other, common ſenſe, united with integrity, furniſhes all competent ability. And it is happy that ſuch endowments are ſufficient; as thereby a large proportion of citizens are enabled to render ſervice to their country, in the important character of *jurymen*.

It is of great conſequence, that juſtice ſhould be diſpenſed, not only with the utmoſt purity, but alſo in a manner calculated to excite the confidence and ſatisfaction of the public. This is remarkably the caſe as to the judicial proceedings of this country. The important truſt of expounding and deciding the law is properly repoſed in men, highly diſtinguiſhed by their abilities, experience, and reputation, in the moſt reſpectable branch of legal practice: whoſe lives have been employed in acquiring the qualifications neceſſary in their arduous ſituation; who, though nominated by the Crown, are independent of it; and whoſe elevated ſtations and character afford the beſt poſſible pledges for the able and upright performance

formance of their difficult and valuable duties.

But the equally important truſt of inveſtigating and eſtabliſhing truth is executed in a manner no leſs deſerving our approbation and confidence, by the means of Trial by Jury; a mode of trial (as practiſed in this country) that affords the beſt poſſible ſecurity againſt error, partiality, and injuſtice; againſt falſe accuſations and perjured witneſſes. When twelve impartial men, returned a conſiderable time before the trial from the neighbourhood of the tranſaction and of the witneſſes, by a civil officer of the firſt rank and conſequence, aſſembled with thoſe circumſtances of ſolemnity that attend a Court of Juſtice, and aided by the experience and authority of a Judge, ſhall have declared, under the ſanction of an oath, what is the truth upon diſputed facts; ſuch a trial may properly be called a trial by the country: ſuch a trial is admirably calculated to ſatisfy the public, and even to carry conviction to the minds of the parties themſelves. The idea that the circumſtances of any tranſaction in which a perſon may happen to be engaged, and which may be made a ſubject of judicial enquiry, will be determined in ſuch a manner, is apt to beget in the mind an attachment to the country where juſtice is ſo adminiſtered; to the Conſtitution which beſtows, and the Government which protects ſo valuable a privilege.

But in order to ſecure the advantages which this mode of adminiſtering juſtice is calculated to produce, the diſtinction of law and fact, which is the ſource of thoſe advantages, muſt be inviolably preſerved. Judges muſt retain an excluſive juriſdiction over the law, and juries over the fact. Any encroachment upon each other's province tends to deprive us of the benefits which reſult from the peculiarly beautiful frame of our judicial polity. Senſible of this, the Conſtitution has tranſmitted the above important diſtinction by one of thoſe maxims which contain in a few words the wiſdom of ages, and which hand down to poſterity principles immemorially conſidered as indiſputable—*Ad quæſtionem juris non reſpondent juratores, ad quæſtionem facti non reſpondent judices.*

It muſt be confeſſed, that although any attempt to draw the cognizance of facts from the jury to the court ſhould be reprobated as an invaſion of one of the moſt valuable privileges of Engliſhmen, an endeavour to inveſt juries with the deciſion of the law would be ſtill more alarming and dangerous; for it is obvious that the judges would be perfectly competent to the inveſtigation of fact, though a tribunal ſo compoſed would, in this reſpect, be deſtitute of thoſe ineſtimable advantages which belong to trial by jury. But the education and modes of life of jurymen are not adapted to furniſh them with legal knowledge; and, however they may vary in their qualifica-

qualifications, it is no diſgrace to them to ſay, that they muſt in general be unqualified to decide queſtions of law. It would be next to impoſſible that their deciſion ſhould accord with any uniform and fixed principles. The conſequence would be, the prevalence of confuſion and uncertainty in all legal proceedings where the intervention of a jury takes place. A total loſs of freedom muſt of courſe enſue; for the eſſence of freedom conſiſts in the certainty of law.

THUS it appears, that while juries are employed in the inveſtigation of fact, they fill a character of the greateſt importance and utility, and may be conſidered as the pillars of a free conſtitution. But if they exceed the bounds of their province, and attempt to decide queſtions of law, they inſtantly ceaſe to be uſeful; they become dangerous and deſtructive; they render themſelves the vehicles of injuſtice; they deface the beauty and deſtroy the ſymmetry of our judicial conſtitution; and they undermine the very foundations of liberty, by rendering the application of thoſe rules, upon which depend the lives, liberties, and properties of the ſubject, vague, fluctuating, and uncertain. Thus while a river keeps within its channel, it beautifies and enriches the lands through which it runs; but when ſwoln by torrents it overflows its banks—it deſolates and lays waſte the country to which it was before both an ornament and a ſource of fertility.

BUT

But it is not on general reaſoning alone, however concluſive, that I mean to depend in maintaining the doctrine, that juries have no cognizance whatever of the law; I propoſe to prove, from the whole tenor of legal proceedings, that their juriſdiction is entirely confined to facts; after which I ſhall conſider ſeparately the application of this principle to caſes of *Libel*.

In no caſe whatever can there be any reference to a jury, excepting where facts are diſputed. If the defence of a party conſiſts ſolely of a matter of law, no jury is ever ſummoned; the whole buſineſs is then ſettled by the court upon demurrer: but when facts are put in iſſue, then, and then only, can a jury interfere.

Accordingly the term Trial is defined an "examination of the matter of fact in iſſue *;" and in ſome caſes even diſputed facts are determined without the intervention of a jury, "who," as the author above referred to ſays †, "are properly called in to inform the conſcience "of the court in reſpect of dubious facts; and "therefore," continues the ſame author, "when "the fact from its nature muſt be evident "to the Court, either from ocular demon-"ſtration or other irrefragable proof, there "the law departs from its uſual reſort, the "verdict of twelve men, and relies on the

* 3. Bl. Com. 330. † Id. ibid. 331.

"judgment

" judgment of the Court alone *." But when the truth is to be made to appear from the mouths of witneſſes, a jury is the only legal criterion thereof; and then, upon iſſue being joined, a writ of *venire facias* is awarded to the ſheriff, directing him, " that he cauſe to " come here (*in court*) on ſuch a day twelve " free and lawful men of the body of his " county, by whom the *truth* of the matter " may be better known, and who are neither " of kin to the plaintiff or defendant, to re- " cognize the *truth* of the iſſue between the " ſaid parties." A writ emphatically deſcriptive of the duty of a jury, and incompatible with the ſuppoſition, that they have any juriſdiction over queſtions of law.

