writer does not take upon him to justify the truth of that report; but that will not do; for the injury is the same to the persons scandalized, whether the letter was inserted out of malice or not; besides, there is no knowing or proving particular malice, otherwise than from the act itself; and therefore if the act imports as much, it is sufficient; nor is he to take the liberty to print what he pleases; for the liberty of the press is only a legal liberty, such as the law allows; and not a licentious liberty. Gentlemen, I tell you again, that I have designedly shortened things, because it hath been so fully again and again laid before you. But if there is any thing afterwards that you want to know, after you have considered these things, I desire you would acquaint me. So, gentlemen, if you are sensible, and convinced that the defendant published that Craftsman of the 2d of January last; and that the defamatory expressions in the letter refer to the ministers of Great Britain;* then you ought to find the defendant guilty; but if you think otherwise, then you ought not to find him guilty.

The Jury found the defendant guilty of publishing the said libel.†

The term following, Mr. Richard Francklin received sentence to pay a fine of 100*l.*, to be imprisoned for one year, and to find security for his good behaviour for seven years; himself in 1,000*l.* penalty, and his two sureties in 500*l.* each.

† This Hague letter was said to be written by the late Henry lord viscount Bolingbroke. Ex Infor. Mr. R. Francklin. *Former Edition.*

† In the case of Perry A. D. 1793, 5 Term Rep. 454, Mr. Justice Buller read a note of proceedings relating to an endeavour to set aside the verdict in this case. See a report of the Trial of Perry *infra.*

490. The Trial of Mr. JOHN PETER ZENGER, of New-York, Printer, for printing and publishing a Libel against the Government; before the Hon. James de Lancey, esq. Chief Justice of the Province of New-York; and the Hon. Frederick Phillipse, esq. second Judge; at New-York, on August 4th: 9 GEORGE II. A. D. 1735.*

AS there was but one printer in the province of New York, that printed a public news-paper, I was in hopes, if I undertook to publish another, I might make it worth my while; and I soon found my hopes were not groundless. My first paper was printed, Nov. 5th, 1733, and I continued printing and publishing of them, I thought to the satisfaction of every body, till the January following; when the chief justice was pleased to animadvert upon the doctrine of libels, in a long charge given in that term to the grand jury, and afterwards on the third Tuesday of October, 1734, was again pleased to charge the grand jury in the following words:

"Gentlemen, I shall conclude with reading a paragraph or two out of the same book, concerning libels; they are arrived to that height, that they call loudly for your animadversion; it is high time to put a stop to them; for at the rate things are now carried on, when all order and government is endeavoured to be trampled on, reflections are cast upon persons of all degrees. Must not these things end in sedition, if not timely prevented? Lenity, you have seen, will not avail; it becomes you then to enquire after the offenders, that we may, in a due course of law, be enabled to punish them. If you, gentlemen, do not interpose, consider whether the ill consequences that may arise from any disturbances of the public peace, may not in part lie at your door?

"Hawkins, in his chapter of Libels, considers three points: 1st, What shall be said to be a libel. 2dly, Who are liable to be punished for it. 3dly, In what manner they are to be punished. Under the 1st, he says, § 7, 'Nor 'can there be any doubt, but that a writing, 'which defames a private person only, is as 'much a libel as that which defames persons in-'trusted in a public capacity, in as much as it 'manifestly tends to create ill blood, and to cause 'a disturbance of the public peace; however, it 'is certain, that it is a very high aggravation 'of a libel, that it tends to scandalize the go-'vernment, by reflecting on those who are en-'trusted with, the administration of public af-'fairs, which does not only endanger the public

* This Trial (or rather part of a trial) published by Mr. Zenger himself, having made a great noise in the world, is here inserted; though the doctrines advanced by Mr. Hamilton in his speeches, are not allowed in the courts here to be law. — See lord Raymond's opinion in the foregoing Trial, p. 672. — To which we have subjoined some remarks on this trial, published soon after it made its first appearance. *Former Edition.* See also stat. 32 Geo. 3, c. 60, as referred to in a note to Francklin's Case, *ante*, p. 672, and the other parts of that note.

'peace, as all other libels do, by stirring; up the 'parties immediately concerned in it, to acts of 'revenge, but also has a direct tendency to 'breed in the people a dislike of their governors 'and incline them to faction and sedition.' As to the 2d point he says, § 10, ' It is certain, 'not only he who composes or procures ano-'ther to compose it, but also that he who pub-'lishes, or procures another to publish it, are in 'danger of being punished for it; and it is said 'not to be material, whether he who disperses a 'libel, knew any thing of the contents or effects 'of it or not; for nothing could be more easy 'than to publish the most virulent papers with 'the greatest security, if the concealing the 'purport of them from an illiterate publisher 'would make him safe in the dispersing 'them. Also it has been said, that if he who 'hath either read a libel himself, or hath heard 'it read by another, do afterwards maliciously 'read or report any part of it in the presence, 'of others, or lend or shew it to another, he is 'guilty of an unlawful publication of it. Also, 'it hath been holden, that the copying of a 'libel libel be a conclusive evidence of the pub-'lication of it, unless the party can prove that 'he delivered it to a magistrate to examine it, 'in which case the act subsequent is said to 'explain the intention precedent. But it seems 'to be the better opinion, that he who first 'writes a libel, dictated by another, is thereby 'guilty of making of it, and consequently 'punishable for the bare writing; for it was 'no libel till it was reduced to writing.'

"These, gentlemen, are some of the offences which are to make part of your enquiries; and if any other should arise is the course of your proceedings, in which you are at a loss, or conceive any doubts, upon your application here, we will assist and direct you."

The grand jury not indicting me as was expected, the gentlemen of the Council proceeded to take my Journals into consideration, and sent the following Message to the General Assembly :

"Die Jons, 3 p. M. 17th of October, 1734.

"A Message from the Council by Philip Cortlandt, in these words, to wit: 'That board having had several of Zenger's New York Weekly Journals laid before them, and other scurrilous papers, tending to alienate the affections of the people of this province from his majesty's government, to raise seditions and tumults among the people of this province, and to fill their minds with a contempt of his majesty's government: And considering the pernicious consequences that may attend such growing evils, if not speedily and effectually put a stop to: And conceiving that the most likely method to put a stop to such bold and seditious practices, to maintain the dignity of his majesty's government, and to preserve the peace thereof, would be by a conference between a Committee of this board, and a Committee of the Assembly; it is therefore ordered, that the gentlemen of this board, now assembled, or any seven of them, be a committee, to join a committee of the House of Representatives, in order to confer together, and to examine and enquire into the said papers, and the authors and writers thereof.'

"Which Message being read,

"Ordered, That the members of this House, or any fourteen of them, do meet a Committee of the Council, at the time and place therein mentioned.

"Die Veneris, 9 A. M. 18 October, 1734.

