cretionary punishment. If prosecutions are less frequent, and if sentences are less severe, this arises merely from the spirit of the times, and not from any change in what is called the law upon the subject. And they who suppose, that there have been no instances of oppression and injustice, in prosecutions for libels, since the Revolution, must be little read in the history of such prosecutions.

It is a matter well worthy the serious consideration of the people of this country, whether they will continue to have doctrines obtruded upon them as law, or whether they will receive them as such, which are repugnant to every principle of freedom, which appear to have been coined in the Star-chamber, or introduced into it from the imperial code, which were never authorized by the legislature, and which

have no legal ſanction but the occaſional adoption of ſome of the judges.

In truth, moſt of the doctrines concerning libels, which are to be found in Viner and in Hawkins, are entitled to no other reception from the people of England, but that of the moſt indignant contempt. They are totally inconſiſtent with every principle of a free conſtitution, they never formed any authentic part of the legal code of this country, they were never ratified by parliament, they were never authorized by our anceſtors.

If theſe doctrines are ſuffered to prevail, we ſhall not be permitted in this free country to ſpeak truth, either of the dead, or of the living. No hiſtory can be written; for no true hiſtory of any country has ever appeared, in which the dead were not libelled; that is, in which ſome evil was not ſpoken of them. No man can publiſh

liſh any animadverſions on the meaſures of government, however iniquitous, but he publiſhes a libel. The conduct of no miniſter, however wicked, can be arraigned by any publications from the preſs. If the facts which are ſtated be unqueſtionably true, the greater the criminality of the publication. At leaſt, the truth of the facts can never be alleged in juſtification of what is publiſhed. But theſe doctrines are no part of the antient common law of England, nor have they ever been ratified by the legiſlature. It is a ſpecies of law repugnant to the principles of a free conſtitution; it is law only MADE BY THE JUDGES; and which the people ſhould firmly and unanimouſly oppoſe. In many inſtances the judges, under the pretence of declaring what the common law is, have actually made the law. This has been particularly the caſe with reſpect to moſt of

the doctrines which have been advanced concerning libels; and the law which has been made by them upon this ſubject, has been highly injurious to the rights of the people, and totally inconſiſtent with national freedom. Theſe doctrines were not, indeed, invented by the judges; they were derived from the court of Star-chamber; but it is the adoption of them by ſome of the judges, which has alone given to theſe doctrines the venerable denomination of the law of England. To their authority too implicit an acquieſcence has been given. The judges are very high and reſpectable magiſtrates, appointed to aſſiſt in the adminiſtration of the laws; but it was never intended by the conſtitution that they ſhould be legiſlators. The latter character has, however, been too much aſſumed by them; and to this aſſumed power a ſubmiſſion has been paid, to which it undoubtedly never had a conſtitutional claim.

If the Star-chamber doctrines concerning libels be the law of England, they are an extreme disgrace to this country, and ought to be immediately abolished by express statute. But they never received the sanction of the legislature, they are adverse to every principle of our free constitution, and can derive no authority from the infamous court to which they owe their origin. Nor ought any maxims to be received as law in this country, which have not a better source, and which are not more congenial to the general spirit of our constitution.

Many hardships and oppressions which have been suffered, by those persons who have undergone prosecutions for libels, and some of whom have been men of as much integrity as any this country has produced, have been the result of the gross partiality of the judges in crown causes. It may also

be obſerved, that the ſentences for libels in the court of Star-chamber were extremely rigorous and cruel; and after the abolition of that court, the Star-chamber ſentences, as well as the Star-chamber doctrines, were too cloſely copied by the courts of law. In the worſt times, groſs injuſtice has been committed by the judges in ſuch caſes; and theſe inſtances are urged as PRECEDENTS [62], in better and more moderate times.

[62] The PRECEDENTS of ſentences, in trials for libels, naturally bring to remembrance the remarks of Swift. 'It is a maxim,' ſays he, 'among theſe 'lawyers, that whatever hath been done before, may 'legally be done again: and, therefore, they take 'ſpecial care to record all the deciſions formerly 'made againſt common juſtice, and the general rea-'ſon of mankind. Theſe, under the name of PRE-'CEDENTS, they produce as authorities to juſtify the 'moſt iniquitous opinions, and the judges never fail of 'directing accordingly.' Voyage to the Houyhnhnms, ch. v.

IN

In the reign of queen Anne, the celebrated Daniel De Foe, for writing a pamphlet, entitled, "The ſhorteſt Way "with the Diſſenters, or propoſals for the "eſtabliſhment of the Church," was ſentenced to ſtand three times in the pillory, to pay a fine of 200 marks, and to find ſecurity for his good behaviour for ſeven years. It was merely an ironical attack upon the high-church party; and the ſentence was extremely iniquitous.