At length the jury are ready to aſſume their important functions. If they were till then ignorant of the nature and extent of their office, they would naturally expect to be informed thereof by the terms of that oath, the ſacred obligation of which is both to warrant and limit their proceedings. But when they

* The caſes above referred to, where diſputed facts are ſettled without the intervention of a jury, are, 1. Trial by record; where the exiſtence of a record is put in iſſue. 2. Trial by inſpection or examination; where the point in queſtion is an object of ſenſe. 3. Trial by certificate; where the evidence of the perſon certifying is concluſive: thus, the cuſtoms of London are tried by the certificate of the mayor and aldermen by the mouth of the Recorder. 4. Trial *per teſtes*; which is only uſed in one caſe, according to Finch. 5. Trial by battle (now diſuſed); and, 6. Trial by wager of law.

 have

have ſworn to "*give a true verdict accord-*
"*ing to the evidence,*" ſurely all doubt muſt be removed from their minds reſpecting the nature of their duty. For nothing but the truth of facts can be proved by the evidence of witneſſes. It is not in the nature of teſtimony to do more. The law is diſcovered by a reference to authorities and precedents, by deductions of analogy, and inferences of legal reaſoning. It would be abſurd in the extreme to talk of ſwearing a witneſs to prove what is law. Queſtions of ſcience and matters of fact do not admit of the ſame medium of proof; the former cannot be aſcertained by teſtimony, nor the latter by abſtract reaſoning. Therefore when a jury engages upon oath to give (not a legal verdict according to law—but) a true verdict according to the evidence, the whole extent of their obligation is to extract, as well as they can, the real facts of the caſe from the depoſitions of the witneſſes; and which witneſſes are only ſworn "*to declare the truth,*" and are neither required nor able to inform the jury what is law.

If the jury were entitled to exerciſe any judgment upon matters of law, they would certainly be ſworn to decide according to law. It would be an unaccountable defect in the Conſtitution, and very different from its uſual courſe, to entruſt men with an office of ſuch vaſt importance, without taking at leaſt the ſecurity of an oath for the proper diſcharge of it.

The

The judges, whoſe province it is to declare and diſpenſe the law, are accordingly ſworn "to decide according to the laws of the land."

If after the jury have commenced their functions, in the courſe of the trial, the party who is to be affected by the evidence adduced, will allow the truth of it, denying however that in point of law it has the effect it is intended to produce, he may by what is called a Demurrer to evidence admit the truth of what is attempted to be proved; upon which the juriſdiction of the jury inſtantly vaniſhes, and the only queſtion that remains, being a queſtion of law, is immediately referred to the Court by the ſilent but never-ceaſing operation of the fundamental principle I am contending for, that the cognizance of the law belongs not to juries, but only to judges.

But it may be ſaid, that when the iſſue, and of courſe the general verdict, compriſe both law and fact, the jury may, in pronouncing ſuch verdict, decide the law as well as the fact of the caſe. In anſwer to this I obſerve, that although upon trials by jury as well queſtions of law as of fact may, and indeed generally do occur, yet theſe queſtions are here alſo entirely diſtinct. I ſhall hereafter, when treating on the ſubject of Libels, endeavour to explain, wherefore, in moſt caſes that come before a jury, the law attaches upon the fact in that ſtage of proceeding. At preſent I ſhall only obſerve, that, while ſuch is the caſe, the queſtions of law and of fact preſent two diſtinct con-

 ſiderations

derations to the mind, and may be decided ſeparately; as is proved by the practice of ſpecial verdicts, which contain only facts. As, however, general verdicts conduce to the more expeditious advancement of juſtice where the iſſue includes both law and fact, the Conſtitution has made it the duty of the judge to inform the jury of the law whenever it comes into queſtion. And if it is the duty of the judge to declare the law to the jury, it muſt ſurely be the duty of the jury to receive the law as the judge has declared it, in caſe they give a general verdict, including both law and fact.

For otherwiſe the greateſt abſurdities would follow. Two ſeparate and jarring juriſdictions would be exerciſed at the ſame time, in the ſame tribunal, and upon the ſame ſubject. The law, as declared by an officer competent to that purpoſe, appointed for that purpoſe, and under the obligation of an oath, would be controuled and over-ruled by men, who are not ſuppoſed to know what is law, who are never called in but when facts are diſputed, and who are only ſworn to decide according to the evidence. The jury could never be inveſted with that power but upon the ſuppoſition that they are better able than the judge to decide the law; and in that caſe it would be much better that a judge ſhould not appear at trials by jury, than that he ſhould appear as a mere cypher, as a piece of uſeleſs pageantry. But the Conſtitution of this country does not act ſuch ridiculous farces, nor practiſe ſuch abſurd inconſiſtencies. The judge is then, as well as upon other occaſions,

placed

placed upon the bench not only in a reſponſible but an efficient character. He is intended to render eſſential ſervices to the community, as the organ of the law in that ſtage of the proceedings where the law and the fact are connected, and where, without his aſſiſtance, they might be confounded.

Besides, if the jury have a right to exerciſe their own judgment upon matters of law, it muſt be either their duty to do ſo, or it muſt be at their diſcretion, whether they will leave the law to the judge, or take it upon themſelves. The former ſuppoſition is incompatible with its being the duty of the bench to ſtate the law to them; and it alſo involves in it the abſurdity and the hardſhip of a duty being impoſed upon them, to the exerciſe of which they muſt be generally unequal. But if it is at their diſcretion, either to receive the law as the judge has declared it, or to pronounce according to a different rule, ſuch a diſcretion would at once erect them into a ſelf-moving court of appeal from the judges themſelves; and it would require as much judgment and legal knowledge to know when to uſe that diſcretion, as to declare the law in the firſt inſtance, without any reference to a judge. The power of reviſing, and of correcting or confirming the opinions of others, implies at the leaſt an ability of judging rightly without any aſſiſtance from thoſe whom we thus ſuperintend;—and indeed it preſumes ſome ſuperiority over the perſons who thus come before the tribunal of our criticiſm.

It is alſo deſerving of obſervation, that if the deciſion of the law were in the breaſt of the jury, this pernicious conſequence would follow, that the law would be decided *ſub ſilentio*, without being declared. The general verdict including both law and fact would leave it quite in the dark what principles of law prevail in it, or whether it is founded upon ignorance, partiality, or caprice. A party in a civil caſe would be entirely ignorant whether he failed from a deficiency of evidence, or becauſe his claim was not ſupported by law. In like manner it would be impoſſible to ſay, whether a jury acquitted a priſoner becauſe they diſbelieved the facts, or becauſe they doubted the law upon thoſe facts. A conviction and execution might take place where a jury did not believe all the facts which are neceſſary in law to conſtitute the crime charged, but only ſuch of them as might appear to them ſufficient to induce guilt, according to their ideas of law or morality. A court of juſtice thus conducted would reſemble an inquiſition. Terrible would be the ſituation of parties reduced to the neceſſity of receiving juſtice in ſuch a way. They could never rely upon the operation of any the moſt eſtabliſhed rules of law in their favour; and, ignorant on what principles their caſes were decided, no mode of redreſs would be in their power, becauſe they could not tell in what ſhape to combat the injuſtice done them. Thus would a trial by jury (which, as it affords ſo public an opportunity of examining and ſifting witneſſes, is the beſt poſſible criterion of truth)

truth) become the dark repoſitory and ſilent diſpenſer of the law, and the means of confounding law and fact.

But if the declaration of the law from the bench is deciſive, as far as the trial goes, of the legal part of the caſe, it is obvious to the whole world on what grounds the verdict is founded. The opinion of the jury muſt then be known as to the facts; a circumſtance which affords even a beneficial check upon jurors; for the evidence is given in the face of day, and before a public as well able to form a judgment thereon as the jury themſelves: and the law being openly and explicitly declared, the ſhare of influence it has upon the verdict is equally notorious as that of the fact; and if erroneous, it is ſubject to reviſion and correction by ſuperior authority.