"Mr. Garretson, from the Committee of this House, reported, That they last night met the Committee of the Council, on the subject-matter of their Message of yesterday to this House; and that after several preliminaries between the said Committees, the gentlemen of the Council reduced to writing, what they requested of this House, and delivered the same to the chairman, who delivered it in at the table, and being read, is in the words following :

" 'At a Committee of the Council held the '17th of October, 1734: PRESENT; Mr. 'Clarke, Mr. Harrison, Dr. Colden, Mr. 'Livingston, Mr. Kennedy, Mr. Chief 'Justice, Mr. Cortlandt, Mr. Lane, Mr. 'Horsmanden.

" 'Gentlemen; The matters we request 'your concurrence in are, That Zenger's pa-'pers, No. 7, 47, 48, 49, which were read, and 'which we now deliver, be burnt by the hands 'of the common hangman, as containing in 'them many things derogatory of the dignity 'of his majesty's government, reflecting upon 'the legislature, upon the most considerable 'persons in the most distinguished stations in 'the province, and tending to raise seditions 'and tumults among the people thereof.

" 'That you concur with us in the address-'ing the governor, to issue his proclamation, 'with a promise of reward for the discovery of 'the authors or writers of these seditious libels.

" 'That you concur with us in an Order for 'prosecuting the printer thereof.

" 'That you concur with us in an Order to 'the magistrates, to exert themselves in the 'execution of their offices, in order to preserve 'the public peace of the province. By order 'of the Committee,

" 'FRED. MORRIS, Cl. Con.'

"Mr. Garretson delivered likewise to the House the several papers referred to in the said request.

"Ordered, That the said papers be lodged with the clerk of this House; and that the consideration thereof, and the said request, be referred till Tuesday next.

"Die Martis, 9 A. M. 22 October, 1734.

"The House according to Order proceeded to take into consideration the request of a Committee of Council, delivered to a Committee of this House, on the 16th instant, as likewise of

the several papers therein referred to. And after several debates upon the subject-matters, it was ordered, That the said papers and requests lie on the table."

The Council finding the General Assembly would not do any thing about it, they sent the following Message to the House:

"Die Sabbati, 9 A. M. 2 November, 1734.

"A Message from the Council by Mr. Livingston, desiring this House to return by him to that board the several seditious Journals of Zenger's, No. 7, 47, 48, 49, which were delivered by a Committee of that Board to a Committee of this House the 17th of October last, together with the proposals of the Committee of that Board, delivered therewith to a Committee of this House; and then withdrew."

On Tuesday the 5th of November, 1734, the quarter-sessions for the city of New York began, when the sheriff delivered to the Court an Order, which was read in these words:

"At a Council held at Fort George, in New York, the 2d of November, 1734: PRESENT; His Excellency William Cosby, Captain General and Governor in Chief, &c. Mr. Clarke, Mr. Harrison, Dr. Colden,* Mr. Livingston, Mr. Kennedy, Mr. Chief Justice, Mr. Cortlandt, Mr. Lane, Mr. Horsmanden.

"Whereas by an Order of this Board, of this day, some of John Peter Zenger's Journals, entitled, 'The New York Weekly Journal, 'containing the freshest Advices, foreign and 'domestic,' No. 7, 47, 48, 49, were ordered to be burnt by the hands of the common hangman, or whipper, near the pillory in this city, on Wednesday the 6th instant, between the hours of eleven and twelve in the forenoon, as containing in them many things tending to sedition and faction, to bring his majesty's government into contempt, and to disturb the peace thereof, and containing in them likewise not only refections upon his excellency the governor in particular, the legislature in general, tut also upon the most considerable persons in the most distinguished stations in this province: it is therefore ordered, That the mayor and magistrates of this city do attend at the burning of the several Papers or Journals aforesaid, numbered as above mentioned.

"FRED. MORRIS, D. Cl. Con."

"To Robert Lurling, esq. mayor of the city of New York, and the rest of the magistrates for the said city and county."

"Upon reading of which Order, the Court forbad the entering thereof in their books at that time; and many of them declared, that if it should be entered, they would have their protest entered against it.

On Wednesday the 6th of November, the sheriff of New York moved the Court of Quarter-sessions to comply with the said Order; upon which one of the aldermen offered a Protest, which was read by the clerk, and approved of by all the aldermen, either expressly or by not objecting to it, and is as followeth:

"Whereas an Order has been served on this Court, in these words." [The Order as above inserted.] "And whereas this Court conceives, they are only to be commanded by the king's mandatory writs, authorised by law, to which they conceive they have the right of shewing cause why they don't obey them, if they believe them improper to be obeyed; or by Orders, which have some known laws to authorise them; and whereas this Court conceives this Order to be no mandatory writ warranted by law, nor knows of no law that authorises the making the Order aforesaid; so they think themselves under no obligation to obey it: which obedience, they think would be in them, an opening a door for arbitrary commands, which, when once opened, they know not what dangerous consequences may attend it. Wherefore this Court conceives itself bound in duty (for the preservation of the rights of this corporation, and, as much as they can, the liberty of the press, and the people of the province, since an assembly of the province, and several grand juries, have refused to meddle with the papers, when applied to by the Council) to protest against the Order aforesaid, and to forbid all the members of this corporation to pay any obedience to it, until it be shewn to this Court, that the same is authorised by some known law, which they neither know, nor believe that it is."

Upon reading of which, it was required of the honourable Francis Harrison, recorder of this corporation, and one of the members of the Council, (present at making the said Order) to shew by what law or authority the said Order was made; upon which he spoke in support of it, and cited the case of Dr. Sacheverell's Sermon, which was by the House of Lords ordered to be burnt by the hands of the hangman, and that the mayor and aldermen of London should attend the doing of it. To which one of the aldermen answered to this purpose: That he conceived the case was no ways parallel, because Dr. Sacheverell and his Sermon were impeached by the House of Commons of England, which is the grand jury of the nation, and representative of the whole people of England: that this their impeachment they prosecuted before the House of Lords, the greatest court of justice of Britain, and which, beyond memory of man, has had cognizance of things of that nature: that there Sacheverell had a fair hearing in defence of himself and of his Sermon; and after that fair hearing, he and his Sermon were justly, fairly, and legally condemned: that be had read the case of Dr.