De Foe was afterwards, in the ſame reign, proſecuted for another ironical pamphlet, written to promote the intereſt of the houſe of Hanover, and received ſentence as a libeller. After being ſome time impriſoned, he received a pardon from the crown for the ſecond publication, but his fortune was greatly impaired by the expences of the proſecution. De Foe was a man of very uncommon merit, and author of a variety

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of ingenious works. He experienced much ill treatment in his own time, and his character was unjuſtly calumniated after his death. He was nearly ruined by his zeal for the houſe of Hanover, but received not the leaſt countenance from the princes of that family, after their acceſſion to the throne, though places, penſions, and titles, were conferred on men who had rendered much inferior ſervices. He was unjuſtly ſatirized by Pope, and was falſely accuſed with having deprived Selkirk of his papers. He appears to have been a man of great integrity and great public ſpirit; and was author of ſome of the moſt popular works of imagination in the Engliſh language. But, during his whole life-time, he ſtruggled with difficulties, and died in very narrow circumſtances.

In 1717, Mr. Redmayne, a printer, was tried and convicted for publiſhing a libel, written

written by Mr. Howel, and entitled, "The "Caſe of Schiſm in the Church of England "truly ſtated." He was ſentenced to pay a fine of five hundred pounds, to remain a priſoner five years, and to find ſureties for his good behaviour during life [63].

In very late times, the judgments pronounced againſt libellers, or thoſe who have been deemed to be ſuch, have been, to ſay the leaſt, ſufficiently ſevere: and they were ſometimes more ſevere in reality, than in appearance. They were attended with great expences, and the mode of proſecution has been peculiarly burthenſome and oppreſſive. It will hardly be thought, by any impartial man, that ſentences for libels, even in the preſent reign, have been too much characterized by gentleneſs and mildneſs. In 1777, Mr. JOHN HORNE, now Mr. HORNE TOOKE, was tried in the

[63] Chronological Hiſtorian, p. 375.

court

court of King's Bench at Guildhall, for two libels, on an information filed againſt him by the attorney-general. Theſe libels were advertiſements publiſhed in the newspapers, in which it was ſtated, that a ſubſcription was entered into by ſome members of the "Conſtitutional Society [64]," for raiſing one hundred pounds for the widows, orphans, and aged parents of thoſe Americans, who had been "inhumanly "murdered by the king's troops at Lexing-"ton." Mr. Horne defended himſelf with uncommon ſpirit, acuteneſs, and ability. The jury, however, thought proper to bring him in guilty; and he was ſentenced to pay a fine of 200l. to be impriſoned for twelve months, and to find

[64] This was a different ſociety from one ſince eſtabliſhed under the title of the "Society for Conſtitu-"tional Information," and which has been frequently termed, the "Conſtitutional Society;" but Mr. Horne was a member of both ſocieties.

ſureties

ſureties for his good behaviour for three years, himſelf in 400l. and two ſureties in 200l. each [65]. The advertiſements had been publiſhed more than two years before Mr. Horne was brought to trial. Several printers had been before tried, and convicted, for the publication of the ſame advertiſements.

THE manifeſt deſign of the advertiſements publiſhed by Mr. Horne, was, to impreſs upon men's minds a conviction of the wickedneſs of that war, which we had then unhappily commenced againſt the Americans. Of the complicated iniquity and folly of that war, it is probable that few men now entertain a doubt: and if the nation, at its commencement, could have been excited, by publications from the preſs, to have put an immediate end to it, the conſequences to Great Britain would have been beneficial in a very high degree.

[65] State Trials, vol. XI. p. 294. Hargrave's edition.

It would have prevented an immenſe expence of blood and of treaſure; and would have preſerved the nation from many of thoſe taxes, and other burdens, which are now found ſo grievous and ſo oppreſſive.

In Mr. Horne's defence of himſelf, in which to obtain an acquittal ſeemed evidently not to be his chief object, he very clearly and ably pointed out to the jury the unconſtitutional powers that were exerciſed by the attorney-general, in filing informations EX OFFICIO for libels; the hardſhips that attended this mode of proſecution; and the diſadvantages that attended the defendant in ſuch a cauſe, from the mode that was adopted, in London and Middleſex, of forming ſpecial juries, who are generally preferred to common juries, by the crown officers, for trying ſuch cauſes. As to the power aſſumed by the attorney-general, of filing informations for libels at his

his pleaſure, it is certainly a power inconſiſtent with the principles of a free conſtitution: and it is reported to have been long ago ſaid by ſir Matthew Hale of this ſpecies of informations, that "if ever they came "into diſpute, they could not ſtand, but "muſt neceſſarily fall to the ground[66]."

In the caſe of the King againſt Almon, that bookſeller was proſecuted by the attorney-general, and convicted of publiſhing a libel, in a miſcellaneous collection, called "The London Muſeum," though it was ſold at his ſhop by his ſervant, without his knowledge or approbation. Before judgment was given, ſeveral affidavits were admitted in the court of King's Bench, by which it was proved, that the libels were ſent to his ſhop without his knowledge; and that, when he was acquainted with

[66] Letter concerning Libels, Warrants, the Seizure of Papers, &c. p. 7.

their

their being in his houſe, he immediately ſtopt the ſale of them. Notwithſtanding theſe favourable circumſtances, he received ſentence, in the court of King's Bench, to pay a fine of ten marks, and to be bound himſelf in a recognizance of 400l. for his good behaviour for two years, and to find two ſureties in 200l. each, under pain of impriſonment [67]. His expences alſo amounted to more than 200l.