It is true, a jury may at all times, if they pleaſe, find a general verdict; and this right has been urged in order to prove that the law is within their cognizance. But where a general verdict *may* be founded upon the conſideration of the facts only, as in caſes of acquittal, the right to return ſuch a verdict is a neceſſary conſequence of the excluſive juriſdiction that the jury certainly poſſeſſes over the fact: and even where the general verdict includes both law and fact, as upon a conviction, the right of the jury to pronounce it, implies no more than that they are not bound to find a ſpecial verdict, which refers the law to the Court from which the record iſſues; but that they

they may combine the law as laid down and applied by the judge at the trial, with the facts as found by themſelves, in the form of a general verdict.

THE right of a jury to return a general verdict of acquittal, is the grand ſecurity for the preſervation of the moſt valuable privileges attending this mode of trial; for hereby a protection is afforded to every individual againſt being convicted of a crime without the judgment of his peers. The moſt important right eſtabliſhed by the Great Charter * is thus preſerved; for while the jury retains ſuch a power, no one can be convicted of an offence unleſs the facts alledged againſt him are proved to the ſatisfaction of his peers: a diſbelief or a doubt of thoſe facts muſt produce an acquittal. And as it is impoſſible to diſprove that an acquittal was founded upon ſuch diſbelief or doubt (the jury being under no obligation to explain their verdict), general verdicts of this kind are always final and concluſive, and abſolve the priſoner abſolutely and for ever from the charge: they could not be reverſed without encroaching upon the province of the jury as to facts.

BUT general verdicts of conviction, which include the law as well as the fact, are not irrevocable; for if it appear that ſuch a verdict is againſt law, it may be ſet aſide: the ex-

* *Nullus liber homo aliquo modo deſtruatur niſi per legale judicium parium ſuorum vel per legem terræ.*
MAGNA CHARTA, cap. 29.

cluſive

clusive cognizance of facts belonging to the jury is not hereby in the least affected; for the verdict being founded both upon law and fact, if it be wrong in law it is clearly a bad verdict, whatever may have been the opinion of the jury as to the truth of the facts.

THE above distinction confirms the principle I am endeavouring to establish, that the consideration of the law is entirely out of the province of the jury; a principle that grows out of every stage of judicial proceedings.

IT cannot however be denied, that as the form of a general verdict does not admit of any reference to the motives or considerations on which it is founded, the jury have the power to take upon themselves the decision of the law But it is impossible from thence to infer the right so to do, unless power necessarily implies right; which I imagine will not be contended. The existence of such a right is incompatible with their situation, the character they sustain, and the whole tenor of the proceedings, in which they take a part, and only a part, however important it may be; and if without the right they exercise the power, it is a power assumed in violation of their duty and their consciences. They have the same power to indulge a bias of favour or resentment, to gratify their partialities or caprice, as to be governed by their own notions of law in opposition to the opinion of the judge; and they have the same opportunity of concealing such motives under the cover of a general verdict.

But

But the Conſtitution truſts that they will not abuſe the confidence repoſed in them; knowing that great and extenſive powers of utility can ſeldom exiſt without giving riſe to opportunities of doing harm. I will here introduce an obſervation of one of the moſt brilliant luminaries of the law that ever ſhone *: "Where a "queſtion can be ſevered by the form of plead- "ing, the diſtinction is preſerved upon the face "of the record, and the jury cannot encroach "upon the juriſdiction of the Court: where by "the form of pleading the two queſtions are "blended together, and cannot be ſeparated "upon the face of the record, the diſtinction "is preſerved by the honeſty of the jury."

ANOTHER great legal authority, Lord Coke, in his Commentary upon Littleton, and in explanation of his author, ſays, "Although the "jury, if they will take upon themſelves the "knowledge of the law, may give a general "verdict, yet it is dangerous for them ſo to do; "for if they miſtake the law, they run into the "danger of an attaint." This paſſage has been ſometimes quoted in ſupport of the right of juries to determine the law: but it appears to me to have quite a contrary operation; for it implies no more than what I am willing to allow, that a general verdict puts the conſideration of the law into the *power* of the jury; but, as it were to prevent their making uſe of ſuch power, they are ſubject to puniſhment if

* Lord Mansfield.

they

they miſtake in the exerciſe of it. Upon points of fact, which are within their cognizance, they are not puniſhable if they do wrong unintentionally and uncorruptly; for it is not the ſpirit of our free and liberal Conſtitution to puniſh an involuntary error, committed in the regular diſcharge of the duties belonging to an office. But if the jury aſſume a legal juriſdiction, they do it at their peril; if they miſtake with the pureſt intentions poſſible, they incur the danger of puniſhment; they have wandered out of their province, and muſt take the conſequences. How ſevere and unjuſt would this be, if the right of deciding the law were veſted in them; they would, under that ſuppoſition, be ſecure from danger, while acting honeſtly in the plain and comparatively eaſy buſineſs of determining matters of fact. But in the more intricate, and frequently to them, impracticable taſk of diſcovering the law, they would be liable to puniſhment for an error, which even the judges might commit with impunity. Having mentioned the above venerable commentator, I will add, without any reflections, his expoſition upon the term verdict *: "*Verdit, veredictum, quaſi dictum* "*veritatis*, as *judicium eſt quaſi juris dictum.* "*Et ſicut ad quæſtionem juris non reſpondent ju-* "*ratores ſed judices; ſic ad quæſtionem facti non* "*reſpondent judices ſed juratores.* For jurors" (he continues) "are to try the fact, and the judges "ought to judge according to the law that "riſes upon the fact; for, "*ex facto jus oritur.*"

* Co. Lit. 226. a.

But although if the jury give a general verdict, including law as well as fact, they are bound in conscience to follow the directions of the judge in point of law; they have the option to bring in their verdict special, stating only the facts of the case. The consequence of this is, that the law will be considered and decided by a superior tribunal, in a much more solemn manner than it could possibly be at the trial, where usually a single judge only presides. This practice is certainly very convenient; for it may happen that a point of law may arise at the trial, of such intricacy, novelty, or importance, that the judge may wish to decline taking upon himself to determine it. In such a case the jury, who are not supposed by the Constitution to be better able to surmount legal difficulties than the judge (though that consequence is involved in the doctrine of their having cognizance of the law), may find the facts specially, and the law will receive that consideration, which is best calculated to decide it upon just, established, and permanent principles: nor am I unwilling to concede, that the right of the jury to return a special verdict might possibly (though according to the present character of judges most improbably) operate in a beneficial manner, by putting the decision of the law out of the power of a judge, who should exhibit evident tokens of partiality. But in no respect does the practice respecting special verdicts furnish an argument in support of the right of juries to take the decision of the law into their own hands.