* "N. B. Dr. Colden was that day at Esopus, 90 miles from New York, though mentioned as present in council."—*Former Edition.*

Sacheverell, and thought he could charge his memory, that the judgment of the House of Lords in that case was, That the mayor and sheriffs of London and Middlesex only should attend the burning of the Sermon, and not the aldermen; and farther he remembered, that the Order upon that judgment was only directed to the sheriffs of London, and not even to the mayor, who did not attend the doing it: and farther said, that would Mr. Recorder shew, that the governor and council had such authority as the House of Lords, and that the papers ordered to be burnt were in like manner legally prosecuted and condemned, there the case of Dr. Sacheverell might be to the purpose; but without shewing that, it rather proved that a censure ought not to be pronounced, till a fair trial *by* a competent and legal authority were first had. Mr. Recorder was desired to produce the books from whence he cited his authorities, that the Court might judge of them themselves, and was told, that if he could produce sufficient authorities to warrant this Order, they would readily obey it, but otherwise not. Upon which he said, he did not carry his books about with him. To which it was answered, he might send for them, or order a constable to fetch them. Upon which he arose, and at the lower end of the table he mentioned, that bishop Bumet's Pastoral Letter was ordered, by the House of Lords, to be burnt* by the high bailiff of Westminster; upon which he abruptly went away, without waiting for an answer, or promising to bring his books, and did not return sitting the Court.

After Mr. Recorder's departure, it was moved, that the Protest should be entered; to which it was answered, that the Protest could not be entered, without entering also the Order, that it was not fit to take any notice of it; and therefore it was proposed that no notice should be taken in their books of either, which was unanimously agreed to by the Court.

The sheriff then moved, that the Court would direct their whipper to perform the said Order; to which it was answered, That as he was the officer of the corporation, they would give no such Order. Soon after which the Court adjourned, and did not attend the burning of the papers. Afterwards about noon, the sheriff, after reading the numbers of the several papers which were ordered to be burnt, delivered them unto the hands of his own negro, and ordered him to put them into the fire, which he did; at which Mr. Recorder, Jeremiah Dunbar, esq. and several of the officers of the garrison, attended.

On the Lord's day, the 17th of November, 1734, I was taken and imprisoned by virtue of a warrant in these words:

"At a Council held at Fort George in New York, the 2d day of November, 1734. PRESENT; his Excellency William Cosby, Captain General and Governor in Chief, &c. Mr. Clarke, Mr. Harrison, Mr. Livingston, Mr. Kennedy, Chief-Justice, Mr. Cortlandt, Mr. Lane, Mr. Horsmanden,

"It is ordered, that the sheriff for the city of New York do forthwith take and apprehend John Peter Zenger, for printing and publishing several seditious libels, dispersed throughout his Journals or News-papers, intituled, 'The New York Weekly Journal, containing the freshest advices, foreign and domestic;' as having in them many things tending to raise factions and tumults among the people of this province, inflaming their minds with contempt of his majesty's government, and greatly disturbing the peace thereof; and upon his taking the said John Peter Zenger, to commit him to the prison or common jail of the said city and county.

"FRED. MORRIS, D. Cl. Con."

And being, by virtue of that warrant, so imprisoned in the jail, I was for several days denied the use of pen, ink, and paper, and the liberty of speech with any persons. — Upon my commitment, some friends soon got a Habeas Corpus to bring me before the chief-justice, in order to my discharge, or being bailed; on the return whereof, on Wednesday the 20th of November, my counsel delivered exceptions to the return, and the chief-justice ordered them to be argued publicly at the city hall, on the Saturday following.

On Saturday the 23d of November, the said exceptions came to be argued, by James Alexander and William Smith, of counsel for me, and by Mr. Attorney General, and Mr. Warrel, of counsel against me, in presence of some hundreds of the inhabitants; where my counsel (saving the benefit of exception to the illegality of the warrant) insisted that I might be admitted to reasonable bail. And to shew that it was my right to be so, they offered Magna Charta, the Petition of Right, 3 Car. the Habeas Corpus Act of 31 Car. 2. which directs the sum, in which bail is to be taken, to be, 'according to the quality of the prisoner, and nature of the offence.' Also 2 Hawkins, cap. 15, §. 5, in these words, 'But justices must take care, that, under pretence of demanding sufficient security, they do not make so excessive a demand as, in effect, amounts to a denial of bail; for this is looked on as a great grievance, and is complained of as such, by 1 W. & M. sess. 2, by which it is declared, 'That excessive bail ought not to be required,' It was also shewn, that the Seven Bishops, who, in king James the 2d's time, were charged with the like crime that I stood charged with, were admitted to bail on their own recognizances,

* Bishop Kennet says, that this Letter seemed to be sacrificed to a poor jest on the author's name [Burnet]. Complete Hist. of Eng. vol. 3, p. 587, 2 Ed. in Lond, 1719. — *Former Edition.*

the archbishop in 200*l.* and each of the other six in 100*l* a-piece only. Sundry other authorities and arguments were produced and insisted on by my counsel, to prove my right to be admitted to moderate bail, and to such bail as was in my power to give; and sundry parts of history they produced, to shew how much the requiring excessive bail had been reseated by parliament. And, in order to enable the Court to judge what surety was in my power to give, I made affidavit, That (my debts paid) I was not worth forty pounds, (the tools of my trade, and wearing-apparel excepted.)

Some warm expressions (to say no worse of them) were dropt on this, occasion, sufficiently known and resented by the auditory, which, for my part, I desire may be buried in oblivion: upon the whole, it was ordered, that I might be admitted to bail, myself in 400*l.* with two sureties, each in 200*l.* and that I should be remanded till I gave it. And as this was ten times more than was in my power to countersecure any person in giving bail for me, I conceived I could not ask any to become my bail on these terms; and therefore I returned to jail, where I lay until Tuesday the 28th of January, 1734-5, bring the last day of that term; and the grand jury having found nothing against me, I expected to have been discharged from my imprisonment: but my hopes proved Tain; for the Attorney General then charged me, by information, for printing and publishing parts of my Journals No. 13 and 23, as being false, scandalous, malicious, and seditious.

To this information my Counsel appeared, and offered Exceptions, leaving a blank for inserting the judges commissions, which the Court were of opinion not to receive till those blanks were filled up. In the succeeding vacation the judges gave copies of their commissions; and on Tuesday the 15th of April last, the first day of the succeeding term, my Counsel offered these Exceptions; which were as follow:

"The ATTORNEY GENERAL, *v.* JOHN PETER ZENGER.—On Information for a Misdemeanor.

"Exceptions humbly offered by John Peter Zenger, to the honourable James de Lancey, esq. to judge in this cause.