AMONG other privileges claimed by the attorney-general, in trials for libels, one is, that of not only enforcing the charge againſt the defendant at the opening of the cauſe, but alſo of replying, after the perſon accuſed has made his defence. On the trial of Mr. Horne, this claim was oppoſed by that gentleman with great ſpirit; but he was over-ruled, and the claim of the

[67] Vid. Second Poſtſcript to the Letter to Mr. Almon, p. 30—38.

attorney-

attorney-general was admitted, and declared to be law. When it has been aſked, how this practice came to be law, no ſatisfactory anſwer has been returned. But the fact ſeems to be, that, from the partiality with which judges have frequently acted in crown cauſes, the perſons holding the office of attorney-general have been ſeveral times permitted to reply; theſe inſtances are exalted into precedents; and we are at length informed, that the practice is law. But if it be law, it is ſurely not equal juſtice. If the proſecutor be allowed to ſpeak twice, the defendant ought to have the ſame liberty. The contrary practice can only be a ſervile compliment to the crown, to the prejudice of the ſubject, and in oppoſition to the dictates of reaſon and of juſtice. If the attorney-general is to ſpeak firſt, and to ſpeak laſt, and if the judge, which is no very improbable thing,

ſhould alſo have a ſtrong diſpoſition to convict the defendant, and ſhould adapt his ſpeech to the jury accordingly, the unfortunate libeller, or pretended libeller, would have very little chance of obtaining an acquittal. If he had not the good fortune to have a ſpirited and enlightened jury, he might be condemned, and ſuffer heavy penalties, though his publication might be ſo far from deſerving the cenſure of his countrymen, that it might be juſtly entitled to their approbation and applauſe.

THE proceedings in trials for public libels, and the ſentences which are paſſed upon conviction, are attended with various circumſtances, that ſeem ſtudiouſly intended to render ſuch proſecutions peculiarly grievous and oppreſſive. Among other appendages to the ſentences upon libellers, one commonly is, obliging the perſon convicted to give ſecurity for his future good behaviour.

behaviour. The reaſon of this ſeems not very apparent. It has been obſerved, that ‘ ſecurity for the peace is calculated as a ‘ guard from perſonal injury; and articles ‘ of the peace can only be demanded from ‘ a man, who by ſome poſitive act has al- ‘ ready broken the peace, and therefore is ‘ likely to do ſo again; or where any one ‘ will make poſitive oath, that he appre- ‘ hends bodily hurt, or that he goes in ‘ danger of his life [68].’ But a perſon who has written a libel, or pretended libel, is not on that account ſuppoſed to be a man who would bruiſe, or maim, or knock down his neighbours. Security for the peace, therefore, ſeems no neceſſary part of the puniſhment of a libeller. If he ſhould write another libel, and be again convicted, he will of courſe be again puniſhed, and there can be no doubt but that the penalties

[68] Letter concerning Libels, p. 18.

will be amply ſufficient. In truth, as there is no reaſon for requiring ſureties for the peace from a ſuppoſed libeller previouſly to his conviction, neither does there appear any juſt ground for annexing ſureties for the behaviour to the ſentence of a libeller. But it conſiderably increaſes the difficulties of the libeller, and eſpecially if he be a man of a high and unconquerable ſpirit: and ſuch men, if they engage in ſupport of the rights of the people, are always objects of great averſion to crown lawyers and prerogative judges.

JURIES have been ſometimes ſo much puzzled by the directions from the bench, and the contrary pleadings of the counſel, in trials for libels, that they have ſeveral times given irregular and incomplete verdicts. Inſtead of bringing in a general verdict of GUILTY, or NOT GUILTY, they have brought in the party accuſed GUILTY OF

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THE PARTICULAR FACT CHARGED, ſpecifying the fact in their verdict. It is obſerved by ſir John Hawles, that "ſuch a "finding hath generally been refuſed by "the court, as being no verdict;" though, he adds, it had been received, "in a caſe "that required favour [69]." That is, not a caſe in which the party tried was to be favoured, but in which the proſecution was to be favoured; and in which it was thought a deſirable thing to obtain a verdict of GUILTY, at any rate, and in any manner.

IN the caſe of the King againſt Williams, the jury, inſtead of bringing in a general verdict of GUILTY, or NOT GUILTY, brought the defendant in guilty of printing the particular paper with the publication of which he was charged. Their verdict was, "Guilty "of printing and publiſhing the North "Briton, No. 45." I was preſent in court

[69] Engliſhman's Right, p. 19, 20.

during that trial; and I remember, that it then appeared evident to me, that the jury, by the manner of bringing in their verdict, meant to find the mere facts of printing and publiſhing, without determining whether the paper was or was not a libel. It alſo appeared to me to be a verdict, that the jury ought not to have given, and that the judge ought not to have taken. I did not, however, know, till I was informed by the publication of the "Opinion of the "court of King's Bench, in the caſe of the "King againſt Woodfall," that the clerk had taken upon him to alter the verdict. But we now know from the moſt unqueſtionable authority, that the clerk altered the verdict, and entered it up as a general verdict of GUILTY [70]. But whatever irregularity there might be in the verdict, or whatever injuſtice in the alteration of it by the clerk, it is certain, that the bookſeller

[70] Sir James Burrow's Reports, vol. V. p. 2668.

