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At a Meeting of the SOCIETY *for* CONSTITUTIONAL INFORMATION *held on Friday, August the 1st,* 1783.

Dr. JEBB (Vice-Prefident) in the Chair.

AS the Liberty of the Prefs is an object of the greateft importance, and effential to the exiftence of a free ftate, and as it is of the utmoft confequence to the prefervation of this great privilege, that Britifh Juries fhould be well acquainted with the powers with which the Conftitution has invefted them, efpecially in profecutions for libels:

Refolved,

That the two following extracts from the fixth volume of Britifh Biography, on the powers and duty of Juries, in profecutions for libels, be inferted in the books of this Society.

Extract from the Life of JOHN LILBURNE, in the fixth volume of Dr. Towers's Britifh Biography, 8vo. 1770.

" Whether Juries are Judges of Law, as well as of Fact, is a matter that has been much controverted by fome. It is obferved by an old Writer, that " among other devices to " undermine the rights and power of Juries, and render them " infignificant, there has been an opinion advanced, that they " are only judges of fact, and not at all to confider the law." This doctrine, when applied to the cafe of libels, amounts to this: that if any man is charged, in any indictment, or by an information in the court of King's Bench, with writing, printing, or publifhing, any book, pamphlet, or paper, which is in fuch information or indictment ftiled a libel, it is not the bufinefs of the Jury to enquire whether fuch book, pamphlet, or paper, really be a libel, or not; or whether it contain truth, or falfhood; but only into the fimple matter of fact, whether the perfon fo charged be the author, printer, or publifher of fuch book, pamphlet, or paper; and to leave the matter of the libel, the determination whether it be a libel or not, entirely to the court. But it is certain, that a cuftom of leaving the determination of what books or pamphlets are or are not libels entirely to the Judges, muft have the moft fatal tendency with refpect to the Liberty of the Prefs, on the prefervation of which all our other rights effentially depend. Should, in any future period,

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period, the people of England be governed by a corrupt, oppressive, and iniquitous Ministry, which is certainly a possible and supposeable case; and should any honest Englishman have courage and patriotism enough to expose the bad measures of such a Ministry, and to guard his countrymen against their designs; any performance of this tendency, though written with the most upright and patriotic intentions, would, by such a Ministry, be most certainly deemed a *seditious libel*; and it is no great improbability to suppose, that they might, in such a case, get some Justice of the court of King's Bench to pronounce that it was so. There have been *formerly* Judges, who were at the beck of the court, and there may *possibly* be such again. If then the Jury are not to judge of the law, as well as of the fact, but to follow implicitly the opinion of the Judge, they would have nothing to do in such a case, but to find the author of any such production guilty. And thus a man would be legally punished for an action as a crime, for which he would deserve the esteem, and the thanks of all his countrymen; and this in a country where the Liberty of the Press has been long boasted of.

It is notorious, that, in many cases, Juries do constantly judge of matters of law, as well as fact. When persons are indicted for murder, it is a matter of law, whether the action committed, provided the fact be proved, falls under the denomination of *murder*, *man-slaughter*, *chance-medley*, or *self-defence*; and yet these matters of law are determined by the Jury. The court inform the Jury what it is that constitutes an action *murder*, *man-slaughter*, &c. and the Jury themselves apply these general principles of law to the particular fact which they are appointed to try, and then bring in their verdict according to their own judgments. "All that the Judges do " (says an old Author) is but advice, though in matter of law; " and it is the Jury only that judges one guilty, or not guilty " of murder, &c." And in most general issues, as upon *Not Guilty* pleaded in trespasses, breaches of the peace, or felonies, though it be matter of law whether the party be a trespasser, a breaker of the peace, or a felon, yet the Jury do not find the fact of the case by itself, leaving the law to the court; but find the party *guilty*, or *not guilty* generally. " The law (says the Author just quoted) considering the great " burthen that lies upon the consciences of Jurymen, has fa- " voured them with this liberty. They may take upon them " the knowledge of what the law is in the matter, or upon " the truth of he fact, as well as the knowledge of the fact, " and so give in a verdict generally, *that the defendant is* " *guilty, or not*." And if it be the custom and the right of Juries to determine the matter of law in other cases, what reason can be assigned why this right should be taken from them in the case of libels only?

