John Tutchin, for a libel, in the reign of Queen Anne, it was declared by Sir E. Northey, the attorney-general, that he would always profecute any man who ſhould aſſert, " that the people have power " to call their governors to account [24]."

THE doctrines which are propagated concerning libels, and the extent of the power of juries in trials for the publication of them, involve in them various abſurdities. Thus though it is affirmed, that juries are incapable of determining what is, or what is not a libel, yet in every profecution of a bookſeller or printer for a libel, it is always taken for granted, that they are capable of determining this intricate and knotty point. For they are never, in any caſe, allowed to plead ignorance on this ſubject, as an exculpation of themſelves for having ſold or printed what is called a libel.

[24] State Trials, vol. V. p. 544.

No bookſeller or printer is permitted to urge in his own juſtification, that he did not know that any book or pamphlet, with the publication of which he is charged, was a libel. Now to take it for granted, that every common bookſeller, or printer, is a judge of what is, or of what is not a libel; and yet to aſſert, that twelve jurymen, perſons of the ſame rank, are incapable of determining it, is to the laſt degree propoſterous and abſurd. But many bookſellers have been pilloried, and otherwiſe ſeverely puniſhed, for ſelling ſeditious libels; and ſome printers have been hanged for printing treaſonable libels.

We are told, that neither common, nor ſpecial juries, are competent to the deciſion of what is, or what is not a libel. But grand juries, it ſeems, poſſeſs more ſagacity. They muſt certainly poſſeſs ſome knowledge upon this ſubject: for it is allowed,

lowed, that they have a right to find bills of indictment againſt libellers. In 1783, a grand jury at Wrexham, in the county of Denbigh, found a bill of indictment againſt the Dean of St. Aſaph for the publication of a libel. The piece ſo denominated was a dialogue on the principles of government, written by ſir William Jones, and which had been, before its publication in Wales, printed and diſperſed at the expence of a public ſociety; who were of opinion, that the principles it contained were ſo juſt, and ſo favourable to the intereſts of national liberty, that they could not be too generally diſſeminated. In the indictment found at Wrexham, it was, however, ſtated, that this publication was a "falſe, wicked, ma-"licious, ſeditious, and ſcandalous libel." Now a plain man may be puzzled to diſcover, how it ſhould happen, that the grand jury at Wrexham ſhould be ſo learned in

the law of libels, and that the ſpecial jury at Shrewſbury, who afterwards tried the cauſe, and who were men of the ſame rank, ſhould have been ſo incompetent, as they were informed they were, to determine the innocence or criminality of this publication. But the whole doctrine of libels, and the modes of proceeding concerning them, are attended with profound myſteries, to the comprehenſion of which common underſtandings ſeem not to be competent. It has been ſaid in divinity, that "where myſtery "begins, religion ends;" and perhaps it may be ſaid of law, with equal truth, that, whenever myſtery is introduced into it, there is an end of reaſon and of juſtice. Whatever is intended for the regulation of all men's conduct, ought to be made intelligible to all. Myſtery in law can anſwer no purpoſes, but thoſe of knavery, or of oppreſſion. But from whatever cauſe it has

has proceeded, abundant pains appear to have been taken, in trials for libels, to bewilder the underſtandings of jurymen, and to involve the buſineſs in the darkneſs of legal jargon, and profeſſional ſophiſtry.

In indictments, or informations for libels, certain epithets are introduced, which are intended to be deſcriptive of the offence with which a perſon is charged who is proſecuted as a libeller. If it be a public libel, or ſuppoſed public libel, it is generally ſtated, in the information, or indictment, to be a "falſe, wicked, malicious, ſeditious, "and ſcandalous libel." If a book or paper ſtyled a libel be not proved to deſerve thoſe epithets, or if it does not appear to the jury to deſerve thoſe epithets, no evidence is produced to them that a libel has been publiſhed. For a book or paper that is not entitled to theſe epithets is not a libel. Whether a book or paper be falſe, or

wicked, or malicious, or ſeditious, or ſcandalous, or whether they be otherwiſe, whether they are innocent or criminal publications, are facts, and facts undoubtedly to be inquired into by the jury. But whether they are queſtions of fact, or queſtions of law, in either caſe they come within the cognizance of the jury: for the jury has nothing elſe to determine, that is in the leaſt worthy the attention of a court of juſtice. The publication of a book or pamphlet is not a crime, independently of the criminal matter which it may contain; and if a jury find a man guilty without a conviction of the criminality of the publication with which he is charged, they convict a fellow-citizen without the leaſt reaſon or juſtice.