ſtood

ſtood in the pillory, and ſuffered other penalties, in conſequence of that verdict. I alſo well remember, that, at the trial of Mr. Williams, I was much ſtruck at the ſtrong reſemblance which there was, both in point of ſentiment and language, between the charge delivered on that occaſion, by lord Mansfield, and ſome parts of the charge delivered in the caſe of ſir Samuel Bernardiſton, by lord chief-juſtice Jefferies.

THE irregular verdict, in the caſe of the King againſt Williams, was urged by the court, in the caſe of the King againſt Woodfall, as a juſtification for taking a verdict of ſimilar irregularity in the latter caſe. This ſhews the neceſſity of guarding againſt incroachments, and ſuch dangerous innovations, as are likely to be prejudicial to the liberty of the ſubject; as ſuch encroachments and innovations are afterwards produced as precedents. It ſhould, however,

be obſerved, that the ſame judge, lord Mansfield, tried both theſe cauſes; and the ſame judge, on a motion for arreſt of judgment in Woodfall's caſe, delivered the opinion of the court.

THE opinion of the court, in the caſe of the King againſt Woodfall, was drawn up with great legal ſubtilty. It had not the perſpicuity, which lord Camden ſometimes diſplayed, on giving important deciſions; nor was it intended for common readers, or for common auditors. It was calculated only for the initiated. The dexterity of it was, however, ſufficiently manifeſt, to all thoſe who were capable of underſtanding it. It is well known, that the doctrines concerning juries, which are conveyed in this opinion, have been publickly queſtioned by lord Camden.

No jury ought to find any man guilty of writing, printing, or publiſhing a libel, unleſs

unleſs they are convinced it is a criminal production. If the criminality be not apparent to them, or if they are doubtful, they ought to acquit the defendant. In that caſe, the information or indictment has not been proved to them; and where the matter is doubtful, in criminal proſecutions, an acquittal is always moſt conſonant to the ſpirit of the law of England. In many caſes, when a jury bring in a verdict of NOT GUILTY, the meaning is not, that they are aſſured that the accuſed party is innocent, but that his guilt has not been proved to them: and this is always ſufficient ground for an acquittal. Nor ſhould incomplete verdicts ever be given in ſuch caſes; or any judgments be pronounced in conſequence of ſuch verdicts. In the caſe of the King againſt Simons, upon a rule to ſhew cauſe why a new trial ſhould not be had, it was ſaid by Mr. Juſtice Deniſon, that 'if the

'verdict

'verdict had been taken as the jurors in-
'tended to give it; namely, guilty of the
'fact, but without any evil intention, it
'would have been an incomplete verdict,
'and consequently, no judgment could
'have been given upon it [71].' And in sundry cases, it has been held by law writers, to be extremely improper in juries to bring in special verdicts. Thus it is said in Jenkins's Reports, that 'where fraud, covin,
'or other doubtful matter of fact occurs to
'the Jurors, they ought not to make a spe-
'cial verdict of it, but give a positive and
'categorical verdict [72].'

It appears, that attempts have been made to establish the Star-chamber doctrines concerning libels even in America, and to deprive jurymen there, as well as in England, of the right of determining the

[71] Sayer's Reports, p. 36.

[72] Second Edition, p. 232.

law,

law, as well as the fact, in trials for libels. Thus in the caſe of JOHN PETER ZENGER, who was tried at New York, in 1735, for printing and publiſhing two libels againſt the government, it was contended, by the attorney-general of that province, that, as the defendant's counſel admitted the publication of the papers, ſtated in the information to be libels, the jury muſt find a verdict for the king: "for," ſaid he, "ſuppoſing they were true, the law ſays, "that they are not the leſs libellous for "that; nay, indeed, the law ſays, their "being true is an aggravation of the "crime [73]." The chief-juſtice of New York alſo maintained ſimilar doctrines; and told the jury, in his charge, that whether the papers were libels was a matter of law, which they MIGHT leave to the court. The pretended libels were news-papers, con-

[73] Trial of John Peter Zenger, p. 28. edit. 8vo. 1752.

taining

taining paſſages in which the conduct of the governor of New York was arraigned. The printer was defended, with great ſpirit and ability, by ANDREW HAMILTON, Eſq; of Philadelphia, who went from that city to New York, on purpoſe to act as counſel in this cauſe. Mr. Hamilton firmly maintained, that the jury had a right "to determine both the law and the fact." The jury aſſerted that right; and accordingly, though the defendant's counſel admitted the facts of printing and publiſhing, they found the printer NOT GUILTY. Mr. Hamilton refuſed to accept of any fee for his ſervices on this occaſion; but the mayor, and corporation of New York, preſented him with the freedom of that city in a gold box, for "his generous defence of the "rights of mankind, and the liberty of "the preſs, in the caſe of John Peter "Zenger."

