Erskine May, Vol. II, Chapter IX, pp. 247-265

Wilkes, Junius, and the Law of Libel

The government was soon at issue with the press. Lord Bute was the first to illustrate its power. Overwhelmed by a storm of obloquy and ridicule, he bowed down before it and fled. He did not attempt to stem it by the terrors of the law. Vainly did his own hired writers endeavour to shelter him: vainly did the king uphold his favourite. The unpopular minister was [248] swept away: but the storm continued. Foremost among his assailants had been the 'North Briton,' conducted by Wilkes, who was not disposed to spare the new minister, Mr. Grenville, or the court. It had hitherto been the custom for journalists to cast a thin veil over sarcasms and abuse directed against public men;(1) but the 'North Briton' assailed them openly and by name.(2) The affected concealment of names, indeed, was compatible neither with the freedom nor the fairness of the press. In shrinking from the penalties of the law, a writer also evaded the responsibilities of truth. Truth is ever associated with openness. The free use of names was therefore essential to the development of a sound political literature. But as yet the old vices of journalism prevailed; and to coarse invective and slander, was added the unaccustomed insult of a name openly branded by the libeller.

The 'North Briton' No. 45

On the 23rd of April, 1763, appeared the memorable number 45 of the 'North Briton,' commenting upon the king's speech at the prorogation, and upon the unpopular peace recently concluded. It was at once stigmatised by the court as an audacious libel, and a studied insult to [249] the king himself; and it has since been represented in the same light, by historians not heated by the controversies of that time. But however bitter and offensive, it unquestionably assailed the minister rather than the king. Recognising, again and again, the constitutional maxim of ministerial responsibility, it treated the royal speech as the composition of the minister.

The court were in no mood to brook the license of the press. Why had great lords been humbled, parties broken up, and the Commons managed by the paymaster, if the king was to be defied by a libeller? It was resolved that he should be punished,—not like common libellers, by the attorney-general, but by all the powers of the state. Prerogative was strained by the issue of a general warrant for the discovery of the authors and printers:(3) privilege was perverted for the sake of vengeance and persecution;(4) and an information for libel was filed against Wilkes in the Court of King's Bench. Had the court contented themselves with the last proceeding, they would have had the libeller at their feet. A verdict was obtained against Wilkes for printing and publishing a seditious and scandalous libel. At the same time the jury found his 'Essay on Woman' to be an 'obscene and impious libel.' But the other measures taken to crush Wilkes were so repugnant to justice and decency, [250] that these verdicts were resented by the people as part of his persecutions. The Court of King's Bench shared the odium attached to the government, which Wilkes spared no pains to aggravate. He complained that Lord Mansfield had permitted the informations against him to be irregularly amended on the eve of his trial: he inveighed against the means by which a copy of his 'Essay on Woman' had been obtained by the bribery of his servant; and by questions arising out of his outlawry, he contrived to harass the court, and keep his case before the public for the next six years. The people were taught to be suspicious of the administration of justice, in cases of libel; and, assuredly, the proceedings of the government and the doctrines of the courts, alike

justified their suspicions.

The printers of the 'North Briton' suffered as well as the author; and the government, having secured these convictions, proceeded with unrelenting rigour against other printers.(5) No grand jury stood between the attorney-general and the defendants; and the courts, in the administration of the law, were ready instruments of the government. Whether this severity tended to check the publication of libels or not, it aroused the sympathies of the people on the side of [251] the sufferers. Williams, who had reprinted the 'North Briton,' being sentenced to the pillory, drove there in a coach marked '45.' Near the pillory the mob erected a gallows, on which they hung the obnoxious symbols of a boot and a Scotch bonnet; and a collection was made for the culprit, which amounted to £200.

Meanwhile *ex-officio* informations had become so numerous as to attract observation in Parliament; where Mr. Nicholson Calvert moved for a bill to discontinue them. He referred the origin of the practice to the Star Chamber,—complained of persons being put upon their trial without the previous finding of a grand jury,—and argued that the practice was opposed to the entire policy of our laws. His motion, however, was brought forward in opposition to the advice of his friends, and being coldly seconded by Mr. Serjeant Hewitt, was lost on a division, by a large majority.