But clear as theſe principles are, much legal ſophiſtry has been employed, to perſuade juries, that they are to pay no attention

tion to the epithets, in informations or indictments for libels, and that they are mere words of courſe, or inferences of law. The epithets FALSE, WICKED, MALICIOUS, SEDITIOUS, and SCANDALOUS, have been compared by lord chief juſtice Jefferies, and other judges ſince, to the phraſes in indictments for murder, that the murder was committed by the party accuſed, "not having the fear of God before his eyes," and "being moved and ſeduced by the inſti-"gation of the devil." But ſurely it is the moſt contemptible ſophiſtry, to compare, and to confound, phraſes that are evidently words of courſe, and which from their nature are incapable of proof, with others that are capable of proof, and which are deſcriptive of, and characteriſtic of the offence with which the accuſed party is charged. If a murder be committed, it cannot be neceſſary to prove, that the murderer committed

the fact " at the inſtigation of the devil ;" but if a man be charged with writing, printing, or publiſhing a libel, the jury ought to be convinced, that the book or paper ſo ſtyled is falſe and ſcandalous, or malicious and ſeditious ; or otherwiſe they condemn a man without the leaſt evidence of criminality ; for writing, printing, or publiſhing, are acts in themſelves perfectly innocent and indifferent.

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

' the proof of the thing itſelf, proves the evil,

' evil mind it was done with. If, then,
' gentlemen, you believe the defendant,
' Sir Samuel Bernardiſton, did write and
' publiſh theſe letters, that is proof enough
' of the words MALICIOUSLY, SEDITIOUSLY,
' and FACTIOUSLY, laid in the informa-
' tion [24].'

' WHEN I reflect,' ſays an able writer, who has been before quoted, ' that the de-
' claration, information, or indictment for
' a libel, charges the paper complained of
' with malice and ſedition, that the jury
' are ſworn well and truly to try this
' charge, and true deliverance make,—and
' that if the jury find him guilty, the ver-
' dict is drawn up; "The jurors ſay, upon
" their oaths, that the defendant maliciouſly
" and ſeditiouſly publiſhed the paper in
" queſtion;" it is impoſſible for me not
' to declare, that the whole of the proceed-

[24] State Trials, vol. III. p. 320.

' ing,

‘ ing, and the only legal form of drawing
‘ up both information and verdict, give the
‘ lie to thoſe who tell a jury, that “ the
“ epithets FALSE, SCANDALOUS, and MA-
“ LICIOUS, are at preſent (before any ver-
“ dict finding the defendant guilty, which
“ eſtabliſhes the fact) all words of courſe;
“ but if the writing be found a libel, they
“ are inferences of law;” or elſe that “ the
“ epithets of malicious and ſeditious are in-
“ ferences in law, with which they have
“ nothing to do, and that whether the pa-
“ per be criminal or innocent, is to them
“ a ſubject of indifference [25].”

In the notion of the epithets reſpecting libels being immaterial, or merely words of courſe, the opinions even of the crown lawyers ſeem not to have been uniform. On the trial of Richard Franklin for a libel,

[25] Another Letter to Mr. Almon, in matter of Libel, p. 54, 55.

in

in 1731, the ſolicitor general told the jury, that it was not material, whether the matters or things publiſhed in the libels were true or falſe, "if the publication thereof "was detrimental to the government, and "of a malicious, injurious, and ſeditious "deſign," &c [26]. Here the truth or falſehood of the libel are ſpoken of as a matter of indifference; but the malicious, injurious, and ſeditious deſign of it, appears to be conſidered as an object of inquiry to the jury.

THE general practice of introducing the term FALSE, in indictments or informations for libels, ſeems ſufficiently to prove, that it was the opinion of our anceſtors, that falſehood was neceſſary to conſtitute a libel. Nor is it eaſy to conceive, that a conſcientious jury can return upon their oaths, that a man has publiſhed a FALSE and

[26] State Trials, vol. IX. p. 258.

MALICIOUS

MALICIOUS libel, which they muſt do when they convict a public libeller, if they are not in their own minds convinced of the FALSEHOOD and the MALICE. With reſpect to private libels, their truth or falſehood has always been conſidered as a matter of ſo much importance, that it has been laid down as a rule in the court of King's Bench, that the court will not grant an information for a private libel charging a particular offence, unleſs the proſecutor will deny the charge upon oath [27].

IT has been ſaid, that juries are not to judge of the INTENTION of a libeller, becauſe INTENTION in this caſe is incapable of proof. But upon this it has been juſtly remarked, that 'Criminal intention in the 'publication of a libel may be proved by 'two ſorts of evidence; one INTERNAL,

[27] Douglas's Reports of Caſes argued and determined in the Court of King's Bench, p. 271.