"The defendant comes and prays hearing of the commission, by virtue of which the honourable James de Lancey, esq. claims the power and authority to judge in this cause, and it is read to him in these words:

"'George the 2d, by the grace of God, 'of Great Britain, France and Ireland, king, 'defender of the faith, &c. To our trusty 'and well beloved James de Lancey, esq. 'We, reposing special trust and confidence in 'your integrity, ability and learning, have 'assigned, constituted and appointed, and we 'do by these presents assign, constitute, and 'appoint you, the said James de Lancey, to 'be chief justice in and over our province of 'New York, in America, in the room of Lewis 'Morris, esq. giving and by these presents 'granting unto you full power and lawful au-'thority to hear, try, and determine all pleas 'whatsoever, civil, criminal, and mixt, accord-'ing to the laws, statutes, and customs of our 'kingdom of England, and the laws and usages 'of our said province of New York, not being 'repugnant thereto, and executions of all judg-'ments of the said court to award, and to make 'such rules and orders in the said court, as may 'be found convenient and useful, and, as near 'as may be, agreeable to the rules and orders 'of our courts of King's-bench, Common 'Pleas, and Exchequer in England. To have, 'hold, and enjoy the said office or place of chief 'justice in and over our said province, with all 'and singular the rights, privileges, profits and 'advantages, salaries, fees and perquisites unto 'the said place belonging, or in any ways ap-'pertaining, in as full and ample manner as 'any person heretofore chief justice of our said 'province hath held and enjoyed, or of right 'ought to have held and enjoyed the same, to 'you the said James De Lancey, esq. for and 'during our will and pleasure. In testimony 'whereof we have caused these our letters to 'be made patent, and the. great seal of our 'province of New York to be hereunto affixed. 'Witness our trusty and well-beloved William 'Cosby, esq. our captain-general and governor 'in chief of our provinces of New York, New 'Jersey, and the territories thereon depending 'in America, vice-admiral of the same, and 'colonel in our army, at Fort George in New 'York, the 21st day of August, in the 7th year 'of our reign, Anno Domini, 1733.'

"Which being read and heard, the said John Peter Zenger, by protestation not confessing nor submitting to the power of any other person to judge in this cause, doth except to the power of the honourable James de Lancey, esq. aforesaid, to judge in this cause, by virtue of the commission aforesaid, for these reasons, viz.

"1st. For that the authority of a judge of the King's-bench, in that part of Great Britain called England, by which the cognizance of this cause is claimed, is by the said commission granted to the honourable James de Lancey, esq. aforesaid, only during pleasure; whereas that authority (by a statute in that case made and provided) ought to be granted during good behaviour.

"2nd. For that, by the said commission, the jurisdiction and authority of a justice of the court of Common Pleas at Westminster, in that part of Great Britain called England, is granted to the said James de Lancey, esq. which jurisdiction and authority cannot be granted to, and exercised by, any one of the justices of the King's-beneh.

"3rd. For that the form of the said commission is not founded on, nor warranted by the common law, nor any statute of England, nor of Great Britain, nor any act of assembly of this colony.

"4th. For that it appears, *by* the commis-

sion aforesaid, that the same is granted under the sea! of this colony *by* his excellency William Cosby, esq. governor thereof; and it appears not, that the same was granted, neither was the same granted, by and with the advice and consent of his majesty's council of this colony; without which advice and consent, his excellency could not grant the same.

"Wherefore, and for many other defects in the said commission, this defendant humbly hopes, that the honourable James de Lancey, esq. will not take cognizance of this cause, by virtue of the commission aforesaid.

"JAMES ALEXANDER.
"WILLIAM SMITH."

The Exceptions to the Commission of the honourable Frederick Phillipse, esq. were the same with the foregoing, including therein his commission, which is in these words:

'George the 2d, by the grace of God, of ' Great Britain, France and Ireland, king, de- ' fender of the faith, &c. To our trusty and ' well-beloved Frederick Phillipse, esq. greet- ' ing: whereas it is our care, that justice be ' duly administered to our subjects within our ' province of New York, and territories thereon ' depending in America; and we, reposing ' especial confidence in your integrity, ability ' and learning, have assigned, constituted and ' appointed, and we do by these presents as- ' sign, constitute and appoint you, the said ' Frederick Phillipse, to be second justice of ' our supreme court of judicature for our pro- ' vince of New York, in the room of James de ' Lancey, esq. giving and granting to you, the ' said Frederick Phillipse, full power and au- ' thority, with our other justices of our said ' supreme court, to hear, try, and determine all ' pleas whatsoever, civil, criminal, and mixed, ' according to the laws, statutes and customs ' of our kingdom of England, and the laws and ' usages of our said province of New York, not ' being repugnant thereto; and executions of all ' judgments of the said court to award, and to act ' and do all things, which any of our justices of ' either bench, or barons of the Exchequer, in ' our said kingdom of England, may or ought ' to do, and also to assist in the making such ' rules and orders in our said court, as shall be ' for the good and benefit of our said province; ' and, as near as conveniently may be, to the ' rules and orders of our said courts in our said ' kingdom of England: to have, hold, and en- ' joy the said office or place of second justice of ' our said province of New York, together with ' all and singular the rights, privileges, salaries, ' fees, perquisites, profits and advantages there- ' to, now or at any time heretofore belonging, ' or in any wise of right appertaining, unto you, ' the said Frederick Phillipse, for and during ' our pleasure. In testimony whereof, we have ' caused these our letters to be made patent, and ' the great seal of our said province of New York ' to be hereunto affixed. Witness our trusty ' and well-beloved William Cosby, esq. our ' captain general and governor in chief of our ' provinces of New York, New Jersey, and ' territories thereon depending in America, ' vice-admiral of the same, and colonel in our ' army, &c. at Fort George in New York, the ' 21st day of August, in the 7th year of our ' reign, Anno Domini, 1733.

'FRED. MORRIS, D. Secretary.'

Tuesday, April 15, 1735.

Mr. Alexander offered the above Exceptions to the Court, and prayed that they might be filed. Upon this the chief justice said to Mr. Alexander and Mr. Smith, that they ought well to consider the consequences of what they offered. To which both answered, that they had well considered what they offered, and all the consequences. And Mr. Smith added, that he was so well satisfied of the right of the subject to take an exception to the commission of a judge, if he thought such commission illegal,—that he durst venture his life upon that point. As to the validity of the Exceptions then offered, he said, he took that to be a second point; but was ready to argue them both, if their honours were pleased to hear him. To which the chief justice replied, that he would consider the Exceptions in the morning; and ordered the clerk to bring them to him.

Wednesday, April 16.

The chief justice delivered one of the Exceptions to the clerk, and justice Phillipse the other; upon which Mr Smith arose, and asked the judges, whether their honours would hear him upon these two points. 1st. That the subject has a right to take such Exceptions, if they judged the commission illegal. 2dly. That the Exceptions tendered were legal and valid. To which the chief justice said, that they would neither hear nor allow the Exceptions; for (said he) you thought to have gained a great deal of applause and popularity by opposing this court, as you did the court of Exchequer; but you have brought it to that point, that either we must go from the bench, or you from the bar: therefore we exclude you and Mr. Alexander from the bar; and delivered a paper to the clerk, and ordered it to be entered; which the clerk entered accordingly, and returned the paper to the chief justice; after which the chief justice ordered the clerk to read publicly what he had written; an attested copy whereof follows:

"At a Supreme Court of Judicature held for the Province of New York, at the City-Hall of the City of New York, on Wednesday the 16th day of April, 1735. PRESENT; the Hon. James de Lancey, esq. chief justice. The Hon. Frederick Phillipse, esq. second justice.