The 'Letters of Junius'

The excitement which Wilkes and his injudicious oppressors had aroused had not yet subsided, when a more powerful writer arrested public attention. Junius was by far the most remarkable public writer of his time.(6) He was clear, terse, and logical in statement,—learned, [252] ingenious, and subtle in disputation,—eloquent in appeals to popular passion,—polished, and trenchant as steel, in sarcasm,—terrible in invective. Ever striving to wound the feelings, and sully the reputation of others, he was even more conspicuous for rancour and envenomed bitterness than for wit. With the malignant spirit of a libeller,—without scruple or regard for truth,—he assailed the private character, no less than the actions of public men. In the 'Morning Advertiser' of the 19th of December 1769, appeared Junius's celebrated letter to the king. Inflammatory and seditious, it could not be overlooked; and as the author was unknown, informations were immediately filed against the printers and publishers of the letter. But before they were brought to trial, Almon, the bookseller, was tried for selling the 'London Museum,' in which the libel was reprinted. His connection with the publication proved to be so slight that he escaped with a nominal punishment. Two doctrines, however, were maintained in this case, which excepted libels from the general principles of the criminal law. By the first, a publisher was held criminally answerable for the acts of his servants, unless proved to be neither privy nor assenting to the publication of a libel. So long as exculpatory evidence was admitted, this doctrine was defensible: but judges afterwards refused to admit such evidence, holding that the [253] publication of a libel by a publisher's servant was proof of his criminality. And this monstrous rule of law prevailed until 1843, when it was condemned by Lord Campbell's Libel Act.(7)

The Rights of Juries

The second doctrine was wholly subversive of the rights of juries, in cases of libel. Already, on the trial of the printers of the 'North Briton,' Lord Mansfield had laid it down that it was the province of the court alone to judge of the criminality of a libel. This doctrine, however questionable, was not without authority;(8) and was now enforced with startling clearness by his lordship. The only material issue for the jury to try, was whether the paper was libellous or not; and this was emphatically declared to be entirely beyond their jurisdiction. Trial by jury was the sole security for freedom of the press; and it was found to have no place in the law of England.

Again, on the trial of Woodfall, his lordship told the jury that, 'as for the intention, the malice, the sedition, or any other harder words which might be given in informations for libels, public or private, they were merely formal words, mere words of course, mere inferences of law,—with which the jury were not to concern themselves.' The jury, however, learning that the offence which they were trying was to be withdrawn from [254] their cognisance, adroitly hit the palpable blot of such a doctrine, by finding Woodfall 'guilty of printing and publishing only.' In vain was it contended, on the part of the crown, that this verdict should be amended, and entered as a general verdict of guilty. The court held the verdict to be uncertain, and that there must be a new trial. Miller, the printer and publisher of the 'Evening Post,' was next tried, at Guildhall. To avert such a verdict as that in Woodfall's case, Lord Mansfield, in language still stronger and more distinct, laid it down that the jury must not concern themselves with the character of the paper charged as criminal, but merely with the fact of its publication, and the meaning of some few words not in the least doubtful. In other words, the prisoner was tried for his offence by the judge, and not by the jury. In this case, however, the jury boldly took the matter into their own hands, and returned a verdict of not guilty.

Other printers were also tried for the publication of this same letter of Junius, and acquitted. Lord Mansfield had, in fact, overshot the mark; and his dangerous doctrines recoiled upon himself. Such startling restrictions upon the natural rights of a jury excited general alarm and disapprobation. They were impugned in several able letters and pamphlets; and above all, in the terrible letter of Junius to Lord [255] Mansfield himself. It was clear that they were fatal to the liberty of the press. Writers, prosecuted by an officer of the crown, without the investigation of a grand jury, and denied even a trial by their peers, were placed beyond the pale of the law.

Debates in Parliament

These trials also became the subject of animadversion in Parliament. On a motion of Captain Constantine Phipps, for a bill to restrain *ex-officio* informations, grave opinions were expressed upon the invasion of the rights of juries, and the criminal responsibility of a publisher for the acts of his servants. Lord Mansfield's doctrines were questioned by Mr. Cornwall, Mr. Serjeant Glynn, Mr. Burke, Mr. Dunning, and Sir W. Meredith;(9) and defended by Mr. Attorney-General De Grey, and Mr. Solicitor-General Thurlow. Lord Chatham, in the House of Lords, assailed Lord Mansfield for his directions to juries in the recent libel cases. Lord Mansfield justified them, and Lord Camden desired that they should be fully stated, in order that the House might judge of their legality.

This debate was followed, in the Commons, by a motion of Mr. Serjeant Glynn for a committee, to inquire into the administration of criminal justice, particularly in cases relating to the liberty of the press, and the constitutional power and duty of juries. The same [256] controverted questions were again discussed; but the feeling of the House being still adverse, the motion was lost by a majority of one hundred and eight. In this debate, Mr. Charles Fox gave little promise of his future exertions to improve the law of libel. He asked, where was the proof, 'that juries are deprived of their constitutional rights?' 'The abettors of the motion,' he said, 'refer us to their own libellous remonstrances, and to those infamous lampoons and satires which they have taken care to write and circulate.'