I SHALL

I SHALL add one obſervation more upon this part of the queſtion. If the jury find the ſpecial matter, and add their concluſion upon the law (which in effect is only ſtating particularly what amounts to a general verdict); if the concluſion in point of law is erroneous, the Court will ſet it aſide, taking the facts as found by the jury, and making their own deciſion as to the law upon thoſe facts *. Now, if the jury cannot expreſsly decide the law, though in connection with the fact, how is it poſſible to argue that they have a right to decide it tacitly? Is it not rather evident, that if in a general verdict they involve their own deciſion of the law, this is a ſurreptitious proceeding, an unfair advantage taken of a confidential ſituation, and an endeavour which can only ſucceed by the aid of concealment, but would be fruſtrated were it openly and explicitly declared †?

THOUGH it is my intention to avoid as much as poſſible quoting legal authorities, which, however applicable, might to ſome perſons ap-

* *Vide* Hale's Hiſt. Pl. C. vol. i. p. 471.

† A diſtinction has been ſometimes attempted between civil and criminal caſes; in reſpect of the right of juries to determine the law; but as the law upon a criminal charge, though often more known and better underſtood, may be, and frequently is, as intricate and difficult of inveſtigation, as in civil proceedings;—and as it is of even *more* importance to the ſubject that it ſhould be decided by eſtabliſhed rules in the former than the latter caſe, every reaſon for referring it ſolely to the judges, upon an iſſue between plaintiff and defendant, applies with at leaſt as much force to the trial of an information or indictment.

pear leſs ſatisfactory upon this ſubject, than arguments drawn from general principles, from obvious expedience, from conſiderations of conſiſtency, and from eſtabliſhed forms, I cannot help introducing in this place an obſervation of Lord Chief Juſtice Vaughan, in Buſhel's Caſe, which ſhews in the cleareſt manner what were his Lordſhip's ideas of the relative ſituation of judge and jury; and which may be conſidered as a very fair authority for me to cite, as it has been relied upon to prove the doctrine oppoſite to that for which I am contending. The paſſage is as follows:

" * TRUE it is, if it fall out upon ſome ſpe-
" cial trial, that the jury being ready to give
" their verdict, and the judge ſhall aſk, " Whe-
" ther they find ſuch a particular fact pro-
" pounded by him?" or, " Whether they find
" the matter of fact to be as ſuch a witneſs or
" witneſſes have depoſed?" and the jury an-
" ſwer, " they find the matter of fact to be ſo;"
" if then the judge ſhall declare, " The mat-
" ter of fact being by you ſo found to be, the law
" is for the plaintiff, and you are to find accord-
" ingly for him"----if, notwithſtanding, they
" find for the defendant, this may be thought
" a finding in matter of law againſt the direc-
" tion of the Court; for in that caſe the jury
" firſt declare the fact as it is found by them-
" ſelves, to which fact the judge declares how
" the law is conſequent.

" AND this is ordinary, when the jury find
" unexpectedly for the plaintiff or defendant,

* *Vide* Vaughan, 135.

" the

" the judge will aſk, " How do you find ſuch " a fact in particular?" and upon their anſwer " he will ſay, " Then it is for the defendant," " though they find for the plaintiff; or *è contra-* " *rio*; and thereupon they rectify their verdict.

" THEREFORE always in diſcreet and lawful " aſſiſtance of the jury the judge's direction is " hypothetical and upon ſuppoſition, and not " poſitive and upon coercion, viz. " If you " find the fact thus," leaving it to them what " they find, " then you are to find for the plain- " tiff; but if you find the fact thus, then it is " for the defendant."

I COME now to the important and much-agitated queſtion of Libels, upon which uncommon powers of reaſoning and ingenuity have been ſtretched to the utmoſt, and the moſt indefatigable exertions made to prevail on juries to take upon themſelves the cognizance of the law. I intend candidly and coolly to diſcuſs this queſtion, uninfluenced by any of that warmth or animoſity which it has too often excited.

IT will certainly be allowed by thoſe who wiſh moſt to extend the rights of juries, that a jury can in no inſtance decide more than is referred to their determination. In order to aſcertain what is ſo referred, we muſt look into the proceedings; and from them it appears (as I pledge myſelf to prove), that in matters of Libel, the iſſue which the jury is to try is only iſſue of fact, and of courſe their verdict cannot be more than a verdict upon the fact.

THE

THE ſtatement of any charge which a man is judicially called upon to anſwer, is denominated a Record. When to this he has pleaded Not Guilty, it is the buſineſs of a jury to try the truth of that plea. It is almoſt peculiar to proſecutions for Libel, that they admit of a clear and obvious ſeparation of the law and the fact upon the record: that is to ſay, the facts are ſo fully, diſtinctly, and ſpecifically alledged, that the queſtions, Whether thoſe facts are true, and, Whether they amount to the crime charged, are not only diſtinct, but ſeparate, and cannot be confounded together. In other caſes theſe queſtions, though in their nature diſtinct, and to be determined by different juriſdictions, are nevertheleſs united in the iſſue, and become ſeparated upon the trial. The facts of the caſe being firſt brought out by the evidence, according to which the jury is to determine, and the law upon thoſe facts being referred to the experience and learning of the judge, who having communicated his opinion thereon, the jury are the organ to pronounce the combined reſult of both inveſtigations. Thus in an indictment for a murder, a burglary, &c. the charge is ſtated generally in the abſtract, as the reſult both of law and fact; and the object of the trial is, to aſcertain whether facts can be proved which juſtify ſuch a charge being made. But in proſecutions for Libels, the facts themſelves are ſtated upon the record as fully and circumſtantially, as in the other caſes they are proved upon the trial, or could be ſet forth

upon

upon a ſpecial verdict. This diſtinction is very obvious, and extremely important. To charge a man generally with a crime, and to charge him with the ſpecific facts that are ſaid to conſtitute the crime, are ſuch different modes of accuſation, as require very different forms of defence. The reaſon of this difference is, that in the former caſes, as murder, &c. though previous to the trial it may be ſufficiently aſcertained that facts exiſt which juſtify the proſecution, yet it may be and generally is impoſſible to obtain a knowledge of the particular circumſtances of thoſe facts, with ſufficient preciſion to put them upon the record; for it is only the trial which can afford that full, cloſe, and compulſory examination of witneſſes, which is alone adequate to the complete inveſtigation of all the circumſtances of the caſe; and therefore, if it were attempted to recite the facts upon the record, a variance would often unavoidably exiſt between the facts ſo ſtated and the proofs; which variance would be fatal to the proſecution, and would afford opportunities to the guilty to eſcape. And if no ſuch variance exiſted, yet many circumſtances that may come out upon the trial, would continue unknown till then, and of courſe would not appear upon the record; and, not appearing there, would not be admiſſible in evidence: as Lord Hale ſays, "It is impoſſible to preſcribe all "the circumſtances evidencing a felonious in-"tent." It is therefore neceſſary to frame the record in ſuch a manner, that the queſtion ariſing upon it, and to which the plea is the