'ariſing

' arising from the nature of the paper; the
' other EXTERNAL, from the circumstances
' accompanying the act of publication [28].'
And of the whole of this the jury are the true and proper judges. It was certainly the opinion of lord chief justice Holt, that the intention of the writer was a proper subject for the jury in matter of libel. In the case of the King against Brown, that judge said, ' An information will be for
' speaking ironically. And Mr. Attorney
' said, 'twas laid to be wrote IRONICÈ, and
' he ought to have shewed at the trial that
' he did not intend to scandalize them; and
' the jury are judges QUO ANIMO this was
' done, and they have found the ill in-
' tent [29].' It is also said in Viner of a libel,

[28] Letter to the Jurors of Great Britain, 8vo. 1771. p. 14.

[29] Lutwyche's Reports of Cases adjudged in the Court of King's Bench, in the reign of Queen Anne, p. 86.

that

that " the mind with which it was made " is to be reſpected [30]."

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

[30] General Abridgment of Law and Equity, vol. XV. p. 85.

' it

' it muſt be falſe, it muſt be malicious, and
' it muſt tend to ſedition [31].'

In many inſtances, the conduct of the judges, in trials for libels, has manifeſted a moſt ſhameful partiality to the crown; and this has happened not only during the reigns of the princes of the houſe of Stuart, but ſince the Revolution, and ſince the acceſſion of the houſe of Hanover. But, according to the ſound maxims of Engliſh law, any partiality, manifeſted by the judge againſt the perſon accuſed, is a violation of the duty of his office. Coke ſays, 'The
' court ought to be inſtead of counſel for
' the priſoner, to ſee that nothing be urged
' againſt him contrary to law and right.
' Nay, any learned man that is preſent
' may inform the court, for the benefit of
' the priſoner, of any thing that may make
' the proceedings erroneous. And herein

[31] State Trials, vol. IV. p. 390.

' there

'there is no diverſity between the peer
'and another ſubject. And to the end
'that the trial may be more indifferent,
'ſeeing that the ſafety of the priſoner con-
'ſiſteth in the indifferency of the court,
'the judges ought not to deliver their opi-
'nions before-hand, of any criminal caſe
'that may come before them judicially [32].'

But, in libel cauſes, it has been no uncommon thing to ſee the judges acting as counſel againſt the perſons under trial: which ſhews the extreme danger and impropriety of leaving the innocence, or criminality, of ſuch publications as are termed libels, wholly to the determination of the court.

To ſuppoſe, from motives of delicacy, that the judges will always be impartial, and that they will never be under any undue influence, in cauſes between the crown and the ſubject, would be extremely

[32] Inſtitutes, Part III. p. 29. edit. 1660.

weak

weak and abſurd; and, indeed, no man can be of that opinion, who has ever read the STATE TRIALS, or who has been a frequent attendant in the courts in crown cauſes.

THAT there have been many inſtances of judges, who have given very erroneous judgments, and whoſe conduct has been extremely criminal, is a fact too notorious to be denied. Lord chief juſtice Vaughan ſays, 'If any man thinks that a perſon 'concerned in intereſt, by the judgment, 'action, or authority exerciſed upon his 'perſon or fortunes by a judge, muſt ſub-'mit in all, or any of theſe, to the im-'plied diſcretion and unerringneſs of his 'judge, without ſeeking ſuch redreſs as 'the law allows him, it is a perſuaſion 'againſt common reaſon, the received law, 'and uſage both of this kingdom, and al-'moſt all others. If a court, inferior or

‘ ſuperior, hath given a falſe or erroneous
‘ judgment, is any thing more frequent
‘ than to reverſe ſuch judgments, by writs
‘ of falſe judgment, of error, or appeals,
‘ according to the courſe of the king-
‘ dom?

‘ If they have given corrupt and diſho-
‘ neſt judgments, they have in all ages
‘ been complained of to the king in the
‘ Star-chamber, or to the parliament. An-
‘ drew Horne, in his Mirror of Juſtices,
‘ mentions many judges puniſhed by king
‘ Alfred, before the conqueſt, for corrupt
‘ judgments, and their particular names
‘ and offences, which could not be had
‘ but from the records of thoſe times. Our
‘ ſtories mention many puniſhed in the
‘ reign of Edward the Firſt: our parlia-
‘ ment rolls of Edward the Third's time,
‘ of Richard the Second's time, for the
‘ pernicious reſolutions given at Notting-
‘ ham

' ham caſtle, afford examples of this kind.
' In latter times, the parliament journals
' of 18 and 21 Jac. the judgment of the
' ſhip-money, in the time of Charles the
' Firſt, queſtioned, and the particular
' judges impeached [33].'