The day after this debate, Lord Mansfield desired that the Lords might be summoned on the 10th of December, as he had a communication to make to their Lordships. On that day, however, instead of submitting a motion, or making a statement to the House, he merely informed their Lordships that he had left with the clerk of the House a copy of the judgment of the Court of King's Bench, in Woodfall's case, which their Lordships might read, and take copies of, if they pleased. This, however, was enough to invite discussion; and on the following day, Lord Camden accepted this paper as a challenge directed personally to himself.

'He has thrown down the glove,' he said, 'and I take it up. In direct contradiction to him, I maintain that his doctrine is not the law of England.' He then proposed six questions to Lord Mansfield upon the subject. His lordship, in great distress and confusion. said, 'he [257] would not answer interrogatories,' but that the matter should be discussed. No time, however, was fixed for this discussion; and notwithstanding the warmth of the combatants, it was not resumed.

So grave a constitutional wrong, however, could not be suffered without further remonstrances. Mr. Dowdeswell moved for a bill to settle doubts concerning the rights of jurors in prosecutions for libels, which formed the basis of that brought in, twenty years later, by Mr. Fox. The motion was seconded by Sir G. Savile, and supported by Mr. Burke, in a masterly speech, in which be showed, that if the criminality of a libel were properly excluded from the cognisance of a jury,—then should the malice in charges of murder, and the felonious intent in charges of stealing, be equally removed from their jurisdiction, and confided to the judge. If such a doctrine were permitted to encroach upon our laws, juries would 'become a dead letter in our constitution.' The motion was defeated on a question of adjournment. All the Whig leaders were sensible of the danger of leaving public writers at the mercy of the courts; and Lord Rockingham, writing to Mr. Dowdeswell, said, 'he who would really assist in re-establishing and confirming the right in juries to judge of both law and fact, would be the best friend to posterity.' This work, however, was not [258] yet to be accomplished for many years; and the law of libel continued to be administered by the courts, according to the doctrine which Parliament had hitherto shrunk from condemning.

Erskine and the Rights of Juries

But the rights of juries continued to be inflexibly maintained in the courts, by the eloquence and noble courage of Mr. Erskine. The exertions of that consummate advocate in defence of the Dean of St. Asaph, are memorable in forensic history.(10) At various stages of the proceedings, in this case, he vindicated the right of the jury to judge of the criminality of the libel; and in arguing for a new trial, delivered a speech, which Mr. Fox repeatedly declared to be 'the finest argument in the English language.' He maintained 'that the defendant had had, in fact, no trial; having been found guilty without any investigation of his guilt, and without any power left to the jury to take cognisance of his innocence.' And by the most closely connected chain of reasoning,—by authorities,—and by cases, he proved that the anomalous doctrine against which he was contending was at variance with the laws of England. The new trial was refused; and so little did Lord Mansfield anticipate the approaching condemnation of his doctrine, that he sneered at the 'jealousy of leaving the law to the court,' as 'puerile rant and declamation.' Such, however, was not the opinion of the first statesmen of his own time, nor of posterity.

[259] Mr. Erskine then moved in arrest of judgment. He had known throughout that no part of the publication, as charged in the indictment, was criminal: but had insisted upon maintaining the great public rights which he had so gloriously defended. He now pointed out the innocence of the publication in point of law: the court were unanimously of opinion that the indictment was defective; and the dean was at length discharged from his prosecution.

The trial of Stockdale, in 1789, afforded Mr. Erskine another opportunity of asserting the liberty of the press, in the most eloquent speech ever delivered in a British Court of Justice. Stockdale was prosecuted by the attorney-general, at the instance of the House of Commons. for publishing a defence of Warren Hastings, written by the Rev. Mr. Logan. This pamphlet was charged in the information as a scandalous and seditious libel, intended to vilify the House of Commons as corrupt and unjust, in its impeachment of Warren Hastings. After urging special grounds of defence, Mr. Erskine contended, with consummate skill and force of argument, that the defendant was not to he judged by isolated passages, selected and put

together in the information, but by the entire context of the publication, and its general character and objects. If these were fair and proper, the defendant must be acquitted. That question he put to the jury as one which 'cannot, in common sense, be anything resembling a question of law, but is a pure [260] question of fact.' Lord Kenyon, who tried the cause, did not controvert this doctrine, and the jury fairly comparing the whole pamphlet with the information, returned a verdict of not guilty. Thus Mr. Erskine succeeded in establishing the important doctrine that full and free discussion was lawful, that a man was not to be punished for a few unguarded expressions, but was entitled to a fair construction of his general purpose and animus in writing,—of which the jury were to judge. This was the last trial for libel which occurred, before Mr. Fox's libel bill. Mr. Erskine had done all that eloquence, courage, and forensic skill could do for the liberty of the press and the rights of juries.

