is perfectly clear. The truth of *all* the circumstances averred upon the record is a question of fact;—the seditious tendency, the *quo animo*, may, under the form of an averment, be questions of fact for the jury; but, Whether the writing, either by itself, or explained by the averments, is a libel? is a *pure, unmixed question of law* for the sole consideration of the Judges, and entirely inapplicable upon the trial of the issue. The cause of the mistake in conceiving that the charge of a libel against the State cannot involve any question of law, appears to be, that the transition is direct and natural, from the idea of a publication tending to excite sedition and revolt, or to withdraw the allegiance of subjects from Government, to the idea of something criminal, and necessarily calling for the restraint of the law. The act of maliciously taking away the life of a man suggests immediately to the mind the idea of a heinous crime, which in a state of society must be severely punished; and yet it is always a question of law, Whether the facts of any case of that description amount to a murder? In like manner the sense and feelings of all mankind inform them, that the very existence of the best possible government (not to mention the respect that must be preserved to the supreme power in every well-ordered state) requires that such publications as above-mentioned should be considered as criminal, and be punishable by law—since otherwise government, which is the source, as well as the means of all security, would want that protection itself

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which is the right of the meaneſt individual, and without which, indeed, it would be unable to protect others, and to preſerve the peace and order of ſociety from perpetual invaſion. Hence it follows, that when a jury has found the miſchievous tendency of a public libel, the ſame being ſtated on the record by way of averment (as it frequently muſt be on account of the caution with which ſuch libels are expreſſed), people are apt to imagine that the crime has been found, and that no queſtion of law can poſſibly remain to be conſidered. But it is ſtill open for the defendant to contend, that the writing which the jury has declared by a verdict of guilty to have a tendency to ſedition, and to weaken or diſſolve the ties between government and the people, is not in law a libel; —all the world, it is true, would be ſurpriſed at ſuch an attempt (if any attempt in reſiſting a charge of libel can now excite ſurprize); but the right to argue the point in arreſt of judgment proves to demonſtration, that till this ſtage of the buſineſs the law of the caſe has not been decided. And though to a common obſerver the facts eſtabliſhed by a verdict in this and other caſes (where the verdict contains only facts) may ſeem neceſſarily and indiſputably to involve legal guilt, they may appear to the court to be deficient either in ſubſtance or in form to produce that effect.

It has been ſometimes aſſerted, that a charge of public libel cannot be applied to any preciſe rule or definition, whereby it may be aſcertained,

tained, whether the facts of a given case amount to a definite crime. This observation must either mean, that there can be no such offence as a public libel, or it means nothing: for there is no crime that is not a violation of the law;—and there is no law without a rule. Indeed, law is defined "a rule of conduct;" but in a free, a populous, and a commercial country like this, where so many rights both public and private, where so many advantages and enjoyments are secured by law, it is impossible to have a precise rule ready for every case that may occur, fitting that case and that alone. It will often happen, that the law must be deduced from general principles, and from analogies; which, however, furnish a rule, though it may require great industry and legal knowledge to discover it with clearness, and apply it with precision. That extensive class of remedy by way of action on the case, and the species of offence called nusance, would frustrate all attempts to find a definite general rule, by the assistance of which any person could ascertain the law upon each particular case that may occur. But one principle pervades all jurisprudence, namely, that wherever a specific rule is not precisely furnished, the law, as it always relates either to established rights or positive duties, so it must depend upon and be ascertained by a reference to those rights or duties, which then can alone furnish the rule for legal decisions. And nothing can be more evident, than that in proportion to the distance at which the rule may

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lie from common obſervation, muſt be the importance of having it declared by thoſe conſtitutional depoſitaries of the law who preſide in the courts of juſtice.

BUT here another difficulty has occurred, and ſome over-cautious perſons who cannot deny the propriety and advantage of referring the deciſion of the law to the judges, in all caſes where the property, the liberty, and the life of the ſubject are concerned, are fearful of leaving to the court the cognizance of ſuch legal queſtions as may ariſe upon proſecutions for public libels. The ground of the wiſh to deviate in ſuch caſes from the regular and eſtabliſhed mode of proceeding, is no leſs illiberal and invidious than a ſuppoſition that the judges are not to be truſted with the exerciſe of their conſtitutional powers, in any caſe where by poſſibility the wiſhes of Government may be hoſtile to the rights and liberties of the people. This ſyſtem unfairly aſſumes, that Government and the judicial power are the ſame, or at leaſt inſeparably united by one common intereſt. It is founded upon a diſtruſt of thoſe perſons in whom the Conſtitution has repoſed the greateſt confidence. It implies that the reverend Characters, who are with ſo much guard and caution inveſted with the important truſt of diſtributing JUSTICE to a great and a free people, will ſwerve from their duty, will violate their oaths, will ſacrifice their reputations, and ſurrender up their own liberties, with thoſe of their fellow-ſubjects, at the mandate of an arbitrary ſovereign or an ambitious mi-