THAT the conduct of the judges, even in their collective capacity, may ſometimes be as cenſurable and corrupt as that of any other claſs of men, the deciſion of the judges in the caſe of ſhip-money, affords, indeed, a very memorable inſtance. Lord Clarendon himſelf, though both a lawyer and a royaliſt, expreſſes great indignation at the iniquitous conduct of the judges at that period, and ſpeaks of their deciſion as having been productive of the moſt pernicious conſequences. He remarks, that the payment of ſhip-money was more firmly oppoſed, after the judges had declared it to

[33] Vaughan's Reports, p. 139.

be legal, than it had been before. 'That 'preſſure,' ſays he, 'was borne with much 'more chearfulneſs before the judgment 'for the king, than ever it was after; 'men before pleaſing themſelves with do-'ing ſomething for the king's ſervice, as a 'teſtimony of their affection, which they 'were not bound to do; many really be-'lieving the neceſſity, and therefore think-'iug the burthen reaſonable; others ob-'ſerving, that the advantage to the king 'was of importance, when the damage to 'them was not conſiderable; and all aſ-'ſuring themſelves, that when they ſhould 'be weary or unwilling to continue the 'payment, they might reſort to the law 'for relief, and find it. But when they 'heard this demanded in a court of law, 'as a right, and found it, by ſworn judges 'of the law, adjudged ſo, upon ſuch grounds

'and

'and reaſons as every ſtander-by was able
'to ſwear was not law, and ſo had loſt the
'pleaſure and delight of being kind and
'dutiful to the king; and, inſtead of giv-
'ing, were required to pay, and by a logic
'that left no man any thing which he
'might call his own, they no more looked
'upon it as the caſe of one man, but the
'caſe of the kingdom, not as an impoſi-
'tion laid upon them by the king, but by
'the judges; which they thought them-
'ſelves bound in conſcience to the public
'juſtice not to ſubmit to.'—'And here the
'damage and miſchief cannot be expreſſed,
'that the crown and ſtate ſuſtained by the
'deſerved reproach and infamy that at-
'tended the judges, by being made uſe of
'in this and like acts of power; there be-
'ing no poſſibility to preſerve the dignity,
'reverence, and eſtimation of the laws

‘ themſelves, but by the integrity and in-
‘ nocency of the judges [34].’

In no caſes have the judges behaved with more ſhameful partiality, than in trials for libels, and in trials for high treaſon. In many inſtances, in ſuch caſes, their conduct has been ſo notoriouſly indefenſible, that the State Trials have been pleaſantly term-ed, “ a libel upon the judges.” Indeed, the unfavourable ſtatement of their conduct, in that collection, is ſo much the more libellous, as it is unqueſtionably true. Hence, however, ſufficient evidence may be adduced of the extreme folly and abſurdity, which would be manifeſted by the people of this country, if they were to ſuffer juries to be deprived of any part of their antient power and authority in ſuch caſes. Theſe are the caſes, in which judges are the moſt

[34] Hiſt. Vol. I. Part I. p. 69, 70. Edit. 8vo, 1707.

likely

likely to be under an undue influence on the part of the crown; and theſe, therefore, are the caſes, in which the ſubject has the moſt occaſion for the protection of a jury.

NOTHING can be more infamous, nor more inconſiſtent with a free conſtitution, than the doctrines which have been maintained by ſome of the judges concerning libels. Mr. Juſtice Allybone, in the caſe of the ſeven biſhops, laid down the following doctrine reſpecting libels. 'I think, in the 'firſt place, that no man can take upon him 'to write againſt the actual EXERCISE of the 'government, UNLESS HE HAVE LEAVE 'FROM THE GOVERNMENT, but he makes 'a libel, be what he writes true or falſe; 'for if once we come to impeach the go-'vernment by way of argument, 'tis the 'argument that makes the government or 'not the government: ſo that I lay down

'that in the firſt place, that the govern-
'ment ought not to be impeached by
'argument, nor the exerciſe of the go-
'vernment ſhaken by argument; becauſe
'I can manage a propoſition in itſelf doubt-
'ful, with a better pen than another man:
'This, ſay I, is a libel. Then I lay
'down this for my next poſition, That no
'private man can take upon him to write
'concerning the government at all; for
'what has any private man to do with the
'government, if his intereſt be not ſtirred
'or ſhaken? It is the buſineſs of the go-
'vernment to manage matters relating to
'the government; it is the buſineſs of ſub-
'jects to mind only their own properties
'and intereſts. If my intereſt is not ſhaken,
'what have I to do with matters of govern-
'ment? They are not within my ſphere.
'If the government does not come to ſhake
'my particular intereſt, the law is open for
'me,

' me, and I may redreſs myſelf by law:
' and when I intrude myſelf into other
' men's buſineſs, that does not concern my
' particular intereſt, I am a libeller. Theſe
' I have laid down for plain propoſitions;
' now let us conſider farther, whether if I
' will take upon me to contradict the go-
' vernment, any ſpecious pretence that I
' ſhall put upon it ſhall dreſs it up into
' another form, and give it a better deno-
' mination; and truly I think it is the
' worſe, becauſe it comes in a better dreſs;
' for by that rule, every man that can put
' on a good vizard, may be as miſchievous
' as he will to the government at the bot-
' tom: ſo that whether it be in the form of
' a ſupplication, or an addreſs, or a peti-
' tion, if it be what it ought not to be, let
' us call it by its true name, and give it its
' right denomination, it is a libel [35].'