Fox's Libel Bill

It now only remained for the legislature to accomplish what had been too long postponed. In May 1791, Mr. Fox made noble amends for his flippant speech upon the libel laws, twenty years before. Admitting that his views had then been mistaken, he now exposed the dangerous anomaly of the law, in a speech of great argumentative power and learning. Mr. Erskine's defence of the Dean of St. Asaph he pronounced to be 'so eloquent, so luminous, and so convincing, that it wanted but in opposition to it, not a man, but a giant.' If the doctrine of the courts was right in cases of libel, it would be right in cases of treason. He might himself be tried for writing a paper charged to be an overt act of treason. In the fact of publication the jury would find a verdict of guilty; and if no motion were made in arrest of judgment, the court would say 'let him be hanged [261] and quartered.' A man would thus lose his life without the judgment of his peers. He was worthily seconded(11) by Mr. Erskine, whose name will ever be associated with that important measure. His arguments need not be recapitulated. But one statement, illustrative of the law, must not be omitted. After showing that the judges had usurped the unquestionable privilege of the jury to decide upon the guilt or innocence of the accused, he stated, 'that if upon a motion in arrest of judgment, the innocence of the defendant's intention was argued before the court, the answer would be and was given uniformly, that the verdict of guilty had concluded the criminality of the intention, though the consideration of that question had been, by the judge's authority, wholly withdrawn from the jury at the trial.'

The opinion of the Commons had now undergone so complete a change upon this question, that Mr. Fox's views found scarcely any opponents. The attorney-general supported him, and suggested that a bill should be at once brought in for declaring the law, to which Mr. Fox readily assented. Mr. Pitt thought it necessary 'to regulate the practice of the courts in the trial of libels, and render it conformable to the spirit of the constitution.' The bill was brought in without a dissentient voice, and passed rapidly through the House of Commons.

In the Lords, however, its further progress was opposed by Lord Thurlow, on account of its importance, and the late period of the session. Lord [262] Camden supported it, as a declaration of what he had ever maintained to be the true principles of the law of England. The bill was put off for a month, without a division: but two protests were entered against its postponement.

In the following session Mr. Fox's bill was again unanimously passed by the Commons. In the Lords it met with renewed opposition from Lord Thurlow, at whose instance the second reading was postponed, until the opinions of the judges could be obtained upon certain questions. Seven questions were submitted to the judges, and on the 11th of May their answers were returned. Had anything been wanting to prove the danger of those principles of law which it was now sought to condemn, it would have been supplied from the unanimous answers of the judges. These principles, it seemed, were not confined to libel: but the

criminality or innocence of any act was 'the result of the judgment which the law pronounces upon that act, and must, therefore, be, in all cases and under all circumstances, matter of law, and not matter of fact.' They even maintained,—as Mr. Fox had argued,—that the criminality or innocence of letters or papers set forth as overt acts of treason was matter of law, and not of fact—yet shrinking from so alarming a conclusion, they added that they had offered no opinion 'which will have the effect of taking matter of law out of the general issue, or out of a general verdict.' Lord Camden combated the doctrines of the judges, and repeated his own matured and reiterated opinion of the law. The bill was now speedily passed; with a protest, signed by Lord Thurlow and five other lords, predicting 'the confusion and destruction of the law of England.'

Results of the Libel Act

And thus, to the immortal honour of Mr. Fox, Mr. Erskine, Lord Camden, and the legislature, was passed the famous Libel Bill of 1792,(12) in opposition to all the judges and chief legal authorities of the time. Being in the form of a declaratory law, it was in effect a reversal of the decisions of the judges by the High Court of Parliament. Its success was undoubted, for all the purposes for which it was designed. While it maintained the rights of juries, and secured to the subject a fair trial by his peers, it introduced no uncertainty in the law, nor dangerous indulgence to criminals. On the contrary it was acknowledged that government was better protected from unjust attacks, when juries were no longer sensitive to privileges withheld, and jealous of the bench which was usurping them.

