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.

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THE SECOND EDITION, WITH ADDITIONS;

LONDON:
PRINTED FOR WHIELDON AND BUTTERWORTH, NO. 42,
FLEET-STREET; AND J. DEBRETT, PICCADILLY.
M. DCC. XCI.
PRICE TWO SHILLINGS.
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
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 doubtless
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.
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
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 questionem juris non respondent juratores, ad questionem 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 as 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 demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the

"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 according 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 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 considerations.
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 controverted 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 to 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 ground 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 alleged 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 terrae.

Magna Charta, cap. 29.
exclusive 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.

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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 pleading, 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 attainct." 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 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 sic ut ad questionum juris non respondent juratores sed judices; sic ad questionem 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 "rules upon the fact; for, “ex facto jus oritur.”

* Co. Lit. 226. a.

D But
But although 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 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-

† 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 expediency, 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 special trial, that the jury being ready to give their verdict, and the judge shall ask, "Whether they find such a particular fact proved by him?" or, "Whether they find the matter of fact to be as such a witness or witnesses have deposed?" and the jury answer, "they find the matter of fact to be so;" if then the judge shall declare, "The matter of fact being by you so found to be, the law is for the plaintiff, and you are to find accordingly for him"---if, notwithstanding, they find for the defendant, this may be thought a finding in matter of law against the direction of the Court; for in that case the jury first declare the fact as it is found by themselves, 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 contrario; 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 plaintiff; 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 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 alleged, 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 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 intent." 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
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 alleged 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 premises 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, to 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 versa. 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.

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As,
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 conclusion 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 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 between law and
fact.

Thus the mischievous intention of the pub-
lisher 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 ap-
pearance 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 constitut-
ing the offence, but inferences of law from
the offence itself. If the defendant has pub-
lished a libel, the law presumes that he pub-
lished it with a bad intent. The question
therefore is not, Whether he has, with such
intent as is expressed by the epithets, pub-
lished 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 re-
quired, 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 intention 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. Erkine's Argument upon a Motion for a new Trial in the Case of the Dean of St. Alaph.

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 seditionous, 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 seditionous; calling thereby upon the defendant to prove the contrary, if he can do so. The epithets candidly apprise 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 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 sheddeth 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 subverting the present Constitution, in order to make way for a republican form of government, 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 delicately famous defence of the Dean of St. Alaph; where, though no answer was attempted to the fact of publication, it was endea-
endeavored 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) cannot 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, unmixed question of fact for the consideration 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 arise as to the fact itself; which is taken for granted the very thing in dispute: for if the defendant can go into evidence collateral to the fact, and which, not tending to disprove the fact, only denies the inference of law to be just, a trial would not be so much an investigation of disputed facts, as an examination of the law. In vain would the law declare certain facts to constitute a crime, if, the facts being fully proved, the defendant could escape from punishment, by convincing a jury that his intentions were not mischievous. It would not be very surprizing if a pathetic address were to find so much favour with the jury, as to rescue from punishment a defendant, whom a heated imagination, misleading honest dispositions, had betrayed into a libel destructive to the peace and welfare of society. Juries are very accessible on the side of commiseration and liberal allowance; and if they can be persuaded 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 generosity towards the individual, forget, for a moment, the interests of the public. Their judgment thus, as well as their feelings, may be successfully affected by artful though false pretensions, throwing a veil upon the real tendency of a libel, and gloating the most inflammatory and seditious publications with colourings drawn from modern theories of government or newly-discovered rights of man.
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 principal consideration; it is the mind that makes the taking of another's goods to be felony, or a bare trespass only: it is impossible to prescribe all the circumstances evidencing 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 indispensable 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 af-
fect the degree of moral criminality belonging
to an act, and thereby furnish a ground of ex-
tenuation, it cannot take the act out of the class
to which it belongs. Thus a man who robs,
in order to affluence the sufferings of a numerous
and distressed family, equally commits a rob-
bery, 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 of-
fence 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 manion-
house by night, with an intent to commit a
felony. Here the intent to commit a felony
is of the offence of the crime: but the in-
ference of law as to that intent may be rebut-
ted 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 in-
tention
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 involves nor can in its nature involve any abstract question of law for the judgment of a court, but must wholly depend on the judgment 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
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 const
first 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 innuendos: 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 petition 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 circum-
stances, it would be a most obnoxious libel,
and, by throwing oil into the fire, would in-
flame 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 extrin-
sic circumstances, by charging the parti-
cular tendency; and such averments would
contain only facts, the truth of which the jury
is to try. In this manner the seditious ten-
dency of a writing may become a question of
fact; for where the libel, being of that de-
scription, 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 circum-
stances; and the only question for the jury is,
Whether the defendant did really publish the
writing there stated?

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