anſwer of the defendant, ſhould be, Whether he has been guilty of a murder, a burglary, or the like? But caſes of Libel admit of the introduction of the facts upon the record, with ſufficient minuteneſs and preciſion to correſpond exactly with the proofs; and therefore the law, which loves ſimplicity in its proceedings, adopts that mode. But as no man can be charged criminally, unleſs the charge ſpecifies what offence he is accuſed of, the indictment or information for a Libel alſo intimates, that the facts ſo ſtated are alledged to amount to a Libel. The record being thus conſtructed, two diſtinct propoſitions are contained in it ---that the defendant did publiſh in ſuch a manner the writing ſtated, and that the writing ſo publiſhed is a Libel. The firſt is purely a propoſition of fact, and the other of law. The record exhibits the premiſes of a ſyllogiſm. The major is evidently implied in the propoſition of law, that "ſuch a publication is a Libel;" the minor, in the propoſition of fact, that "the defendant did ſo publiſh:" the concluſion follows of courſe, that "if the pre-
"miſes are true, the defendant is guilty of
"having publiſhed a Libel." Thus, for inſtance, if the record ſtates in the uſual form, that the defendant did wickedly, maliciouſly, and ſeditiouſly publiſh the following Libel, "The
"Houſe of Commons have abuſed the truſt
"repoſed in them by their conſtituents," with proper innuendos; here are evidently theſe two propoſitions---that wickedly and maliciouſly to publiſh ſuch an aſſertion amounts to a Libel---

and

and that the defendant did wickedly and maliciouſly publiſh ſuch an aſſertion. The defendant, being called upon for his anſwer to this record, has his choice to deny either of the propoſitions; for both muſt be true, to juſtify the concluſion that he is guilty of a libel. He cannot deny both by one plea; ſuch a plea would be double and equivocal: but the law and the fact being diſtinctly charged, they muſt be anſwered diſtinctly. If the propoſition containing the law is denied, the only way of doing this, in the firſt inſtance, is by demurrer; if the propoſition of fact, the defendant muſt plead not guilty. Should it be ſaid, that the plea of not guilty is meant to negative the concluſion, I anſwer, that where the concluſion only is charged, that obſervation is juſt; but where the premiſes are ſtated, and the concluſion is left to follow from them, the only way to prevent the concluſion, according to the rules of logic and ſound reaſoning, which are ſubſtantially the ſame, is to deny one of the premiſes; for if they are left uncontradicted, they are tacitly admitted, and muſt be preſumed to be true; and then the concluſion follows of courſe. As therefore the plea of *not guilty* in a caſe of libel is not applicable to the concluſion (that not being expreſsly charged, but only left to follow the proof of the premiſes), ſuch plea muſt refer either to the propoſition of fact or the propoſition of law. To the law it cannot apply, becauſe the appropriated form of proceeding in denying the law is by a demurrer; of courſe it contains only a denial of the facts

charged, and the trial cannot extend beyond an inveſtigation of facts. As therefore the ſame terms may bear very different ſignifications, being applied upon different occaſions, ſo the term "not guilty" differs very much in its import and extent, according to the form in which the charge is advanced.

But I cannot help thinking, that the form of proceeding in proſecutions for libel is abundantly the moſt favourable to the accuſed, as well as moſt advantageous to public juſtice; and that the ſame form would have prevailed in all proſecutions, if in the nature of the caſe that had been practicable; for it certainly is very deſirable that every accuſation ſhould be as preciſe and explicit as poſſible; that the party accuſed ſhould be able to take advantage, in the ſhorteſt and ſimpleſt manner, of that mode of defence which is moſt likely to avail him. Now, if the law and the fact are diſtinctly ſtated, the accuſed may immediately ſhape his defence according to his caſe. If he can combat the charge ſucceſsfully on legal grounds, an inveſtigation of the facts is unneceſſary, and *vice verſâ*. Beſides, by a diſtinct ſtatement and ſeparate diſcuſſion of the law, he has a better opportunity of taking all advantages that the law can afford him, than he could poſſibly enjoy upon a trial, where the facts are brought out by evidence, and the law attaches upon them as they ariſe; and where he may be obliged without preparation to argue points of law, of the greateſt importance and nicety, which it

may

may not be always in his power to reſerve for future diſcuſſion. Not to mention, that in the former caſe the law is *ſolemnly* decided by ſeveral judges; in the latter, it is referred to the *extempore* deciſion of a ſingle judge.

THAT the plea of not guilty upon a proſecution for a libel refers only to facts, will further appear, if we conſider that the reverſe of ſuch a plea, namely, a plea of "guilty," involves only a confeſſion that the facts charged are true. For after ſuch a plea the defendant may urge in arreſt of judgment, that the writing, the publication of which he has ſo acknowledged, is not in law "a libel." This would be a ſtrange inconſiſtency, if the plea contained an admiſſion of the law: it would be ſaying and unſaying, admitting and denying by the ſame mouth. The plea would be final and concluſive as to the queſtion of fact; but would have no operation as to the queſtion of law. The tacit admiſſion of the law, which is implied by the defendant's pleading inſtead of demurring, is very different; for it would be extremely hard to conclude a man by a tacit admiſſion, by the mere neglect of an opportunity to take advantage of a legal defence, while the queſtion of law continues open upon the record: but he could not complain if, after an *expreſs* confeſſion that both law and fact are againſt him, he were to be equally concluded as to both.

As, therefore, the plea of "guilty" only admits the facts, and the plea of "not guilty" only denies the facts, the trial of the latter plea can only aſcertain whether the facts charged are true; for the facts being all ſtated upon the record, the law upon thoſe facts can derive no poſſible elucidation from the teſtimony of witneſſes. A thouſand trials cannot render the law plainer than it appears originally upon the record.

UNLESS theſe preliminaries be overthrown (which I flatter myſelf is impoſſible), it will be in vain to contend that the jury, by their verdict, decide upon the law of the caſe: ſuch a doctrine would imply that the jury can determine what the proceedings do not refer to their conſideration—what is not and cannot be agitated in that ſtage of the buſineſs—what the defendant by his plea has not conteſted, and what the trial cannot poſſibly inveſtigate. They have not even the *power* of deciding the law againſt the defendant by a verdict of "guilty;" for after ſuch a verdict he may arreſt the judgment, upon the ground that the publication, found to be true by the jury, is not in law a libel; which he could not do if the law had been already decided. How then can it be pretended that they have a right to determine the law in his favour by a verdict of "not guilty?" for to acquit upon a point of law, requires preciſely the ſame juriſdiction, the ſame right,

right, and I may add the ſame capacity and legal knowledge, as to convict: and it would be abſurd to ſay, that the jury is capable of aſcertaining that the law is *not* againſt a man, unleſs they can alſo aſcertain whether it *is* againſt him.