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As the inhabitants of the United States of America, in conſequence of having obtained their independence, have a power of making their own laws, it may be hoped, that they will be too wiſe to adopt the whole ſyſtem of our law of libels in their new governments; and that they will preſerve unviolated, and in their full extent, the rights of juries. There are many particulars in the law of England, and in the proceedings of our courts, ſo truly excellent, as to be highly worthy of their adoption; but there are other particulars, in the law and in the practice of the courts, ſo extremely burthenſome and expenſive, and of ſo little advantage to any but the practitioners of the law, that the Americans will act wiſely in adopting different maxims of law, and different modes of practice. Indeed, the uncertainty of the law, in a variety of inſtances, and its enormous expence,

pence, are objects highly worthy the attention of the parliament of England. In many cases, the expence attending lawsuits is so great, that it is better to submit to injustice than to appeal to the law; which is an evil that certainly ought not to subsist in a well-regulated state. Among other things, it may also possibly be doubted, whether the practice is a beneficial one, of readily and frequently granting new trials, because a judge happens not to like a verdict, or because it was given contrary to his direction, though perhaps strictly conformable both to law and equity. This practice contributes much to increase the uncertainty of the law; though it must be acknowledged to be advantageous to its practitioners, however inconvenient it may be to the public in general.

NOTWITHSTANDING the attempts which have been made by some judges, and crown lawyers,

lawyers, to deprive juries of thoſe powers which have been given them by the conſtitution, there have always been ſome lawyers, and ſuch as have been diſtinguiſhed for their integrity, and the extent of their legal knowledge, who have aſſerted the rights of juries, and particularly in the caſe of libels. Among others, Lord CAMDEN is underſtood always to have maintained the right of juries to determine both the law and the fact. Even when attorney-general, Mr. Pratt, afterwards lord Camden, in moving before lord Mansfield, for leave to file an information againſt Dr. Shebbeare for a libel, publickly ſaid, and was not contradicted: 'It is merely to put 'the matter in a way of trial: for I admit, 'and HIS LORDSHIP WELL KNOWS, that 'the jury are judges of the law as well as 'the fact, and have an undoubted right to 'conſider, whether, upon the whole, the 'pamphlet

'pamphlet in queſtion be or be not pub-
'liſhed with a WICKED, SEDITIOUS IN-
'TENT, and be or not a FALSE, MALI-
'CIOUS, and SCANDALOUS libel [74].'

As the late caſe of the Dean of St. Aſaph has particularly excited the attention of the public to the law of libels, and to the rights and power of juries in ſuch caſes, it may not be improper here to make ſome farther obſervations relative to that cauſe. The Dialogue for the publication of which the Dean was proſecuted, was originally printed, and diſtributed gratis, at the expence of the "Society for conſtitutional "Information." After a bill of indictment had been found againſt the Dean of St. Aſaph, for the publication of that edition of it which was printed in Wales, Sir WILLIAM JONES, who was then in Eng-

[74] Second Poſtſcript to the Letter to Mr. Almon, 8vo. 1770, p. 7.

land,

land, and who was a member of the ſociety by which it was originally publiſhed, ſent a letter to Lloyd Kenyon, Eſq; then chief-juſtice of Cheſter, afterwards maſter of the rolls, and now lord-chief-juſtice of the court of King's Bench, in which he avowed himſelf to be the author of the Dialogue, and maintained, that every poſition in it was ſtrictly conformable to the laws and conſtitution of England. The trial of the Dean, however, came on at Wrexham, on the 1ſt of September, 1783; and a ſpecial jury was empannelled to try the cauſe, conſiſting of ſome of the moſt reſpectable gentlemen in Wales. But before they were ſworn, an affidavit was offered, and received by the court, in which it was ſtated, that papers had been diſperſed at Wrexham, which were calculated to prejudice the minds of the jury in this cauſe. Theſe papers conſiſted of ſeveral extracts from the ſixth vo-

lume of BRITISH BIOGRAPHY, octavo, containing certain paſſages[75], aſſerting the right of juries to determine the law, as well as the fact, in trials for libels. That volume of this biographical work, from which theſe extracts were made, was printed in 1770, thirteen years before the trial of the Dean of St. Aſaph; and no addition was made to theſe extracts, but a vote of the "ciety for Conſtitutional Information," for their publication, in which no mention was made of the trial of the dean of St. Aſaph. However, in conſequence of the diſperſion of theſe papers, an immediate ſtop was put to the trial, and it was ordered to ſtand over to the next grand ſeſſion for the county of Denbigh. But whether it was in any reſpect juſt, or reaſonable, or proper, thus to ſuſpend the trial, at a great

[75] Theſe paſſages were all written by the author of this Collection of Tracts.

expence

expence to the defendant, merely becauſe papers had been diſperſed in the neighbourhood, aſſerting the general rights of juries, but in which not a ſingle ſyllable was advanced, relative to the particular cauſe of the dean of St. Aſaph, muſt be left to the deciſion of the impartial public, who will probably think and ſpeak as freely of judges, or of maſters of the rolls, as they do of kings and miniſters of ſtate.