"James Alexander, esq. and William Smith, attornies of this Court, having presumed, (notwithstanding they were forewarned by the Court of their displeasure, if they should do it) to sign, and having actually signed, and put into court. Exceptions, in the name of John

Peter Zenger; thereby denying the legality of the judges their commissions; though in the usual form, and the being of this Supreme Court. It is therefore ordered, that, for the said contempt, the said James Alexander, and William Smith, be excluded from any farther practice in this Court; and that their names be struck out of the roll of attornies of this Court. Per Cur'. JAMES LYNE, Cl."

After the order of the Court was read, Mr. Alexander asked, whether it was the order of Mr. Justice Phillipse as well as of the chief-justice? To which both answered, that it was their order; upon which Mr. Alexander added. That it was proper to ask that question, that they might know how to have their relief: he farther observed to the Court, upon reading of the Order, that they were mistaken in their wording of it, because the Exceptions were only to their commissions, and not to the being of the Court, as is therein alleged; and prayed that the Order might be altered accordingly. The chief-justice said, they conceived the Exceptions were against the being of the Court. Both Mr. Alexander and Mr. Smith denied that they were, and prayed the chief-justice to point to the place that contained such exceptions; and further added, that the Court might well exist, though the commissions of all the judges were void; which the chief-justice confessed to be true: and therefore they prayed again, that the Order in that point might be altered; but it was denied.

Then Mr. Alexander desired to know, whether they over-ruled or rejected the Exceptions? The chief-justice said, He did not understand the difference; to which said Alexander replied, that if he rejected the Exceptions, then they could not appear upon the proceedings, and in that case the defendant was entitled to have them made part of the proceedings by bills of exceptions : but if they over-ruled them, then, by so doing, they only declared them, not sufficient, to hinder them from proceeding by virtue of those commissions; and the Exceptions would remain as records of the Court, and ought to be entered on the record of the cause, as part of the proceedings. The chief-justice said, They must remain upon the file, to warrant what we have done: as to being part of the record of the proceedings in that cause, he said, You may speak to that point to-morrow.

Friday, April 18th, 1735.

Mr. Alexander signified to the Court, that on Wednesday last their honours had said, that the counsel for Mr. Zenger might speak to the point, concerning the rejecting or overruling of Mr. Zenger's Exceptions, on the morrow: to which the chief-justice answered, that he said, You may get some person to speak to that point on the morrow, not meaning that the said Alexander should speak to it, that being contrary to the Order. Both Mr. Alexander and Mr. Smith said, they understood it otherwise.

They both also mentioned, that it was a doubt, whether by the words of the Order, they were debarred of their practice as counsel, as well as attornies, whereas they practised in both capacities. To which the chief-justice answered, That the Order was plain, "That James Alexander, esq. and William Smith, were debarred and excluded from their whole practice at this bar; and that the Order was intended to bar their acting both as counsel and as attornies, and that it could not be construed otherwise." And it being asked Mr. Phillipse, whether he understood the Order so? He answered, That he did.

Upon this exclusion of my counsel, I petitioned the Court to order counsel for my defence; who thereon appointed John Chambers, esq. who pleaded Not Guilty for me to the information. But as to the point, whether my Exceptions should be part of the record, as was moved by my former counsel, Mr. Chambers thought not proper to speak to it. Mr. Chambers also moved, that a certain day in the next term might be appointed for my trial, and for a Struck Jury; whereupon my trial was ordered to be on Monday the 4th of August, and the Court would consider till the first day of next term, whether I should have a struck jury or not; and ordered, that the sheriff should, in the mean time, at my charge, return the freeholders book.

At a Supreme Court of Judicature held for the Province of New York, before the honourable James De Lancey, esq. Chief-Justice of the said Province; and the honourable Frederick Phillipse, esq. second Justice of the said Province.

On Tuesday the 29th of July, 1735, the Court opened; and on motion of Mr. Chambers for a Struck Jury, pursuant to the rule of the preceding term, the Court were of opinion, that I was entitled to have a Struck Jury; and that evening, at five of the clock, some of my friends attended the clerk, for striking the jury; when, to their surprize, the clerk, instead of producing the freeholders book, to strike the jury out of it in their presence, as usual, he produced a list of 48 persons, whom, he said, he had taken out of the freeholders book: my friends told him, that a great number of these persons were not freeholders; that others were persons holding commissions and offices at the governor's pleasure; that others were of the late displaced magistrates of this city, who must be supposed to have resentment against me, for what I had printed concerning them; that others were the governor's baker, taylor, shoe-maker, candle-maker, joiner, &c. that as to the few indifferent men that were upon that list, they had reason to believe (as they had heard) that Mr. Attorney had a list of them to strike them out; and therefore requested, that be would either bring the freeholders book, and chuse out of it 48 unex-

ceptionable men in their presence, as usual; or else, that he would hear their objections, particularly to the list he offered; and that he would put impartial men in the place of those against whom they could shew just objections. Notwithstanding this, the clerk refused to strike the jury out of the freeholders book, and refused to hear any objections to the persons on his list; but told my friends, if any objections they had to any persons, they might strike those persons out; to which they answered, There would not remain a jury, if they struck out all the exceptionable men; and, according to the custom, they had only a right to strike out 12.

But finding no arguments could prevail with the clerk to hear their objections to his list, nor to strike the jury as usual, Mr. Chambers told him, he must apply to the Court, which the next morning he did; and the Court, upon his motion, ordered, That the 48 should be struck out of the freeholders book, as usual, in the presence of the parties; and that the clerk should hear objections to persons proposed to be of the 48, and allow of such exceptions as were just. In pursuance of that order, a jury was that evening struck, to the satisfaction of both parties, though my friends and counsel insisted on no objections but want of freeholders; and though they did not insist, that Mr. Attorney General (who was assisted by Mr. Blagge) should shew any particular cause, against any persons he disliked, but acquiesced that any person he disliked should be out of the 48.

Before James De Lancey. esq. Chief-justice of the province of New York, and Frederick Phillipse, second judge, came on my trial, "on the fourth day of August, 1735, upon an information for printing and publishing two news-papers, which were called libels against our governor and his administration.

The defendant John Peter Zenger, being called, appeared.

And the sheriff returned his Venire for the trial of this said cause.

Mr. *Chambers*, of counsel for the defendant. I humbly move your honours, that we may have justice done by the sheriff, and that he may return the names of the jurors in the same order as they were struck.

Mr. *Chief Justice.* How is that? Are they not so returned?

Mr. *Chambers.* No, they are not; for some of the names that were last set down in the pannel, are now placed first.

Mr. *Chief Justice.* Make out that, and you shall be righted.

Mr. *Chambers.* I have the copy of the pannel in my hand, as the jurors were struck; and if the clerk will produce the original, signed by Mr. Attorney and myself, your honour will see our complaint is just.