A GREAT deal has been ſaid and written about the impropriety of annexing the term "guilty" to the finding of facts; for it is obſerved "*guilty*" is not a fact, but "a conclu-"ſion of law from a fact." At moſt, this is but cavilling at a circumſtance of form, and it leaves the ſubſtance of the argument entirely untouched. But, even in point of form, I contend that the objection is deſtitute of weight; for the facts conſtitute the guilt, if in law they amount to the crime; and the defendant by pleading *not guilty* to a record, which ſtates diſtinctly both the fact and the concluſion of law, has taken upon himſelf to deny only the fact, and has very properly uſed the term "not "guilty" for that purpoſe. For if the facts are not true, he is certainly not guilty; and if at the trial the facts are not proved, the jury muſt give the verdict of "not guilty:" and as ſuch a verdict, like the plea, negatives only the *facts*, of courſe the verdict of "guilty" has juſt the contrary effect; it finds only the *facts*. It means, guilty of thoſe facts which the defendant has denied by his plea, which are charged by the record to conſtitute a libel, and which the defendant, by not demurring, has tacitly admitted to have that effect. The

defen-

defendant has rejected his proper opportunity of controverting the concluſion of law; he has choſen to reſt his defence upon a plea, which by a verdict of "guilty" the jury find to be falſe, and which muſt therefore be taken to be falſe within his knowledge; whereas upon demurrer he might have taken any advantage that his caſe afforded of a defence in law, without reſorting to a falſe plea: but by pleading "not guilty," he has only denied that he publiſhed the libel ſtated upon the record. In that ſtage of the buſineſs, therefore, it muſt be preſumed that the record does ſtate a libel; ſuch a preſumption is admitted by the defendant himſelf; it is founded upon his own plea; therefore it is not injurious to him that it ſhould extend to the verdict, which decides upon the plea. Still, however, as the verdict of "guilty" does not find the law, the term "guilty" is there taken in a qualified ſenſe, ſubject to the condition, that the facts juſtify the concluſion of law: it means, "guilty, if thoſe facts amount to a libel:" and although the defendant by his plea has tacitly admitted the queſtion of law to be againſt him, yet that queſtion remains open upon the record, and he may avail himſelf of it in arreſt of judgment, notwithſtanding the plea and the verdict.

I HOPE I have ſufficiently proved that the queſtion of law, Whether the publication amounts to a libel, is not for the conſideration of the jury. But it has been endeavoured, by indirect and circuitous means, to inveſt

juries

juries with the determination of the law, under the ſemblance of deciding only upon the facts. To this purpoſe much ingenuity has been uſed to confound the diſtinction been law and fact.

Thus the miſchievous intention of the publiſher of a writing charged to be libellous, has been repreſented as a diſtinct queſtion of fact, and as requiring poſitive proof, in order to juſtify a conviction. This doctrine has been ſupported by arguments drawn from the appearance of certain epithets on the record, as *wickedly*, *maliciouſly*, *ſeditiouſly*, &c. and it has been contended, that the jury ſhould not find a verdict of "guilty," unleſs they are perſuaded by evidence that the intention of the publiſher was *wicked*, *malicious*, or *ſeditious*.

To this I anſwer, that ſuch epithets are by no means circumſtances of fact conſtituting the offence, but inferences of law from the offence itſelf. If the defendant has publiſhed a libel, the law preſumes that he publiſhed it with a bad intent. The queſtion therefore is not, Whether he has, with ſuch intent as is expreſſed by the epithets, publiſhed the matter charged as libellous? but, Whether he has publiſhed it at all? If he has, the intent is preſumed, as it ever muſt be, to accompany the crime. No direct proof is required, nor indeed can in general be given, of a malicious intention; for it is not poſſible to dive into the heart of man, and drag forth from

from thence his thoughts and purpoſes to public view. If crimes were never to be punished unleſs further proof were brought of a criminal intention than is inferred from the commiſſion of the offence, ſociety could not long ſubſiſt.

But it has been urged, that "upon an "indictment for traitorouſly compaſſing the "death of the king, where the overt act is "ſtated to be the publication of a paper ſet "out *literatim* upon the record, it may as "well be argued, that the treaſonable inten-"tion would be an inference of law from the "fact of publiſhing the paper, as that the "ſeditious intention is an inference of law "in the caſe of a libel of that nature*." The analogy between theſe two caſes has been relied on with conſiderable triumph, as deciſive of the queſtion, though in fact no two caſes can be more diſſimilar.

The crime of treaſon in compaſſing the death of the king, conſiſts entirely in the intention and purpoſe of the mind, of which the overt act is but evidence. The giſt of the queſtion is, Did the party form ſuch a deliberate purpoſe as is imputed to him? The treaſonable *intention* is the very point that is to be eſtabliſhed, and the overt act of publication is only evidence to eſtabliſh that point;

* *Vide* Mr. Erſkine's Argument upon a Motion for a new Trial in the Caſe of the Dean of St. Aſaph.

whereas,

whereas, in a charge of libel, the publication of the matter ſaid to be libellous is the crime itſelf: and if the publication is found by the jury, the crime is completely found, ſuppoſing that ſuch publication contains a libel. The miſchievous intention referred to in the epithets, is there an inference of law, becauſe the crime has been eſtabliſhed; but in the other caſe, a verdict of "guilty of publiſhing the paper charged as the overt act," would, in effect, be no verdict at all, becauſe it would leave untouched the main point of the charge; that is, the treaſonable intention.

So in murder, the malice is the very point in queſtion; it is the ſubſtance of the crime, and not merely an inference of law from a crime previouſly and independently eſtabliſhed.

SHOULD it be aſked, To what purpoſe the epithets are introduced upon the record, if they are not to be proved? it is anſwered, That they render the deſcription of the offence more complete than it poſſibly could be without their aſſiſtance. The fact of publication may be ambiguous. It is poſſible, that though the writing be libellous, the publication of it may have been innocent, becauſe the mind did not accompany the act. If the defendant delivered the writing to his printer by miſtake, intending to produce another paper;---or if the delivery of it was purely accidental in any other reſpect, or compelled by fear of violence

and perſonal injury;---in theſe and in ſimilar caſes, the publication was not malicious or ſeditious, becauſe not intentional. But it is only the *criminal* publication of a libel that the law means to puniſh, and therefore the record charges the publication as wicked, malicious, or ſeditious; calling thereby upon the defendant to prove the contrary, if he can do ſo. The epithets candidly apprize him what inference the law will draw from the charge brought againſt him, if it be proved; and they warn him not to neglect the opportunity of the trial to rebut that inference. He cannot afterwards complain of having been entrapped, by the ſilence of the record, into conſtructions, which it was in his power to obviate by proving a ſufficient excuſe. The epithets therefore contain mere inferences of law; and though they admit of no other proof than that of the facts from which ſuch inferences are deduced, yet they may be rebutted by evidence which amounts to an explanation or excuſe of thoſe facts. But as the facts, when not explained or juſtified, are neceſſarily followed by the legal inference of a criminal intent, ſo nothing can prevent that inference from ariſing but evidence that relates to the facts. No point or principle of law relating to the queſtion of "Libel or No Libel" can have that effect; for that queſtion cannot ariſe before a jury---it is quite irrelevant to the iſſue;---and therefore the publication in that ſtage of the buſineſs muſt be preſumed (though not concluſively) to contain a Libel.