At the great ſeſſion held at Wrexham, in the September following, the cauſe of the dean of St. Aſaph was to have come on again; but a writ of CERTIORARI was then obtained, by which the indictment was removed into the court of King's Bench, and the cauſe was ordered to be tried at the next aſſizes at Shrewſbury. It was accordingly brought on before Mr. Juſtice Buller, and tried by a ſpecial jury, on the 6th of Auguſt, 1784. Mr. ERSKINE, who was counſel for the dean of St. Aſaph, defended the

cauſe of his client with much ſpirit and elo-
quence; and, in a very manly manner,
avowed his own perſonal conviction, that
the doctrines contained in the Dialogue were
juſt and conſtitutional. He alſo aſſerted the
right of the jury to determine whether the
Dialogue was a libel, as well as to inquire
into the fact of publication. But the jury were
inſtructed by the judge, that whether the
pamphlet was, or was not a libel, was a
queſtion of law, to the determination of
which they were not competent. It was
alſo ſomewhat ſingular, that the learned
judge himſelf, before whom the cauſe was
tried, did not chooſe to give any opinion
whether the Dialogue was, or was not a li-
bel. It was not for him, he ſaid, a ſingle
judge, ſitting at NISI PRIUS, to ſay whether
the pamphlet was, or was not a libel.

ONE reaſon aſſigned for declining to
give any opinion whether the Dialogue
was, or was not a libel, was, that, if this

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were done, the profecutor would thereby be deprived of that valuable birth-right, a writ of error. Another reaſon was, that it was not yet the proper STAGE OF THE BUSINESS, to determine whether the pamphlet was, or was not a libel. This ſeems to be an idea truly original. It was formerly thought, that when a man was brought to be tried before a judge and jury, it was their buſineſs to acquit or to condemn him. But now, it ſeems, if he be a libeller, he is to go through ſeveral ſtages. A robber, or a murderer, may, unleſs the jury bring in a ſpecial verdict, which is very ſeldom done, be either acquitted or condemned at once: but a libeller is to go through a variety of STAGES, to the great entertainment of himſelf and the public, and very much to the comfort and emolument of the gentlemen of the law.

THE cauſe of the dean of St. Aſaph was firſt brought on at Wrexham. It was then put off, becauſe papers had been diſtributed in the neighbourhood relative to the rights of juries. It was brought on again at Wrexham, but was removed by writ of CERTIORARI from the court of King's Bench, by which the cauſe was to be brought to trial in an Engliſh county. It was then tried by a ſpecial jury at Shrewſbury. But it was not yet to be finally determined. It had not gone through the neceſſary ſtages. Beſides the proſpect of the judgment which might be paſſed, the dean might have the additional felicity of an application to the court of King's Bench, and an appeal to the Houſe of Peers. If all this did not ſatisfy him, he muſt be a man eminently unreaſonable; and if he were not ſatisfied, it is at leaſt probable that the lawyers would.

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THE dean of St. Aſaph, being a man of fortune, might indulge himſelf in this luxury of law: but to a libeller, or one who might be termed ſuch, whoſe circumſtances were leſs affluent, it would not be quite ſo pleaſant or convenient. Such a man might wiſh to meet with a jury, who ſhould have ſufficient ſpirit and diſcernment to do juſtice to their fellow-citizen themſelves, as was originally intended by the very inſtitution of juries, and not leave him to ſeek it, either from the judges of the court of King's Bench, or from the Houſe of Peers.

THE cauſe of the dean of St. Aſaph is now over; but ſeveral hundred pounds were expended on the part of that gentleman before it was decided. And "it is "worthy of remark, that after the dean of "St. Aſaph had been convicted, on proof of "the publication, according to the doctrine

" ratified as law by the court of King's
" Bench, which ſhut out both from Judge
" and Jury at the trial, the quality of the
" thing publiſhed, he was finally and com-
" pletely diſcharged from the proſecution,
" by a motion made by Mr. Erſkine in
" arreſt of judgment: the court unani-
" mouſly declaring, That no libel was
" ſtated on the record [78]." But before this determination of the court of King's Bench, it had probably been decided by the moſt enlightened part of the nation, that the Dialogue, for the publication of which the dean was proſecuted, was a production which contained no ſentiments, but what were perfectly conſonant to the genius of the Engliſh conſtitution. It was a ſpeculative pamphlet on the general principles of government, and on the right of the people to bear arms, and to

[78] Appendix to the Trial of John Stockdale, p. 119.

qualify

qualify themſelves for the uſe of them. As to the right of the people to bear arms, this is a right which the inhabitants of this country will hardly ſuffer to be wreſted from them. Should they ever be thus tame and ſervile, the purpoſes for which the Revolution was effected will be defeated, and the Engliſh nation will no longer have any claim to be conſidered as a free people.