[35] State Trials, vol. IV. p. 391.

On

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

[36] State Trials, vol. III. p. 58.

'lic knowledge any thing that concerns the 'government without the king's imme- 'diate licence [37].' The chief juſtice Scroggs, in ſumming up the evidence to the jury, on the ſame trial, expreſſed himſelf in the following terms: 'I muſt recite what Mr. 'Recorder told you at firſt, what all the 'judges of England have declared under 'their hands. The words I remember are 'theſe: "When by the king's command we "were to give in our opinion what was to "be done in point of the regulation of the "preſs; we did all ſubſcribe, that to print "or publiſh any news-books or pamphlets "of news whatſoever, is illegal; that it is a "manifeſt intent to the breach of the peace; "and they may be proceeded againſt by law "for an illegal thing [38]."

In the trial of the ſeven biſhops, Sir William Williams, the ſolicitor-general, ſaid to

[37] State Trials, vol. III. p. 58.

[38] Ibid. p. 64.

the

the jury, 'If any perſon, in any paper, 'have ſlandered the government, you are 'not to examine who is in the right, and 'who is in the wrong, whether what they 'ſaid to be done by the government be legal 'or no; but whether the party have done 'ſuch an act [39].' It is a circumſtance not unworthy of notice, that this learned lawyer had himſelf acquired his knowledge in the law of libels at no inconſiderable expence. He had been fined 10,000l. by the court of King's Bench, in the firſt year of the reign of king James the Second, for publiſhing a libel called "Dangerfield's "Narrative." He paid 8000l. of it, whereupon ſatisfaction was acknowledged upon record. He was ſpeaker of the houſe of commons when he publiſhed the libel, and publiſhed it by order of the houſe [40].

[39] State Trials, vol. IV. p. 386.

[40] Ibid. vol. X. Appendix, p. 34.

It is obſerved by an acute writer, who has been repeatedly quoted, that 'the whole 'doctrine of libels, and the criminal mode 'of proſecuting them by information, grew 'with that accurſed court the Star-chamber. 'All the learning intruded upon us DE LI-'BELLIS FAMOSIS was borrowed at once, 'or rather tranſlated, from that ſlaviſh im-'perial law, uſually denominated the civil 'law. You find nothing of it in our books 'before the time of queen Elizabeth and 'ſir Edward Coke [41].'—'The matter of li-'bel, independent of the ſtatutes DE SCAN-'DALIS MAGNATUM, was ſcarcely heard 'of in this iſland, until the time of Coke; 'and the ſhort caſe of LAMB, by him re-'ported, ſtates the law as reſolved upon 'this head, in the reign of a Stuart, by 'the ſevereſt of all courts, the Star-cham-'ber,

[41] Letter concerning Libels, Warrants, the Seizure of Papers, &c. 8vo. 1765. p. 20.

' ber, the fountain of this ſort of proſe-
' cution. And yet this dreadful court,
' upon ſolemn argument, rules, " that
" every one who ſhall be convicted, either
" ought to be a contriver of the libel, or
" a procurer of the contriving of it, or a
" malicious publiſher of it, knowing it to
" be a libel [42]."

' THE notion of purſuing a libeller in a
' criminal way at all, is alien from the na-
' ture of a free conſtitution. Our antient
' common law knew of none but a civil re-
' medy, by ſpecial action on the caſe for
' damages incurred, to be aſſeſſed by a jury
' of his fellows. There was no ſuch thing
' as a public libel known to the law. It
' was in order to gratify ſome of the great
' men, in the weak reign of Richard the
' Second, that ſome acts of parliament

[42] Another Letter to Mr. Almon, in matter of Libel, p. 31, 32.

' were

'were passed to give actions for false tales, 'news, and slander of peers, or certain 'great officers of state, which are now 'termed DE SCANDALIS MAGNATUM [43].'

ONE maxim concerning libels, of which we have lately so frequently heard, namely, that it is of no consequence whether a libel be true or false, is so little consonant to common sense, that one is tempted to inquire, how this maxim came to be a part of the law of England? and upon inquiry it appears, that this admirable maxim derived its origin from a court truly worthy of it. In Viner's Abridgment, we find it stated, that 'the court held that a libeller 'was punishable, though the matter of the 'libel is true [44].' But when we examine into the authority for this, and the court by which it was decreed, we are referred, as

[43] Another Letter to Mr. Almon, in matter of Libel, p. 31, 32.