Dr. Ellis, formerly Bishop of St. David's, remarks, that " when the cause is summed up, the Jury are to determine it," *i. e.* they are to judge of the facts upon which the merit of the cause turns. How far such facts are criminal in law, they are indeed directed by the Judges; but still they are at liberty whether they will be wholly governed by the Judges opinions, or not; for they give their verdict in general, so that though they think the facts sufficiently proved, yet if they do not think, as the Judges think, that such facts are criminal, they need not bring in the parties guilty. The great Judge Lyttleton, in his Tenures, §. 368. declares, "that if a Jury will take upon them " the knowledge of the law upon the matter, they may;" which is agreed to by Lord Coke in his Com. thereupon: and Sir Matt. Hale says, " that the Jury are Judges not only of the " fact, but of the law." And it seems probable, that by law the Juries in all cases ought to be the Judge of points of law, as well as of fact; because originally the persons of the Jury seem to have been of the nature of Judges, and to have sat upon the bench*."

Dr. Pettingal remarks, that " the Author of the Trial per Pais, or Law of Juries, though he inclines sometimes to the opinion of their being confined to matters of fact only, as in p. 220. of the Edition in black letter, yet a little after he says, p. 251. "a special verdict is a plain proof that the Jury are Judges of law, as well as facts; for leaving the judgment of the law to the court implies, that if they pleased they had that power of judgment in themselves." Again, p. 336. he says, " When the question is asked the Jury, Guilty or Not Guilty, which includes the law, in their answer they resolve both law and fact. And beyond all doubt this reasoning is right and just; for how can a Jury declare guilty or not guilty, unless they compare the fact with the law, and thereby judge how far the fact comes within the penalty annexed to the breach of the law? and how can they compare without being judges of one as well as the other? But notwithstanding this doctrine of Juries not being judges of law, broached in bad times, and designed

* Ellis's Liberty of Subjects in England. *Vid.* also Sir Joh Hawles's Englishman's Right, edit. 1763. p. 17.

deſigned for the worſt purpoſes, long prevailed in Weſtminſter-hall,—yet a great and learned Judge (Lord Camden), as I am informed, lately declared, to his great honour, from the Bench, that the Jury are Judges of law as well as fact *."

We have one late remarkable inſtance, and that a noble one, of an Engliſh Jury's aſſerting their right to determine the matter of law, as well as the matter of fact. In 1752, Mr. William Owen, bookſeller, was tried, in the court of King's Bench, before Lord Chief Juſtice Lee, for publiſhing a pamphlet, intitled, "The Caſe of Alexander Murray, Eſq; in an "appeal to the people of Great Britain." This Piece had been voted by the Houſe of Commons to be an *impudent, malicious, ſcandalous, and ſeditious libel*; and the Houſe had thereupon addreſſed the King to proſecute the Author, Printer, and Publiſher thereof; and the Author having left the kingdom, the proſecution fell upon the bookſeller. The *fact* of the publication was, in the courſe of the trial, very clearly proved; and the Judge, in ſumming up the evidence, gave it as his opinion, that the Jury *ought* to find the defendant guilty, for he thought the publication was fully proved; and, if ſo, they could not *avoid* bringing the defendant in guilty: for it was the opinion of the court, that the pamphlet was a ſcandalous and ſeditious libel, and it had been voted to be ſo by the Houſe of Commons. But the Jury thought they had a right to determine the matter of law, as well as the matter of fact; and they were reſolved to aſſert that right: they thought there was truth and reaſon in the pamphlet before them, which had been deemed a libel; and, therefore, notwithſtanding the opinion of the Judge, and the vote of the Houſe of Commons, they brought in the bookſeller *Not guilty*.

It appears evidently from the very deſign of the inſtitution of Juries, as well as from the declarations of the greateſt Lawyers, that the Jurors are the proper judges of the *whole* of the matters which they are appointed to try. "Whether— "an act was done in ſuch or ſuch a manner, (ſays Sir John "Hawles) or to ſuch or ſuch an *intent*, the Jurors are judges: "for the court is not judge of theſe matters, which are evi- "dence to prove or diſprove the thing in iſſue. And there- "fore the witneſſes are always ordered to *direct their ſpeech to* "*the Jury*; they being the proper judges of their teſtimony †."