SIR WILLIAM JONES, the author of the Dialogue for the publication of which the dean of St. Aſaph has been proſecuted, is now one of the judges of his majeſty's ſupreme court of judicature in Bengal [79]. It was ſaid of this gentleman, by the judge before whom the cauſe came on at Wrexham, in 1783: 'It is very true, as has 'been ſtated by Mr. Erſkine, that he is

[79] He had been lately appointed to this ſtation when this tract was firſt publiſhed.

'gone

‘ gone in a judicial capacity into a country,
‘ where it would be unwiſe to ſend a man
‘ in that character who has any thing ſedi-
‘ tious about him. Whether it will be pro-
‘ per to REVIEW that appointment, or not,
‘ is not for me to ſay: it is certainly a thing
‘ fit to be conſidered, and ſeriouſly and ſo-
‘ berly to be conſidered, by thoſe to whom
‘ it belongs to conſider it.’ I confeſs, that I perfectly agree with this learned judge, that the appointment of men to judicial offices, in any part of the Britiſh dominions, is a matter that deſerves to be conſidered, and very “ ſeriouſly and ſoberly conſidered,” by thoſe who are admitted into his majeſty’s councils. If men are raiſed to the office of judges, who are known to be poſſeſſed of arbitrary and unconſtitutional principles, this is a juſt ground of alarm to the nation: and if men, who have diſtinguiſhed themſelves by judicial deciſions that are repugnant to

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the principles of a free and limited government, are preferred to ſtill higher offices, this muſt afford abundant reaſon for the people to entertain ſuſpicion and diſtruſt of any adminiſtration by which ſuch appointments are made. There can, however, be no occaſion for reviewing, or re-conſidering, the promotion of Sir WILLIAM JONES. His appointment did honour to the adminiſtration by which it was made [80]. If this country has any right to ſend judges to the Eaſt Indies, no man could be more proper

[80] Though there could be no poſſible reaſon to review, or to re-conſider, the promotion of Sir William Jones, there have been ſome appointments to high offices in the law ſince, which very much deſerved to be reviewed, and re-conſidered. Sir William Jones died in Bengal in 1794. I had ſome perſonal knowledge of him before he went to the Eaſt Indies; and very ſincerely regretted his death, as a loſs not only to his friends, but to the republic of letters, of which he was a diſtinguiſhed ornament.

for

for that office, than a gentleman diſtinguiſhed not only by his ſkill in the laws of England, but by a very extenſive acquaintance with oriental languages, and oriental literature, and alſo poſſeſſed of an enlarged and liberal mind, and a ſincere attachment to the intereſts of juſtice and humanity.

ONE of the moſt memorable caſes, in which Engliſh juries have aſſerted their right of judging of the law, as well as the fact, in trials for libels; is that of Mr. WILLIAM OWEN, who was tried in the court of King's Bench, by a ſpecial jury, in 1752, on an information filed by the attorney-general, for publiſhing a pamphlet, entitled, "The caſe of the Hon. ALEX. MURRAY, "Eſq; in an appeal to the people of Great "Britain." This pamphlet contained a narrative of the rigorous treatment which Mr. Murray had received from the houſe of commons, in conſequence of ſome charges exhibited

exhibited againſt him reſpecting his behaviour at the Weſtminſter election, in 1750, and on account of his having refuſed to receive the ſentence of the houſe upon his knees. In this publication were alſo ſome ſevere ſtrictures on the conduct of the houſe in this buſineſs. Of the charge againſt Mr. Murray, who was brother to lord Elibank, it is obſerved by lord Melcombe Regis, who was preſent in the houſe at the time, that he "never ſaw an accuſa-" tion worſe ſupported by any thing but " numbers[81]." Indeed, the treatment which Mr. Murray received was violent, arbitrary, and oppreſſive, and ſuch as will ever reflect extreme diſgrace on that parliament. The pamphlet, therefore, containing an account of his caſe, was naturally a ſevere attack upon the houſe of commons; but though it was ſevere, it was juſt. For the

[81] Diary, p. 88.

conduct

conduct of the houſe in this affair was more ſuitable to the character of a court of inquiſition, than to that of a Britiſh Houſe of Commons. After the publication of the pamphlet, the houſe voted it to be "an impudent, malicious, ſcandalous, and ſeditious libel:" and preſented an addreſs to the king, requeſting his majeſty to order his attorney-general to proſecute the author, printer, and publiſher. Mr. Murray having now quitted the kingdom, the proſecution fell upon the bookſeller. The trial came on at Guildhall, before ſir William Lee, lord-chief-juſtice of the court of King's Bench. Mr. Murray, afterwards lord Mansfield, as ſolicitor-general, was one of the counſel for the crown againſt Owen; and Mr. Pratt, afterwards lord Camden, was one of the counſel for the bookſeller. Mr. Murray contended, that the queſtion was,

'Whether the jury were ſatisfied, that the

'defendant,

'defendant, Owen, had published the 'pamphlet? If the fact was proved,' he said, 'the libel PROVED ITSELF, the SEDITION, DISTURBANCE, &c. [82].'