niſter. To give the leaſt colour to ſuch an extravagant ſuppoſition, an abſolute dependence of the judges upon Government ſhould be previouſly eſtabliſhed. But inſtead of this being poſſible, if there is or can be a ſituation of INDEPENDENCE in the kingdom, it is that of the dignified perſons alluded to. The Crown, in its executive character, as the fountain of juſtice, has very properly the nomination to theſe great judicial offices; but having exerciſed that power, its influence is at an end. The perſons ſo nominated, who are previouſly eminent for their qualifications and merits, are ſecurely and immoveably placed in a ſituation at once exalted and venerable: they move in a ſphere calculated to excite and to gratify honourable ambition: they perform duties of the firſt importance to ſociety: they fill an office which affords ſingular opportunities for enjoying the moſt refined pleaſures of noble and well-deſerved fame, or for becoming the objects of univerſal deteſtation; and that particularly in caſes of a popular nature: They are ſecure of a liberal, nay an elegant competence for life: and they are, from the moment of their appointment, out of the reach and power of the Crown, which, with all its weight of prerogative and influence, can neither remove them from a ſituation of ſuch high reſpectability, ſuch diſtinguiſhed eminence, nor in any reſpect render it uneaſy or diſagreeable to them. Is this a ſtate of ſervility? Are theſe the dependent Characters, which cannot ſafely be entruſted with the deciſion of any queſtion which may involve the beſt liberties of the ſubject?

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On the contrary, is it not an invaluable privilege to have the ſecurity of law, thus adminiſtered, for the continuance of thoſe liberties? Surely, if any improper influence could be apprehended, it would rather be that of a popular kind, ſuch as might be excited by the deſire to pleaſe a public, which can crown with laurels, or load with infamy,---which can rend the air with plaudits, or the heart with hiſſes and execrations,---rather than a monarch or a miniſter, whoſe wrath muſt be impotent, and whoſe favour cannot ſave from opprobrium.

It may be further permitted me to obſerve, with a view to obviate a miſconſtruction of the principles I have endeavoured to ſupport, that their effect is not (as has been ſometimes repreſented) to confine juries to the queſtion, Whether the defendant has publiſhed the mere *words* ſtated to be libellous? A jury ſhould always enquire, Whether the meaning which the words, *as they appear upon the record*, purport to convey, is their true and real meaning, *as they appear upon the publication?* The meaning of a paſſage in a book may be extremely different, when that paſſage is ſelected by itſelf, and when it ſtands in its connection with the reſt of the work; therefore the jury ought to compare the paſſage with the context, in order to judge whether their combined effect is conſiſtent with the meaning, which the paſſage, ſtanding alone upon the record, conveys to the mind. This principle has alſo had the fate of being diſtorted to ſupport the right of juries to examine the legal meaning; that is, Whether in point

of law the meaning is libellous; though its only operation is to ſecure their right to determine the queſtion of fact, Whether the defendant has really publiſhed the writing attributed to him?

I SHALL here offer two general propoſitions drawn from what I have ſaid, and exhibiting in one point of view the ſubſtance and the reſult of the whole inquiry.

1ſt, IN all caſes where the whole of the crime charged is put in iſſue, the deciſion of ſuch iſſue includes in it both law and fact; which, though united in a general verdict, are in themſelves perfectly diſtinct, and are aſcertained by very different modes of inveſtigation: ---the fact ariſing wholly out of the evidence, according to which the jury are ſworn to determine---the law exiſting in a previous rule, which the jury cannot be ſuppoſed to know, and which it is the duty of the judge to declare to them. Therefore, although the general verdict pronounced by the jury compriſes the law as well as the fact, the jury cannot be ſaid to determine the law, they having received that law from the bench; and all they do in that reſpect is, to combine the law ſo received, with the facts as found by themſelves in the form of a general verdict.

2dly, BUT in caſes of Libel the whole of the crime charged is not in iſſue before the jury—the queſtion upon the iſſue being, Whether the defendant *did publiſh the matter ſaid to be libellous?*

and

and not, *Whether that matter is libellous?* Of courſe the verdict, which cannot exceed the bounds of the iſſue, relates only to facts, like a ſpecial verdict in other caſes; and the term *guilty* implies no more than that the facts charged are true, without which indeed guilt cannot be ſuppoſed. But the queſtion, "Whether ſuch facts amount in law to a Libel, is a queſtion of pure law upon the record, which the defendant might have brought forward in the firſt inſtance by a demurrer, and which after a verdict of *guilty* he may agitate in arreſt of judgment.