As then it is the right and the duty of Jurymen to judge entirely of the whole matter before them, it ſeems eaſy to diſcern

* Pettingal's Enquiry into the uſe and practice of juries, p. 121, 122.
† Hawles, *ut ſupra*, p. 13.

what is the proper buſineſs of the Judge. He is to ſtate the law to the Jury, and he may deliver his *opinion*, where the caſe is difficult; but they are under no obligation to be guided implicitly by that opinion. The office of a Judge, Coke obſerves, is *jus dicere*, not *jus dare*; not to make any law by ſtrains of wit, or forced interpretations; but plainly and impartially to declare the law already eſtabliſhed. And the Jury are to apply the general rules and maxims of law, or any particular ſtatute or ſtatutes, to the particular fact which is the object of their enquiry. This being the caſe, the duty of a Judge, in the buſineſs of libels, as well as in other matters, is very plain. He is to inform the Jury what the law ſays concerning libels, and they are to apply that law to the particular fact in queſtion. This is the method in which the Judges act, when they act rightly, in other matters; and in this manner they certainly ought to act in the caſe of libels. They are not to dictate to the Jury what verdict they are to bring in; but only to inform their judgments, by inſtructing them in ſuch points of law as they, from their ſituation in life, may reaſonably be ſuppoſed to be unacquainted with. A Judge ought not to ſay to a Jury, "This book, pamphlet, or paper, "is a libel; and if you are convinced that this man wrote, "printed, or publiſhed it, you muſt find him guilty:" but ſhould firſt declare to them what the law ſays concerning libels; and then leave them to apply it to the point in queſtion. And Hawles obſerves, that "if merely in compliance, becauſe the "Judge *ſays thus, or thus*, a Jury ſhall give a verdict, though "ſuch a verdict ſhould happen to be right, true, and juſt; "yet they, being not well aſſured *it is ſo*, from their own "underſtanding, are *forſworn*, at leaſt *in foro conſcientiæ* *." Nor ought any Jury to be influenced by either Judges, or Counſel, who torture ſentences in any book, or paper, ſtiled a libel, into a bad ſenſe, when they are capable of bearing a good one; for it is a maxim in law, that *Verba accipienda ſunt in mitiori ſenſu*; words are to be taken in that ſenſe which is moſt innocent. And every Jury ſhould remember, that they may *preſume* nothing but *innocency*; and that they ought to do, until the contrary be *proved*.

An ingenious Writer well obſerves, that "there is a conſtitutional reaſon of infinite moment to a free people, Why a Jury ſhould of themſelves always determine whether any thing be or be not a libel. It is this, that ninety-nine times out of

* Engliſhman's Right, p. 38.

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an hundred, these informations for public libels are a dispute between the Ministers and the people; and, in my conscience, this very circumstance has made our progenitors retain to themselves the power of determining both the law and the fact, with respect to libels, although they waved or ceded to the Judges the power of determining the law in all other respects. Having acquiesced in the power exercised by the Attorney-General, of informing against what he pleases as a libel, they were resolved not to part with the prerogative of judging finally upon the matter themselves; and, in my poor opinion, had they done so, we should, long before this, not only have lost the Liberty of the Press, but every other liberty besides *."

In short, the real cause why some Judges have been so desirous of propagating the notion that Juries are only Judges of fact, and not of law, seems to be this; that this doctrine tends to advance their own power and authority, and enables them the better, on many occasions, to carry a favourite point. But we should ever remember, that as trial by Jury is one of the most valuable privileges of Englishmen, so it is of the utmost importance that the rights of Jurymen should be well understood, and resolutely maintained."

Extract from the Life of Lord Chief Justice JEFFERIES, in the same Work.

" In February, 1683, Sir Samuel Bernardiston, Bart. was tried before Sir George Jefferies for the publication of several scandalous and malicious libels. This gentleman was well known to be no friend to the despotic measures of Charles the Second, and was therefore obnoxious to the Court; but nothing could be found on which to ground a prosecution against him, but by the scandalous practice of intercepting his private letters. Four of these, written in confidence to his friends, and containing nothing more than some free remarks on the state of public affairs at that time, were the libels which he was prosecuted for publishing, by sending them to the post-office; for that was the only method in which he had published them. Jefferies took abundant pains to cause this gentleman to be condemned; and the Jury being either weak or wicked enough to bring him in guilty, the Chief Justice had the conscience to fine him ten thousand pounds.