MR. FORD, one of the counsel for the defendant, maintained, on the contrary, that proving the publication, was not proving the charge stated in the information. 'Only 'proving the sale of the book,' said he, 'does not prove all those opprobrious and 'hard terms laid in the charge against the 'defendant.' He added, 'I must observe 'one thing, which is, the danger of your 'finding a verdict SPECIALLY. Suppose 'you find him GUILTY OF PUBLISHING and 'selling this book. GUILTY includes 'GUILT: then guilty of what? Selling 'paper. Where is the guilt? Take care, 'gentlemen, of being DECEIVED, by 'finding him GUILTY any way. By

[82] State Trials, vol. X. p. 205.

'bringing

'bringing in your verdict any way againſt him, you render him liable to THE CONSEQUENCES OF THE WHOLE; that is, to the ſame penalties that he would have been liable to, if he had committed the WHOLE CRIME laid to his charge, and that charge FULLY PROVED againſt him! ——By finding him GUILTY, you do all that you can againſt him; and then it will be out of your power to ſerve him [83].' And then Mr. Pratt alſo contended, that if that part of the information againſt the defendant was not proved, that he had publiſhed the book maliciouſly, ſeditiouſly, ſcandalouſly, &c. that the jury ought to acquit him.

THE fact of publication was clearly and circumſtantially proved; and the chief-juſtice, in his charge, gave it as his opinion, 'that the jury OUGHT to find the defendant

[83] State Trials, vol. X. p. 207.

'GUILTY;

'GUILTY; for he thought the fact of pub-
'lication was fully proved; and, if ſo, they
'COULD NOT AVOID bringing in the de-
'fendant guilty [84].' The jury, however, thought otherwiſe; and nobly reſolved to aſſert their right of judging of the law, as well as of the fact. The pamphlet ſtyled a libel contained a real ſtate of facts, and was ſuch an appeal to the public as an injured and oppreſſed man had a right to make. They, therefore, notwithſtanding the opinion of the chief-juſtice, and the vote of the Houſe of Commons, and though the fact of publication was fully proved, brought in the bookſeller NOT GUILTY. At the deſire of the attorney-general, the chief-juſtice aſked the foreman of the jury, "Whether they thought "the evidence laid before them, of "Owen's publiſhing the book by ſelling it,

[84] State Trials, vol. X. p. 208.

" was not ſufficient to convince them, that " the ſaid Owen did ſell that book?" The foreman, without anſwering the queſtion, ſaid " Not guilty, Not guilty;" and ſeveral of the other jurymen ſaid, " That is our " verdict, my lord, and we abide by it [25]." The attorney-general deſired the chief-juſtice to put ſome other queſtions to the jury; but this his lordſhip thought proper to decline. Thus did reaſon, juſtice, and common ſenſe, obtain a clear and decided victory over the efforts of abuſed power, and the arts of legal ſophiſtry: and, in every ſimilar caſe, the conduct of Owen's jury is a proper model for future juries.

In 1789, Mr. John Stockdale, bookſeller, was tried in the court of King's bench, on an information exhibited EX OFFICIO by the attorney-general, in conſequence of a motion made for that purpoſe in

[25] State Trials, vol. X. p. 208.

in the houſe of commons. He was charged, in the information, with having ‘ with force and arms, unlawfully, wick- ‘ edly, maliciouſly, and ſeditiouſly printed ‘ and publiſhed, a certain book or pamphlet, ‘ entitled, “ A Review of the principal “ Charges againſt Warren Haſtings, Eſq; “ late governor-general of Bengal;” which was ſtated to be a libel againſt the houſe of commons. The bookſeller was defended with great ability and eloquence by his counſel Mr. Erſkine; and, though the fact of publication was fully proved, the jury very properly brought in a verdict of Not Guilty [86]. Whatever might have been

[86] Vid. the whole Proceedings on the Trial of an Information exhibited ex officio, by the King's Attorney-general, againſt John Stockdale, for a Libel on the Houſe of Commons, publiſhed in 8vo. by Stockdale, in 1790; to which is ſubjoined an Argument in ſupport of the Rights of Juries, delivered by Mr. Erſkine,

been the demerits of Mr. Haſtings, or however criminal his conduct, it was certainly unjuſt and abſurd, at a time when the charges againſt him, and the ſpeeches of the managers in ſupport of thoſe charges, were publiſhed in almoſt every news-paper in the kingdom, that it ſhould be ſuppoſed proper to proceed criminally againſt thoſe who publiſhed pieces in his vindication.

THIS was a proſecution, which reflected no honour on thoſe by whom it was ſet on foot: ſuch proſecutions come with a peculiarly ill grace from thoſe who profeſs themſelves to be the friends of the people, and of liberty. No houſe of commons

in the Court of King's Bench, on the 15th of November, 1784, when application was made for a new trial of the dean of St. Aſaph, on account of the miſdirection of the judge, in his charge to the jury at Shrewſbury.

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