It may not be amiſs juſt to mention the diſtinction now almoſt generally underſtood between a civil action and a criminal proſecution for a Libel, in reſpect of the *truth* of the writing charged to be libellous being a defence to ſuch a charge. The different object of theſe proceedings gives riſe to the diſtinction. The action is brought with a view to obtain damages for the injury the individual has ſuſtained; and if the expreſſions of which he complains as libellous were founded in truth, however inconvenient or diſagreeable the publication may have been to him, he has not ſuſtained any injury, and therefore he is not entitled to any redreſs. Evidence of the truth of the publication is therefore a complete anſwer to the action, if the defendant has inſiſted upon that advantage by way of plea. But a criminal proſecution for a Libel (like all other criminal proſecutions) has only in view the injury ſociety has ſuſtained from the commiſſion

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of a crime. It does not conſider private but public intereſts. And as a libel tends equally to a breach of the peace, whether it is founded in truth or falſehood, it is no anſwer to the charge, to ſay the publication is true. To publiſh extrajudicially, that a man is a murderer, or a robber, is calculated to inflame his mind and the minds of his friends in the moſt violent degree, and to excite the keeneſt reſentment; and if the charge be true, it is even more cutting than it would be if falſe, and more likely to produce violence. If falſe, the beſt way of repelling it would be by an inveſtigation of the truth; and the reſentment the charge excites may be moſt efficaciouſly indulged by calling in the aid of a court of juſtice: But if true, no way is open to the party to puniſh the attack but by acts of violence; for a judicial proceeding would only tend to confirm the accuſation, and the diſgrace attending it, and would open the door to juſtice. A Libel therefore, when true, ſeems more likely to engender violence and cauſe bloodſhed than when it is falſe. And as the puniſhment of Libels criminally has for its object the preſervation of the *peace of ſociety*, the truth of a Libel can furniſh no excuſe for its publication. Individuals are not to take the puniſhment of offences into their own hands; but if they know of a crime being committed, they ſhould purſue the offender to puniſhment by judicial proceſs. Any other mode tends to the obſtruction of juſtice, and is of courſe favourable to the perpetration of crimes.

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I CANNOT help taking notice of the injuſtice of thoſe obſervations which have frequently been made, and which repreſent the doctrine, that juries have no cognizance of the law, as tending to convert them into mere cyphers. Are juries cyphers while they are determining whether a perſon has really done thoſe facts, which are alledged againſt him by way of a criminal charge? Are they cyphers while their juriſdiction extends over the immenſe range of all the tranſactions and circumſtances that can be made the ſubject of judicial enquiry—a juriſdiction co-extenſive with the limits of human conduct, conſidering man as a ſocial being? Are they cyphers while diſtinguiſhing from evidence whether a writing was levelled againſt the peace and happineſs of mankind, or, whether it was meant merely to convey abſtract ſentiments? yet ſuch are the powers that the above doctrine permits to juries—ſubject indeed to the limitation, founded in the cleareſt reaſon, that they can decide only upon the truth of ſuch facts as are referred to their inveſtigation. It rather appears that the contrary ſyſtem may with juſtice be arraigned, as aiming at the ſubverſion of the authority and the uſefulneſs of judges. If it be true, that a jury has a right to decide the law (the exerciſe of which right, being entirely at their diſcretion, muſt be without reſtriction or control), then indeed are the *judges* merely cyphers, and all the pomp and ſolemnity with which the conſtitution has diſtinguiſhed their office, only ſerve to render their inſignificance more viſible.

JURIES would do well to be on their guard againſt thoſe attempts, which, under a pretence of ſecuring, in reality aim at an extenſion of their rights. Such attempts are generally pointed at acquittals, and are only calculated to furniſh opportunities for the guilty to eſcape. The doctrine that the law is within the comprehenſion and the province of the jury, is extremely convenient to libellers, as it furniſhes them with an opportunity, by means of popular harangues—by taking advantage of the prejudices of the times—and by an abuſe of the moſt ſacred terms relating to civil rights—to perſuade juries to return a verdict of *not guilty*, or ſome other verdict that may equally fruſtrate the ends of juſtice. It would alſo be well if juries were to hear with great caution *all appeals to their paſſions*. Cool and ſober reaſon ſhould ever preſide at the ſeat of judgment. It is difficult to hold the ſcales of juſtice ſteady, while the paſſions agitate the mind. In fine, juries ſhould never forget, that on a ſacred regard to the diſtinction between the offices of judge and jury, as well as on an amicable and harmonious co-operation in the much connected duties thereof, depend the importance and utility of both, and the beneficial execution of our admirable ſyſtem of laws.

FINIS.

ERRATUM.

Page 31. line 4. for *been*, read *between*.