[44] Vol. XV. p. 58.

to

to the earlieſt authority, to Want's caſe in the court of Star-chamber. Thus it appears, that this maxim originated in the infamous court of Star-chamber, and being retailed from one law reporter or compiler to another, we are at length gravely and confidently informed, that this is a part of the law of England.

THE fact is, that there is very little law upon the ſubject of libels to be found in the books; and what there is, appears to be, for the moſt part, of no legitimate origin. In Viner's "General Abridgment of Law and "Equity," in twenty-three volumes, folio, there are not more than ſeven pages on the law of libels; and a great part of the caſes referred to are caſes in the Star-chamber. There being, therefore, ſuch a ſcarcity of real law upon the ſubject, the Star-chamber code was received by ſome of the judges, as no other happened to be fabri-

cated.

cated. Accordingly the preſent ſyſtem of libel law, is manifeſtly little more than a collection of maxims retailed from the court of Star-chamber, and having no other legal ſanction than the occaſional adoption of ſome of the judges. In ſhort, almoſt the whole of what is now called the law of libels, is the mere fabrication of the profeſſors and officers of the law, and was never ratified by the parliament, or the people of England, nor any part of the antient common law of the land.

MODERN precedents, and the mere opinions of judges, ought not to be implicitly received as law, when they tend to the diminution of the liberty of the ſubject, and relate to points which may be conteſted between the ſubject and the crown. Matters in which the intereſts of general liberty are concerned, are of too ſacred and important a nature, to be entirely ſubmitted

to the determination of magiſtrates appointed by the crown. In affairs relative to private property, in which the judges may be preſumed wholly diſintereſted, there is leſs danger in permitting them to make the law; though, perhaps, upon inquiry it will be found, that it is to this ſpecies of law that we are much indebted for that variableneſs, and that uncertainty in the law, which is ſo profitable to its practitioners, and ſo prejudicial to the people at large.

THE doctrines concerning libels, which are to be found in ſome of our law-books, are ſo deſtitute of any legitimate origin, ſo evidently ſprung from the court of Star-chamber, and ſo inconſiſtent with every principle of a free conſtitution, that they deſerve much more to be ſcouted, than ſome of thoſe black letter caſes, which have been treated with ſuch extreme contempt by the preſent chief juſtice of the King's Bench.

Bench [45]. Lord Mansfield long ago decided for common ſenſe againſt Dyer; and it would be well if juries would acquire ſo much ſpirit and acuteneſs, as to decide, in trials for libels, for common ſenſe, and common juſtice, even againſt Hawkins, or any other ſolemn reporter or compiler of Star-chamber law.

Of the doctrines concerning libels, which are to be found in ſome of our law compilations, it may not be improper here to give a few ſpecimens. Of the nature of a libel the following definition has been given: 'A LIBEL, called FAMOSUS LIBELLUS, SEU INFAMATORIA SCRIPTURA, is 'taken for a ſcandalous writing, or act done, 'tending to the defamation of another. 'And this may be, and ſometimes is, againſt 'a public, and ſometimes againſt a private

[45] Lord Mansfield was living, and in office, when this piece was firſt publiſhed.

' perſon; ſometimes againſt the living,
' ſometimes againſt the dead [46].'

HAWKINS ſays, 'It ſeemeth, that a libel,
' in a ſtrict ſenſe, is taken for a malicious
' defamation, expreſſed either in printing
' or writing, and tending either to blacken
' the memory of one who is dead, or the
' reputation of one who is alive, and to
' expoſe him to public hatred, contempt,
' or ridicule [47].'

'SUCH ſcandal, as is expreſſed in a ſcoff-
' ing and ironical manner, makes a writ-
' ing as properly a libel, as that which is
' expreſſed in direct terms.'——' Nor can
' there be any doubt, but that a writing
' which defames private perſons only, is as
' much a libel as that which defames per-
' ſons intruſted with a public capacity, in-

[46] Sheppard's Action upon the Caſe for Slander, edit. 1662. p. 115.

[47] Pleas of the Crown, Book I. p. 193.

' aſmuch

‘ aſmuch as it manifeſtly tends to create ill
‘ blood, and to cauſe a diſturbance of the
‘ public peace. However, it is certain,
‘ that it is a very high aggravation of a li-
‘ bel, that it tends to ſcandalize the govern-
‘ ment, by reflecting on thoſe who are en-
‘ truſted with the adminiſtration of public
‘ affairs, which doth not only endanger the
‘ public peace, as all other libels do, by
‘ ſtirring up the parties immediately con-
‘ cerned in it to acts of revenge, but alſo
‘ has a direct tendency to breed in the peo-
‘ ple a diſlike of their governors, and in-
‘ cline them to faction and ſedition [48].’

‘ The taking of a copy of a libel is a libel,
‘ becauſe it comprehends all that is neceſ-
‘ ſary to the making of a libel; it has the
‘ ſame ſcandalous matter in it, and the ſame
‘ miſchievous conſequences attending it at
‘ firſt. For it is by this means perpetuated,

[48] Pleas of the Crown, Book I. p. 194.