Progress of the Press

Since the beginning of this reign, the press had [264] made great advances in freedom, influence, and consideration. The right to criticise public affairs, to question the acts of the government, and the proceedings of the legislature, had been established. Ministers had been taught, by the constant failure of prosecutions,(13) to trust to public opinion for the vindication of their measures, rather than to the terrors of the law for the silencing of libellers. Wilkes and Junius had at once stimulated the activity of the press, and the popular interest in public affairs. Reporters and printers having overcome the resistance of Parliament to the publication of debates,(14) the press was brought into closer relations with the state. Its functions were elevated, and its responsibilities increased. Statesmen now had audience of the people. They could justify their own acts to the world. The falsehoods and misrepresentations of the press were exposed. Rulers and their critics were brought face to face, before the tribunal of public opinion. The sphere of the press was widely extended. Not writers only, but the first minds of the age,—men ablest in council and debate,—were daily contributing to the instruction of their countrymen. Newspapers promptly met the new requirements of their position. Several were established during this period, whose high reputation and influence have survived to our own time;(15) and by fullness and rapidity of intelligence, [265] frequency of publication, and literary ability, proved themselves worthy of their honourable mission to instruct the people.

Nor is it unworthy of remark that art had come to the aid of letters, in political controversy. Since the days of Walpole, caricatures had occasionally pourtrayed ministers in grotesque forms, and with comic incidents: but during this period, caricaturists had begun to exercise no little influence upon popular feeling. The broad humour and bold pencil of Gillray had contributed to foment the excitement against Mr. Fox and Lord North; and this skilful limner elevated caricature to the rank of a new art. The people were familiarised with the persons and characters of public men: crowds gathered round the printsellers' windows; and as they passed on, laughing good-humouredly, felt little awe or reverence for rulers whom the caricaturist had made ridiculous. The press had found a powerful ally, which, first used in the interests of

party, became a further element of popular force.

Footnotes.

1. Even the Annual Register, during the first few years of this reign, in narrating domestic events, generally avoided the use of names, or gave merely the initials of ministers and others: e.g. 'Mr. P.,' 'D. of N.,' 'E. of B.,' 1762, p. 46; 'Mr. F.,' 'Mr. Gr.,' p. 62; 'Lord H.' and 'Lord E-r-t,' 1763, p. 40; 'M. of R.,' 1765, p. 44; 'Marquis of R.' and 'Mr. G.,' 1769, p.50; 'The K-,' 1770, p. 59, etc. etc.
2. 'The highest names, whether of statesmen or magistrates, were printed at length, and the insinuations went still higher,'—Walpole's Mem., i. 179.
3. Infra, Vol. III. p. 2.
4. See supra, Vol. II. 2.
5. Horace Walpole affirms that 200 informations were filed, a larger number than had been prosecuted in the whole thirty-three years of the last reign.—Walp. Mem., ii. 15, 67. But many of these must have been abandoned, for in 1791 the attorney-general stated that in the last thirty-one years there had been seventy prosecutions for libel, and about fifty convictions: twelve had received severe sentences; and in five cases the pillory had formed part of the punishment.—Parl Hist., xxix. 551.
6. Burke, speaking of his letter to the king, said:—'It was the rancour and venom with which I was struck, In these respects the "North Briton" is as much inferior to him, as in strength, wit, and judgment.'—Parl. Hist., xvi. 1154.
7. 6 and 7 Vict., c. 96, s. 7; Hans. Deb., 3rd Ser., lvi. 395. etc.
8. Lord Raymond in Franklin's Case, 1731; Ch. Justice Lee in Owen's case, 1752.—St. Tr., xvii. 1243; xviii. 1203; Parl. Hist., xvi. 1275.
9. Mr. Wedderburn also spoke against *ex-officio* informations.
10. In 1778. He had only been called to the bar on the last day of the preceding term.—St. Tr., xxi. 1; Erskine's Speeches, i. 4; Edinburgh Review, vol. xvi. 103.
11. The motion was one of form, 'that the Grand Committee for Courts of Justice do sit on Tuesday next.'
12. 32 Geo. III. c. 60. It was followed by a similar law passed by the Parliament of Ireland. Lord Macaulay says:—'Fox and Pitt are fairly entitled to divide the high honour of having added to our statute book the inestimable law which places the liberty of the press under the protection of juries.' This is cited and accepted by Lord Stanhope in his Life of Pitt, ii. 148; but why such prominence to Pitt, and exclusion of Erskine?
13. On the 27th Nov 1770, the Attorney-General De Grey 'declared solemnly that he had hardly been able to bring a single offender to justice.'—Parl. Hist., xvi. 1138.
14. Supra, p. 33, et seq.
15. Viz., The Morning Chronicle, 1769 (extinct in 1862); The Morning Post, 1772; The Morning Herald, 1780 (extinct in 1869); The Times, founded in 1788, holds an undisputed position as the first newspaper in the world.—Hunt's Fourth Estate, ii. 99-189.

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