Mr. *Chief-Justice.* Clerk, is it so? Look upon that copy; is it a true copy of the pannel as it was struck?

Clerk. Yes, I believe it is.

Mr. *Chief Justice.* How came the names of the jurors to be misplaced in the pannel annexed to the Venire?

Sheriff. I have returned the jurors in the same order In which the clerk gave them to me.

Mr. *Chief-Justice.* Let the names of the jurors be ranged in the order they were struck, agreeable to the copy here in court.

Which was done accordingly. And the jury, whose names were as follow, were called and sworn:

JURY.

Hermanus Rutgers,	Egbert Van Borson,
Stanley Holmes,	Tho. Hunt, Foreman,
Edward Man,	Benjamin Hildreth,
John Bell,	Abraham Keteltas,
Samuel Weaver,	John Goelet,
Andries Marsehalk,	Hercules Wendover.

Mr. Attorney General opened the information, which was as follows:

Att. Gen. May it please your honours, and you gentlemen of the jury; the information now before the Court, and to which the defendant Zenger, has pleaded Not Guilty, is an information for printing and publishing a false, scandalous, and seditious libel, in which his excellency, the governor of this province, who is the king's immediate representative here, is greatly and unjustly scandalized, as a person that has no regard to law nor justice; with much more, as will appear upon reading the informations. This [practice] of libelling is what has always been discouraged, as a thing that tends to create differences among men, ill blood among the people, and oftentimes great bloodshed between the party libelling and the party libelled. There can be no doubt but you, gentlemen of the jury, will have the same ill opinion of such practices as the judges have always shewn upon such occasions: But i shall say no more at this time, until you hear the information, which is as follows:

"New-York, Supreme Court.

"Of the Term of January, in the eighth year of the reign of our Sovereign Lord King George the Second, &c.

"New York, *ss.* Be it remembered, that Richard Bradley, esq. Attorney General of our sovereign lord the king for the province of New-York, who for our said lord the king in this part prosecutes, in his own proper person comes here into the Court of our said lord the king, and for our said lord the king gives the Court here to understand, and be informed, that John Peter Zenger, late of the city of New-York, printer, (being a seditious person, and a frequent printer and publisher of false news and seditious libels, and wickedly and maliciously devising the government of our said lord the king of this his majesty's province of New-York, under the administration of his

excellency William Cosby, esq. captain-general and governor in chief of the said province, to traduce, scandalize and vilify, and his excellency the said governor, and the ministers and officers of our said lord the king, of and for the said province, to bring into suspicion, and the ill opinion of the subjects of our said lord the king residing within the said province) the 28th day of January in the 7th year of the reign of our sovereign lord George the Second, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, &c. at the city of New-York, did falsely, seditiously and scandalously print and publish, and cause to be printed and published a certain false, malicious, seditious, scandalous libel, intituled, 'The New-York Weekly Journal, containing the freshest advices, foreign and domestic;' in which libel (of and concerning his excellency the said governor, and the ministers and officers of our said lord the king, of and for the said province) among other things therein contained are the words, 'Your appearance in 'print, at last, gives a pleasure to many, 'though most wish you bad come fairly into 'the open field, and not appeared behind re-'trenchments made of the supposed laws 'against libelling, and of what other men have 'said and done before: These retrenchments, 'gentlemen, may soon be shewn 1o you, and 'all men, to be weak, and to have neither law 'nor reason for their foundation, so cannot long 'stand you in stead: Therefore, you had much 'better as yet leave them, and come to what 'the people of this city and province [the city 'and province of New-York meaning] think 'are the points in question; (to wit) they '[the people of the city and province of New-'York meaning] think, as matters now stand, 'that their liberties and properties are pre-'carious, and that slavery is like to be in-'tailed on them and their posterity, if some 'past things be not amended; and this 'they collect from many past proceedings.' [Meaning many the past proceedings of his excellency the said governor, and of the ministers and officers of our said lord the king, of and for the said province.] And the said attorney General of our said lord the king, for our said lord the king, likewise gives the Court here to understand, and be informed, that the said John Peter Zenger afterwards, (to wit) the *Bill* day of April, in the 7th year of the reign of our said lord the king, at the city of New York aforesaid, did falsely, seditiously, and scandalously print and publish, and cause to be printed and published, another false, malicious, seditious and scandalous libel, entitled, 'The 'New York Weekly Journal, containing the 'freshest Advices foreign and domestic.' In which libel, [of and concerning the government of the said province of New York, and of and concerning his excellency the said governor, and the ministers and officers of our said lord the king, of and for the said province] among other things therein contained are these words, 'One of our neighbours [one of the inhabitants 'of New Jersey meaning] being in company, 'observing the strangers [some of the inha-'bitants of New York meaning] full of com-'plaints, endeavoured to persuade them to re-'move into Jersey; to which it was replied, 'That would be leaping out of the frying-pan 'into the fire: for, says he, we both are under 'the same governor [his excellency the said 'governor meaning] and your Assembly have 'shewn with a witness what is to be expected 'from them; one that was then moving to 'Pensylvania, [meaning one that was then 'removing from New York with intent to re-'side at Pensylvania] to which place it is re-'ported several considerable men are removing '[from New York meaning] expressed in terms 'very moving, much concern for the circum-'stances of New York [the bad circumstances 'of the province and the people of New York 'meaning] seemed to think them very much 'owing to the influence that some men [whom 'he called tools] had in the administration '[meaning the administration of government 'of the said province of New York] said he was 'now going from them, and was not to be hurt 'by any measures they should take, but could 'not help having some concern for the welfare 'of his countrymen, and should be glad to bear 'that the Assembly [meaning the General As-'sembly of the province of New York] would 'exert themselves as became them, by shew-'ing that they have the interest of their coun-'try more at heart, than the gratification of any 'private view of any of their members, or being 'at all affected by the smiles or frowns of a go-'vernor, [his excellency, the said governor, 'meaning] both which ought equally to be de-'spised, when the interest of their country is at 'stake. You, says he, complain of the law-'yers, but I think the law itself is at an end. 'We [the people of the province of New York 'meaning] see men's deeds destroyed, judges 'arbitrarily displaced, new courts erected, with-'out consent of the legislature [within the pro-'vince of New York meaning] by which it 'seems to me, trials by juries are taken away 'when a governor pleases, [his excellency the 'said governor meaning] men of known es-'tates denied their votes, contrary to the re-'ceived practice, the best expositor of any law: 'Who is then in that province [meaning the 'province of New York] that call [can call 'meaning] any thing his own, or enjoy any 'liberty [liberty meaning] longer than those in 'the administration [meaning the administra-'tion of government of the said province of 'New York] will condescend to let them do it, 'for which reason I have left it [the province 'of New York meaning] as I believe more 'will;' to the great disturbance of the peace of the said province of New York, to the great scandal of our said lord the king, of his excellency the said governor, and of all others concerned in the administration of the government of the said province, and against the peace of our sovereign lord the king, his crown and dignity, &c. Whereupon the said

Attorney General of our said lord the king, for our said lord the king, prays the advisement of the Court here, in the premises, and the due process of the law, against him the said John Peter Zenger, in this part to be done, to answer to our said lord the king of and in the premises, &c. R. BRADLEY, Attorney General."