'and it may come into the hands of other 'men, and be publiſhed after the death of 'the copier; and if men might take copies 'with impunity, by the ſame reaſon print-'ing of them would be no offence; and 'then farewell to all government [48].' 'He 'who diſperſes libels, though he does not 'know the effect of them, nor ever heard 'them read, is puniſhable [50].'

SIR Edward Coke maintained, in the caſe of Edwards againſt Wootton, that 'a per-'ſon LIBELLING HIMSELF is puniſhable by 'the civil law; and it ſeemed to him, that 'he ſhould be ſo in the Star-chamber [51].' He alſo ſays, 'If one finds a libel againſt a 'private man, he may either burn it, or de-'liver it to a magiſtrate immediately; but 'if it concerns a magiſtrate, or other public 'perſon, he ought immediately to deliver

[48] Viner's General Abridgment of Law and Equity, vol. XV. p. 87.

[50] Ibid.

[51] Ibid.

'it

‘ it to a magiſtrate, that the author may
‘ be found out [52].’

HAWKINS ſays, ‘ That it is far from be-
‘ ing a juſtification of a libel, that the con-
‘ tents thereof are true, or that the perſon
‘ upon whom it is made has a bad reputa-
‘ tion, ſince the greater appearance of truth
‘ there is in any malicious invective, ſo
‘ much the more provoking it is [53].’

COKE informs us, in his Reports, that it was obſerved, in a caſe which he recites,
‘ that Job, who was the mirror of patience,
‘ became QUODAMMODO impatient when
‘ libels were made of him; and therefore
‘ it appears of what force they are to pro-
‘ voke impatience and contention [54].’

IN order, however, to give us ſome conſolation with reſpect to the doctrine of

[52] Viner's General Abridgment of Law and Equity, vol. XV. p. 88.

[53] Pleas of the Crown, p. 194.

[54] Vol. III. p. 126. Wilſon's Edit. 8vo. 1777.

libels, ſerjeant Hawkins informs us, that ‘ it hath been reſolved, that he who barely ‘ reads a libel in the preſence of another, ‘ without knowing it to be a libel, or ‘ who hearing a libel read by another, ‘ laughs at it, or who barely ſays, That ‘ ſuch a libel is made upon ſuch a perſon, ‘ whether he ſpeaks it with or without ‘ malice, ſhall not, in reſpect of any ſuch ‘ act, be adjudged the publiſher of it [55].’

We alſo learn from Mr. ſerjeant Salkeld, that though we may not ſpeak truth of a miniſter of ſtate, or arraign the proceedings of any adminiſtration, however juſtly, yet we may abuſe all mankind collectively, or the divines, or lawyers, as bodies, though not individually, without being guilty of a libel. ‘ Where a writing inveighs againſt ‘ mankind in general, or againſt a parti- ‘ cular order of men; as for inſtance, men

[55] Pleas of the Crown, p. 196.

‘ of

' of the gown, this is no libel, but it muſt
' deſcend to particulars and individuals to
' make it a libel [56].'

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

[56] Salkeld's Reports, vol. III. p. 224.

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

theſe contemptible dogmas obtain the name of law; and the ſupineneſs and inattention of the people, and their ignorance of the various modes of legal artifice and chicanery, prevented them from being ſufficiently aware of the injury and the inſult that were offered them.

THE poſitions concerning libels, which are laid down in Coke's Reports [57], are evidently thoſe doctrines which were maintained upon this ſubject in the court of Star-chamber, and are much the ſame with thoſe that are to be found in Viner and in Hawkins. It is, indeed, certain, that, notwithſtanding the very reſplendent profeſſional merit of Coke, yet, as a crown lawyer, he ſometimes acted in a manner that will ever reflect diſhonour on his memory. This was particularly the caſe when he

[57] Vol. III. fol. 125, 126, &c. Wilſon's edit. 8vo. 1777.

appeared

appeared as attorney-general againſt Sir Walter Raleigh, whom he treated with great inſolence, injuſtice, and brutality. It was after he was diſgraced at court, that he chiefly diſtinguiſhed himſelf as a conſtitutional lawyer, and a friend to the liberties of his country. He was then principally concerned in framing the famous Petition of Right, and in other ſpirited exertions in ſupport of the conſtitution. It is, indeed, ſometimes a conſiderable benefit to the public, when great lawyers are ill uſed by kings, or miniſters of ſtate. In ſuch caſes they are led to employ thoſe abilities, and that knowledge, in ſupport of the liberty of the ſubject, which might otherwiſe be employed to its extreme injury.