NEITHER

NEITHER can any evidence of the motives of the defendant in the publication, or of his conceptions of the meaning of the work, prevent the inference of a criminal intent from ariſing; for ſuch evidence does not go at all to the fact, which is the only point in iſſue before the jury:---and if it were otherwiſe, as it is impoſſible to aſcertain the real motives, ideas, and intentions of a party, they being out of the reach of any human proceſs to diſcover, ſuch inveſtigations would be but groping in the dark, and produce endleſs confuſion and uncertainty. It is neceſſarily the principle of every ſyſtem of criminal law, that if a fact, which the law denominates a crime, is fully proved, the criminal intention muſt of courſe be preſumed; and therefore the queſtion upon every criminal charge is not, Whether the party intended to commit the crime? but, Whether he intended to do the act which the law declares to be a crime?---not, Whether he intended to commit a murder? but, Whether he has committed a murder? that is, Whether he has *intentionally* done thoſe acts which conſtitute a murder? Beſides which, when a perſon actually commits a crime, if it could be proved to demonſtration that he did not know or believe he was doing what was criminal---nay, if it were proved that he thought he was doing a meritorious act, no defence could ariſe out of ſuch proof; for the injury to ſociety is equally complete---the offence againſt the laws is equally complete, whether the defendant believed or not that his conduct was criminal. If a perſon, thinking that the text in Holy Writ

which ſays, "*Whoſo ſheds man's blood, by man* "*ſhall his blood be ſhed,*" enjoined individuals to avenge that crime with their own hands; ſhould kill a murderer in ſafe cuſtody upon that charge, can it be ſaid ſuch an opinion (if it could admit of proof) would be a juſtification for the act ſo founded upon it? So, if a Defendant charged with a Libel were to ſay, "Notwithſtanding the publication is "in law a Libel (which by my plea I have "admitted), yet I publiſhed it with an intent "that appeared to me to be laudable, of ſub-"verting the preſent Conſtitution, in order to "make way for a republican form of govern-"ment, and thereby eſtabliſh the reign of "freedom;" I imagine the republican principles of ſuch a defendant, however they may juſtify his conduct to his own mind, would furniſh no excuſe for his breach of the laws.

THUS it appears, that neither a miſtake in opinion, nor the merit of a particular intention, can poſſibly, in a ſtate of ſociety, be permitted to prevent the puniſhment of ſuch acts as the law declares to be criminal. What effect ſuch circumſtances may have in the tribunal of that JUDGE who knows the heart, is quite another conſideration.

IT may be permitted here to obſerve, that there appears to me to be a fallacy of this kind in the deſervedly famous defence of the Dean of St. Aſaph; where, though no anſwer was attempted to the fact of publication, it was endea-

endeavoured to eſtabliſh that the Dean believed the publication to be meritorious; and abilities of the greateſt reſpectability were tortured upon the Motion for a new Trial, to prove that ſuch evidence ſhould have been left to the jury. But ſurely if it could have been incontrovertibly eſtabliſhed, that in publiſhing the libel the Dean was actuated by the moſt honeſt intentions poſſible, as ſuch evidence neither related to the fact of publiſhing, nor to the queſtion of libel, it could not furniſh a juſtification or excuſe. Notwithſtanding ſuch evidence, the fact may be clear and the law indiſputable—than which nothing more is wanting to render the crime complete—and ſociety calls for a vindication of its offended laws. The learned and ingenious gentleman who conducted the defence I refer to, introduced ſome general propoſitions in ſupport of the ſeveral doctrines he then maintained; and upon the part of the caſe now under conſideration he ſays, "that in all caſes "where the miſchievous intention (which is "agreed to be the eſſence of the crime) can-"not be collected by ſimple inference from "the fact charged, becauſe the defendant "goes into evidence to rebut ſuch inference, "the intention becomes then a pure, un-"mixed queſtion of fact for the conſidera-"tion of the jury."

THIS propoſition ſeems to imply, that the defendant may go into any evidence whatever, to rebut the inference of a miſchievous intention,

tion, independently of any doubt that may arife as to the fact itfelf; which is taken for granted the very thing in difpute: for if the defendant can go into evidence collateral to the fact, and which, not tending to difprove the fact, only denies the inference of law to be juft, a trial would not be fo much an inveftigation of difputed facts, as an examination of the law. In vain would the law declare certain facts to conftitute a crime, if, the facts being fully proved, the defendant could efcape from punifhment, by convincing a jury that his intentions were not mifchievous. It would not be very furprizing if a pathetic addrefs were to find fo much favour with the jury, as to refcue from punifhment a defendant, whom a heated imagination, mifleading honeft difpofitions, had betrayed into a libel deftructive to the peace and welfare of fociety. Juries are very acceffible on the fide of commiferation and liberal allowance; and if they can be perfuaded to believe, that a defendant has erred with good intentions, or that he did not mean the harm he has done, they may, in the indulgence of an amiable generofity towards the individual, forget, for a moment, the intereffs of the public. Their judgment alfo, as well as their feelings, may be infenfibly affailed by artful though falfe pretenfions, throwing a veil upon the real tendency of a libel, and gloffing the moft inflammatory and fedition publications with colourings drawn from modern theories of government or newly-difcovered *rights of man*.

THE

THE ſame gentleman cites a paſſage from Lord Hale's Pleas of the Crown, to which I am very willing to refer the deciſion of the point in queſtion.

" IN all crimes the intention is the prin-
" cipal conſideration; it is the mind that
" makes the taking of another's goods to be
" felony, or a bare treſpaſs only: it is impoſ-
" ſible to preſcribe all the circumſtances evi-
" dencing a felonious intent, or the contrary;
" but the ſame muſt be left to the attentive
" conſideration of judge *and jury*; wherein
" the beſt rule is, *in dubiis* rather to incline to
" acquittal than conviction."

UNDOUBTEDLY the intention is the principal conſideration in all crimes; for without an intention no act can be done. Will is eſſential to agency; and where there is a defect of will, there can be neither merit nor demerit. As an intention is an indiſpenſible ingredient in every act, ſo different acts, in themſelves ſimilar, receive their reſpective colour, their diſtinguiſhing characteriſtic, from the particular intent with which they were done. Thus (according to Lord Hale) the taking of another's goods may be either a felony or a bare treſpaſs, according to the mind of the party who did the act. But a diſtinction is neceſſary between *intention*, as it produces the act, and as it refers to the conſequences that may ariſe from the act. In the firſt caſe, the intention is an eſſential ingredient in an act,

and

and denominates it to be of a particular kind or deſcription. In the ſecond, it is collateral to the act: and though it may in that ſenſe affect the degree of moral criminality belonging to an act, and thereby furniſh a ground of extenuation, it cannot take the act out of the claſs to which it belongs. Thus a man who robs, in order to aſſuage the ſufferings of a numerous and diſtreſſed family, equally commits a robbery, as if he were led to that violence by a deſire of indulging his propenſities to vice and idleneſs; yet in the firſt inſtance the moral offence is much extenuated, and poſſibly in his own ideas might be entirely excuſed. The firſt ſpecies of intention before-mentioned, which is of the ſubſtance of an act, muſt be either expreſsly proved, or neceſſarily implied, before it can be ſaid that an act is done, or a crime committed; and nothing but evidence of the ſame nature can furniſh an anſwer to ſuch proof or implication. Thus a burglary is a forcible breach and entry of a manſion-houſe by night, with an intent to commit a felony. Here the intent to commit a felony is of the eſſence of the crime: but the inference of law as to that intent may be rebutted by evidence inconſiſtent therewith; as, that the defendant was an officer of juſtice, and broke and entered in execution of his duty.