To this information the defendant has pleaded Not Guilty, and we are ready to prove it.

Mr. Chambers has not been pleased to favour me with his notes, so I cannot, for fear of doing him injustice, pretend to set down his argument; but here Mr. Chambers set forth very clearly, "The nature of a libel, the great allowances that ought to be made for what men speak or write; that in all libels there must be some particular persons so clearly pointed out that no doubt must remain about who is meant; that he was in hopes Mr. Attorney would fail in his proof, as to this point; and therefore desired that he would go on to examine his witnesses."

Then Mr. Hamilton, who at the request of some of my friends, was so kind as to come from Philadelphia, to assist me on the trial, spoke:

Mr. *Hamilton.* May it please your honour: I am concerned in this cause on the part of Mr. Zenger, the defendant. The information against my client was sent me, a few days before I left home, with some instructions to let me know how far I might rely upon the truth of those parts of the papers set forth in the information, and which are said to be libellous. And though I am perfectly of the opinion with the gentleman who has just now spoke, on the same side with me, as to the common course of proceedings, I mean in putting Mr. Attorney upon proving, that my client printed and published those papers mentioned in the information; yet I cannot think it proper for me (without doing violence to my own principles) to deny the publication of a complaint, which, I think, is the right of every free-born subject to make, when the matters so published can be supported with truth; and therefore I'll save Mr. Attorney the trouble of examining his witnesses to that point; and I do (for my client) confess, that he both printed and published the two newspapers set forth in the information, and I hope in so doing he has committed no crime.

Mr. *Attorney.* Then, if your honour pleases, since Mr. Hamilton has confessed the fact, I think our witnesses may be discharged; we have no further occasion for them.

Mr. *Hamilton.* If you brought them here only to prove the printing and publishing of these newspapers, we have acknowledged that, and shall abide by it.

Here my journeyman and two sons (with several others subpœna'd by Mr. Attorney, to give evidence against me) were discharged, and there was silence in the Court for some time.

Mr. *Chief Justice.* Well, Mr. Attorney, will you proceed?

Mr. *Attorney.* Indeed, Sir, as Mr. Hamilton has confessed the printing and publishing these libels, I think the jury must find a verdict for the king; for supposing they wore 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.

Mr. *Hamilton,* Not so neither, Mr. Attorney, there are two words to that bargain: I hope it is not our bare printing and publishing a paper, that will make it a libel: you will have something more to do, before you make my client a libeller; for the words themselves must be libellous, that is false, scandalous, and seditious, or else they are not guilty.

As Mr. *Attorney* has not been pleased to favour us with his argument which he read, or with the notes of it, we cannot take upon us to set down his words, but only to shew the book cases he cited, and the general scope of his argument, which he drew from those authorities. 'He observed upon the excellency, as well as use of government, and the great regard and reverence which had been constantly paid to it, both under the law and the gospel. That by government we were protected in our lives, religion and properties; and that, for these reasons, great care had always been taken to prevent every thing that might tend to scandalize magistrates, and others concerned in the administration of the government, especially the supreme magistrate. And that there were many instances of very severe judgments, and of punishments inflicted upon such as had attempted to bring the government into contempt; by publishing false and scurrilous libels against it, or by speaking evil and scandalous words of men in authority; to the great disturbance of the public peace.' And to support this, he cited 5 Coke 121. (I suppose it should be 125.) Wood's Instit. 430. 2 Lilly 168. 1 Hawkins 73. 11. 6. From these books he insisted, 'That a libel was a malicious defamation of any person, expressed either in printing or writing, signs or pictures, to asperse the reputation of one that is alive, or the memory of one that is dead; if he is a private man, the libeller deserves a severe punishment, but if it is against a magistrate, or other public person, it is a greater offence; for this concerns not only the breach of the peace, but the scandal of the government; for what greater scandal of government can there be, than to have corrupt or wicked magistrates to be appointed by the king, to govern his subjects under him? And a greater imputation to the state cannot be, than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in, or concerning the administration of justice.' And from the same books Mr Attorney insisted, that whether the person defamed is a private man or a magistrate, whether living or dead, whether the libel is true or false, or if the party against whom it is made is of good or evil fame, it is nevertheless, a libel.

For in a settled state of government, the party grieved ought to complain for every injury done him, in the ordinary course of the law. And as to its publication, the law had taken so great care of men's reputations, that if one maliciously repeats it, or sings it in the presence of another, or delivers the libel or a copy of it over, to scandalize the party, he is to be punished as a publisher of a libel. He said it was likewise evident, that libelling was an offence against the law of God. Acts xxiii. 5. Then, said Paul, I wist not, brethren, that he was the high priest: For it is written, Thou shalt not speak evil of the ruler of the people. 2 Peter ii. 10. Despise government, presumptuous are they, self-willed, they are not afraid to speak evil of dignities, &c. He then insisted that it was clear, both by the law of God and man, that it was a very great offence to speak evil of, or to revile those in authority over us; and that Mr. Zenger had offended in a most notorious and gross manner, in scandalizing his excellency our governor, who is the king's immediate representative, and the supreme magistrate of this province: for can there be any thing more scandalous said of a governor than what is published in those papers? Nay, not only the governor, but both the council and assembly are scandalized; for there it is plainly said, That 'as matters now stand, their liberties and properties are precarious, and that slavery is like to be entailed on them and their posterity. And then again Mr. Zenger says, The assembly ought to despise the smiles or frowns of a governor; that he thinks the law is at an end; that we see men's deeds destroyed, judges arbitrarily displaced, new courts erected, without consent of the legislature; and, that it seems trials by juries are taken away when a governor pleases; that none can call any thing their own, longer than those in the administration will condescend to let them do it.'— And Mr. Attorney added, ' That he did not know what could be said in defence of a man, that had so notoriously scandalized the governor and principal magistrates and officers of the government, by charging them with depriving the people of their rights and liberties, and taking away trials by juries; and in short, putting an end to the law itself.— If this was not a libel, he said he did not know what was one. Such persons as will take those liberties with governors and magistrates, he thought, ought to suffer for stirring up sedition and discontent among the people. And concluded, by saying, that the government had been very much traduced and exposed by Mr. Zenger, before he was taken notice of; that at last it was the opinion of the governor and council, that he ought not to be suffered to go on, to disturb the peace of the government, by publishing such libels against the governor, and the chief persons in the government; and therefore they had directed this prosecution, to put a stop to this scandalous and wicked practice, of libelling and defaming his majesty's government and disturbing his majesty's peace.'