It is an incontrovertible fact, that in conſequence of the doctrines concerning libels, which have been propagated by prerogative judges, and crown lawyers, and the

the power which judges have aſſumed in ſuch caſes, and to which juries have too implicitly ſubmitted, men have been found guilty, and received very ſevere ſentences, for writings, or publications, in which there was not the leaſt degree of criminality. Of this ſir SAMUEL BERNARDISTON, Mr. RICHARD BAXTER, BENJAMIN KEACH, and HENRY CARR, all whoſe caſes are recorded in the State Trials, are ſtriking inſtances.

IT was in 1683, that ſir SAMUEL BERNARDISTON was tried before ſir George Jefferies, for the publication of ſeveral ſcandalous and malicious libels. Theſe pretended libels were nothing but private letters, written in confidence to his friends, and containing the news which then happened to be in circulation, and ſome remarks on the ſtate of public affairs at that period. As he was known to be a friend to

the

the liberties of his country, his letters were intercepted at the poſt-office; and their being ſent thither was conſidered as a publication. On this charge he was found guilty by the jury, and fined ten thouſand pounds.

In the year 1685, Mr. Richard Baxter, a man of diſtinguiſhed piety and virtue, and who, from motives of conſcience, had refuſed a biſhopric, was tried before the ſame judge for the publication of his "Paraphraſe on the New Teſtament," which was ſtyled a ſcandalous and ſeditious libel againſt the government. Several paſſages were ſelected, which were ſtated to contain reflections on the prelates of the church of England, and he was therefore charged with having been guilty of ſedition. The fact was, that he had really written with ſo much moderation concerning the biſhops, that he incurred ſome cenſure, from warmmen among the Diſſenters, on that account.

This

This reſpectable man was, however, treated by the chief-juſtice with the utmoſt brutality of reproach; and the jury were mean and ſervile enough to find him guilty: upon which he was ſentenced to pay a fine of five hundred pounds, to be impriſoned till he had paid it, and to give ſureties for his good behaviour for ſeven years [58]. As he was unable to pay the fine, he remained more than a year and a half in the King's Bench priſon; but his fine was afterwards remitted, and he was ſet at liberty.

In 1664, Mr. Benjamin Keach was tried at the aſſizes at Ayleſbury, before lord-chief-juſtice Hyde, for writing a little book called "the Child's Inſtructor," in which he had oppoſed the doctrine of infant baptiſm, and maintained that laymen might preach the goſpel. Theſe were the moſt dangerous doctrines contained in his book;

[58] State Trials, vol. X. Appendix, p. 40.

but

but the chief-juſtice mentioned it as an aggravating circumſtance, that Keach had ſpoken of infant-baptiſm in his performance in ſuch a manner, as implied that the child of a Turk or a Heathen was "equal with the "child of a Chriſtian [59]." His lordſhip accordingly pronounced it to be a libel, and bullied the jury till they brought in a verdid of GUILTY, which they appear to have done very unwillingly. However, on this contemptible charge, Mr. Keach was fined, and twice pilloried.

HENRY CARR was tried in the court of King's Bench, at Guildhall, in 1680, for a libel, entitled, "The Weekly Packet of ad-"vices from Rome." The libellous paſſage ſtated in the information, and upon which he was convicted, contained only a kind of allegorical repreſentation of the powerful effects of money, and of its tend-

[59] State Trials, vol. II. p. 548.

ency

ency to "make juſtice deaf as well as "blind," but without any application to any particular perſon or perſons[60]. The jury, however, found Carr guilty; and the judge, Sir William Scroggs, aſſured them, that in ſo doing they had acted like honeſt men[61].

It may, perhaps, be alleged, that theſe inſtances of oppreſſion were before the Revolution; but if the ſame doctrines are maintained now, that were maintained by the proſtituted crown lawyers of thoſe times, it is neceſſary to point out whither they would lead, and what is their tendency. And the fact is, that the doctrines concerning libels, which are now propagated, are the ſame that were maintained before the Revolution. There has been no new law upon the ſubject; and it is only the ſpirit of the times, and in conſequence

[60] Vid. State Trials, vol. III. p. 60.

[61] Id. ibid.

a more moderate exercise of the powers of government, that has occasioned that freedom of the press which has actually appeared in this country. The same doctrine, that the epithets FALSE, and SCANDALOUS, and MALICIOUS, and SEDITIOUS, in indictments or informations for libels, are mere words of course, or inferences of law, and not at all to be attended to by the jury, which was asserted by Jefferies and Scroggs, by the worst judges, and most prostituted lawyers, during the reign of the Stuarts, has been repeatedly asserted even in the present reign. None of the Star-chamber doctrines concerning libels have ever been formally disavowed; they are still brought forward whenever it is thought proper or expedient; the attorney-general may still prosecute whom he pleases, and when he pleases; and the judges of the court of King's Bench still possess the power of discretionary