It being observed on this occasion by Sir Samuel Bernardiston's Counsel, that no evidence had been given to the Jury, that the letters

* Letter concerning libels, warrants, the seizure of papers, &c. 8vo. 1765.

letters in question were written *falsly*, *scandalously*, *maliciously*, and *seditiously*, Jefferies made the following remarks in his charge to the Jury: 'It has been objected (said he) that inasmuch as the words *falsly*, *seditiously*, *maliciously*, *factiously*, 'and the like words, are in the information, they would have 'you believe, That there being no evidence of any such thing 'as Faction, Malice, or Sedition, or that the man did it maliciously, and advisedly, and seditiously, (which are the 'words in the premises, as I may call them, or the preamble 'of the information), therefore they must be acquitted of that 'part. Now as to that, I told them then, and tell you now, 'gentlemen, that no man living can discover the malicious evil 'designs and intentions of any other man, so as to give evidence 'of them, but by their words and actions. No man can prove 'what I intend, but by my words and actions. Therefore, 'if one doth compass and imagine the death of the King, that, 'by our law, is High Treason; but whether or no he be 'guilty of this treason, so as to be convicted of it by another, 'is not proveable, or discoverable, but by some words or 'actions, whereby the imagination may be manifested. And 'therefore my imagining, my compassing, which is private 'in my own mind, must be submitted to the judgment that 'reason and the law passeth upon my words or actions; and 'then the action itself being proved, that discovers with what 'mind the thing was done.——Suppose any man, without 'provocation, kills another; the words of the indictment are, 'That he did it maliciously, feloniously, not having the fear 'of GOD before his eyes, but being moved and seduced by 'the instigation of the Devil. Now all these things, whether 'he had the fear of GOD before his eyes, or not; or whether 'he were moved by the instigation of the Devil, and of his 'malice fore-thought, or no; these cannot be known, till they 'come to be proved by the action that is done. So in case 'any person doth write libels, or publish any expressions, 'which in themselves carry sedition, and faction, and ill-will 'towards the Government; I cannot tell well how to express 'it otherwise in his accusation, than by such words, that he 'did it seditiously, factiously, and maliciously. And the 'proof of the thing itself, proves the evil mind it was done 'with. If, then, gentlemen, you believe the defendant, Sir 'Samuel Bernardiston, did write and publish these letters, 'that is proof enough of the words maliciously, seditiously, 'and factiously, laid in the information *.'

* State Trials, Vol. III. p. 320.

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We have the rather made this quotation from Jefferies's ſpeech on this occaſion, becauſe arguments to the ſame purpoſe, and indeed nearly in the ſame words, have been ſince made uſe of in libel-cauſes, by men who would not be thought to imitate this infamous Chief Juſtice. But every man muſt ſee the fallacy of this kind of reaſoning. In the caſe Jefferies mentions, of compaſſing and imagining the death of the King, there muſt be a proof of ſome overt-act to evidence ſuch a treaſonable deſign. In the caſe of murder, the proof of the act itſelf is a ſufficient evidence of guilt; becauſe to kill any man, unleſs it be by accident, or in ſelf-defence, is an illegal and wicked act. But the caſe of libels is eſſentially different. If, in a trial for a libel, nothing is proved but the writing or publication, there is no *guilt* of any kind proved, unleſs it be proved to the Jury, that the book or writing really is what it is ſtiled in the information or indictment; for writing or publiſhing are, in themſelves, innocent and indifferent actions. Jefferies indeed ſays, "in caſe any perſon doth write libels, "or publiſh any expreſſions, which in themſelves carry ſedi-"tion, and faction, and ill-will towards the Government, "I cannot tell well how to expreſs it otherwiſe in his accuſa-"tion, than by ſuch words, that he did it ſeditiouſly, fac-"tiouſly, and maliciouſly." And this obſervation might be allowed, if Jefferies, and thoſe who have imitated him, had left it to the Jury to determine, whether the writings or books in queſtion did really contain "expreſſions, which in them-"ſelves carry ſedition, and faction, and ill-will towards the "Government." But neither Jefferies, nor his imitators, have ever done this. They have always laboured to make Juries take it for granted, on their mere *ipſe dixit*, that the books or writings in queſtion were ſcandalous, ſeditious, and malicious libels, or whatever elſe they have thought proper to ſtile them. And this practice, and theſe doctrines, have been much inculcated by certain Crown Lawyers, and ſuch Judges as have been diſpoſed at all events to gratify the Court. But it is the duty of Jurymen to judge for themſelves; and that they ſhould do ſo, is of the utmoſt importance to the Freedom of the Preſs; on the preſervation of which all our other rights do moſt eſſentially depend."

THOMAS YATES, Sec.

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