But it was the ſecond kind of intention above alluded to, that was relied upon in the caſe of the Dean of St. Aſaph. No evidence was attempted to ſhew, that it was not the intention

tention of the defendant to do the act. The ſole object of that part of the defence was to eſtabliſh the particular notions of the defendant as to the tendency of the publication; which notions had nothing to do with the caſe, as a matter of legal enquiry, and would be always a moſt ſuſpicious kind of evidence. Where the direct intent of the party is to publiſh and ſcatter, what the law denominates a libel, it is perfectly immaterial, in a court of juſtice, what his abſtract notions of the work may be. He has done an act forbidden by the law—his intent to do that act is not refuted by any evidence—he therefore muſt be taken to have done it *ſuo periculo*, and muſt expect the conſequences which the law attaches upon it.

It has alſo been contended by the learned gentleman before-mentioned, that "where a "writing indicted as a libel neither contains "nor is averred to contain any ſlander of an "individual, ſo as to fall within thoſe rules of "law which protect perſonal reputation, but "whoſe criminality is charged to conſiſt in its "tendency to ſtir up general diſcontent, that "the trial of ſuch an indictment neither in-"volves nor can in its nature involve any ab-"ſtract queſtion of law for the judgment of a "court, but muſt wholly depend on the judg-"ment of the jury on the tendency of the "writing itſelf to produce ſuch conſequences, "when connected with all the circumſtances "which attended its publication." But I apprehend no principle can be more inconteſtible

than this, that whether any given circumſtances whatever amount to a given crime, is always a pure queſtion of law; the law alone can furniſh the rule by which ſuch a queſtion can be decided. And as a libel of whatever ſpecies is a crime (for otherwiſe the court would have no right to pronounce judgment upon it), whether the circumſtances ſtated upon the record conſtitute a libel, is entirely a conſideration of law. This muſt be the caſe whether the libel is of a private or public nature—whether it attacks the reputation of an individual, or the good order and quiet of ſociety—whether the law is ſimple and obvious—or abſtruſe and obſcure. It ſurely is not intended by the above propoſition to deny that a writing may be a public libel, though it do not contain "any "ſlander of an individual;" and I ſhould be glad to aſk, if the queſtion, "Whether all the facts "forming the charge of a public libel amount "to that crime?" is not a queſtion of law, what ſpecies of queſtion it is? It will hardly be called a queſtion of philoſophy, ethics, or theology. Neither is it a queſtion of fact; for that can never extend beyond the inquiry, whether the circumſtances appearing in the charge do really exiſt. It ſeems that an error has ariſen from confounding the truth of the averments, containing the tendency of a writing (when ſuch tendency is averred), with the point of law, Whether the writing with ſuch a tendency is a libel? In ſome caſes it is neceſſary to ſtate upon the record, by way of averment, the tendency of a publication; and as averments always conſiſt

ſiſt of facts, their truth muſt be found by the jury. To explain this matter a little more fully. It has been already obſerved, that the record muſt contain a complete deſcription of the offence, by ſtating facts ſufficient in law to conſtitute the crime. But the record need not contain any more circumſtances than are ſufficient for that purpoſe. Therefore, where the meaning and tendency of a libel are fully obvious upon the face of it, nothing more is neceſſary than to ſtate the publication ſimply upon the record, in ſuch a manner that its direct meaning and tendency may be obvious. But it is poſſible that a writing may be expreſſed with ſo much caution and reſerve, that though upon the bare reading of it, without any aſſociation with extrinſic circumſtances, it cannot be ſaid to be libellous, yet when conſidered with ſuch an aſſociation (which it may excite in the mind of every reader), it will be a libel of the moſt flagrant nature. Thus in a private caſe, a writing apparently indifferent, or perhaps, on the face of it, even panegyrical, may, by means of ſome implied reference or alluſion, contain a fatal ſtab to the reputation of an individual; ſo a writing juſtifiable in the abſtract, or profeſſing merely to aim at fair diſcuſſion, may, from the manner, the time, and the other circumſtances under which it is publiſhed, have a tendency to ſubvert the peace and order of ſociety, and to introduce confuſion, anarchy, and civil war. Such libels are not the leſs, but the more pernicious, becauſe they conceal under a maſk their real tendency.

Did they explicitly declare their true design, the indignation they muſt excite would fruſtrate their intended effect; the public would thereby be put upon their guard: the ſnake in the graſs is infinitely more dangerous to the unſuſpecting traveller, than one that openly rears its threatening creſt.

In the proſecution of libels of this deſcription, it is neceſſary to ſtate upon the record ſuch extrinſic circumſtances as diſcloſe their real tendency; for the record muſt contain all thoſe circumſtances which compoſe the crime. This is done by means of averments and innuendo's: the former introduce ſuch facts as are *deſcriptive* of the *crime*, but are not contained in the libel; the latter furniſh an explanation of ſuch circumſtances as are there mentioned in ſuch a manner, as to require farther elucidation. Suppoſe, for inſtance, that in the year 1780, while the Metropolis was in a ſtate of univerſal conſternation,---while the bands of ſociety were looſed, and a tumultuous populace had thrown off thoſe reſtraints which are indiſpenſable to the preſervation of public tranquillity, either a miſtaken bigot, or a cautious friend to riot and devaſtation, had diſperſed among the outrageous rabble hand-bills containing only the following ſentence: "Britons "ſhould repel an attack upon their RELIGIOUS "and civil rights at the riſk of their lives." This poſition is in the abſtract perfectly juſt, and being publiſhed as a general principle could never be charged as libellous; but publiſhed

liſhed and diſperſed under the above circumſtances, it would be a moſt obnoxious libel, and, by throwing oil into the fire, would inflame ſtill more the licentious ſpirit already abroad, and menacing general deſtruction. The record, upon the proſecution for ſuch a libel, muſt by averments connect it with the extrinſic circumſtances, by charging the particular tendency; and ſuch averments would contain only facts, the truth of which the jury is to try. In this manner the ſeditious tendency of a writing may become a queſtion of fact; for where the libel, being of that deſcription, does not, upon the face of it, imply a ſeditious tendency, but only when connected with foreign circumſtances, ſuch tendency being an eſſential fact in the caſe, it muſt be diſtinctly averred, and muſt be proved to the ſatisfaction of the jury.

Where, however, the publication is ſo full, direct, and explicit, as to import its real meaning and intended effect upon the face of it, it would be ſuperfluous to introduce upon the record any reference to external circumſtances; and the only queſtion for the jury is, Whether the defendant did really publiſh the writing there ſtated?

After all, whether the writing alone appears on the record, or whether other facts, connected and co-operating with it in conſtituting a libel, are alſo introduced by way of averment, the diſtinction between law and fact

is