Mr. *Chambers* then summed up to the jury, observing with great strength of reason on Mr. Attorney's defect of proof, that the papers in the information were false, malicious or seditious, which was incumbent on him to prove to the jury, and without which they could not on their oaths say, that they were so as charged.

Mr. *Hamilton.* May it please your honour: I agree with Mr. Attorney, that government is a sacred thing; hut I differ very widely from him, when be would insinuate, that the just complaints of a number of men, who suffer under a bad administration, is libelling that administration. Had I believed that to be law, I should not have given the Court the trouble of hearing any thing that I could say in this cause. I own, when I read the information, I had not the art to find out (without the help of Mr. Attorney's innuendos) that the governor was the person meant in every period of that news-paper; and I was inclined to believe, that they were wrote by some, who from an extraordinary zeal for liberty, had misconstrued the conduct of some persons in authority into crimes; and that Mr. Attorney, out of his too great zeal for power, had exhibited this information, to correct the indiscretion of my client; and at the same time, to shew his Superiors the great concern he had, lest they should be treated with any undue freedom. But from what Mr. Attorney has just now said, to wit, That this prosecution was directed by the governor and council, and from the extraordinary appearance of people of all conditions which I observe in Court upon this occasion, I have reason to think, that those in the administration have by this prosecution something more in view, and that the people believe they have a good deal more at stake than I apprehended; and, therefore, as it is become my duty, to be both plain and particular in this cause, I beg leave to bespeak the patience of the Court.

I was in hopes, as that terrible court, where those dreadful judgments were given, and that law established, which Mr. Attorney has produced for authorities to support this cause, was long ago laid aside, as the most dangerous court to the liberties of the people of England that ever was known in that kingdom; that Mr, Attorney knowing this, would not have attempted to set up a Star-Chamber here, nor to make their judgments a precedent to us: for it is well known, that what would have been judged treason in those days for a man to speak, I think, has since not only been practised as lawful, but the contrary doctrine has been held to be law.

In Brewster's case, for printing, That the subjects might defend their rights and liberties by arms, in case the king should go about to destroy them, he was told, by the chief-justice, that it was a great mercy he was not proceeded against for his life; for that to say the king could be resisted, by arms in any case what-

soever, was express treason. And yet we see, since that time, Dr. Sacheverell was sentenced in the highest court in Great Britain, for saying, that such a resistance was not lawful. Besides, as times have made very great changes in the laws of England, so in my opinion, there is good reason that places should do so too.

Is it not surprising to see a subject, upon his receiving a commission from the king to be a governor of a colony in America, immediately imagining himself to be vested with all the prerogatives belonging to the sacred person of his prince? And which is yet more astonishing, to see that a people can be so wild as to allow of and acknowledge those prerogatives and exemptions, even to their own destruction? Is it so hard a matter to distinguish between the majesty of our sovereign, and the power of a governor of the plantations? Is not this making very free with our prince, to apply that regard, obedience and allegiance to a subject which is due only to our sovereign? And yet in all the cases which Mr. Attorney has cited to shew the duty and obedience we owe to the supreme magistrate, it is the king that is there meant and understood, though Mr. Attorney is pleased to urge them as authorities to prove the heinousness of Mr. Zenger's offence against the governor of New-York. The several plantations are compared to so many large corporations, and perhaps not improperly; and can any one give as instance, that the mayor or head of a corporation ever put in a claim to the sacred rights of majesty? Let us not (while we are pretending to pay a great regard to our prince and his peace) make bold to transfer that allegiance to a subject, which we owe to our king only. What strange doctrine is it, to press every thing for law here which is so in England? I believe we should not think it a favour, at present at least, to establish this practice. In England so great a regard and reverence is had to the judges, (C. 3 Inst. 140.) that if any man strikes another in Westminster-hall, while the judges are sitting, he shall lose his right-hand, and forfeit his land and goods for so doing. And though the judges here claim all the powers and authorities within this government, that a court of King's-bench has in England, yet I believe Mr. Attorney will scarcely say, that such a punishment could he legally inflicted on a man for committing such an offence, in the presence of the judges sitting in any court within the province of New-York. The reason is obvious; a quarrel or riot in New-York cannot possibly be attended with those dangerous consequences that it might in Westminster-hall; nor (I hope) will it be alleged, that any misbehaviour to a governor in the plantations, will, or ought to be judged of or punished, as a like undutifulness would be to our sovereign. From all which, I hope Mr. Attorney will not think it proper to apply his law-cases (to support the cause of his governor), which have only been judged, where the king's safety or honour was concerned. It will not be denied but that a freeholder, in the province of New-York, has as good a right to the sole and separate use of his lands, as a freeholder in England, who has a right to bring an action of trespass against his neighbour, for suffering his horse or cow to come and feed upon his lands, or eat his corn, whether inclosed or not inclosed; and yet I believe it would be looked upon as a strange attempt for one man here to bring an action against another, whose cattle and horses feed upon his grounds not inclosed, or indeed for eating and treading down his corn, if that were not inclosed. Numberless are the instances of this kind that might be given, to shew, that what is good law at one time, and in one place, is not so at another time, and in another place; so that I think the law seems to expect, that in these parts of the world, men should take care, by a good fence, to preserve their property from the injury of unruly beasts. And perhaps there may be as good a reason why men should take the same care, to make an honest and upright conduct a fence and security against the injury of unruly tongues.

Mr. *Attorney.* I don't know what the gentleman means, by comparing cases of freeholders in England with the freeholders here. What has this case to do with actions of trespass, or men's fencing their ground? The case before the Court is, Whether Mr. Zenger is guilty of libelling his excellency the governor of New-York, and indeed the whole administration of the government? Mr. Hamilton has confessed the printing and publishing, and I think nothing is plainer, than that the words in the information are scandalous, and tend to sedition, and to disquiet the minds of the people of this province. And if such papers are not libels, I think it may be said, there can be no such thing as a libel.

Mr. *Hamilton.* May it please your honour, I cannot agree with Mr. Attorney; for though I freely acknowledge that there are such things as libels, yet I must insist at the same time, that what my client is charged with, is not a libel; and I observed just now, that Mr. Attorney, in defining a libel, made use of the words, scandalous, seditious, and tend to disquiet the people; but (whether with design, or not, I will not say) he omitted the word false.

Mr. *Attorney.* I think I did not omit the word false: but it has been said already, that it may be a libel, notwithstanding it may be true.

Mr. *Hamilton.* In this I must still differ with Mr. Attorney; for I depend upon it, we are to be tried upon this information now before the Court and jury, and to which we hare pleaded Not Guilty, and by it we are charged with printing and publishing a certain false, malicious, seditious and scandalous libel. This word false must have some meaning, or else how came it there? I hope Mr. Attorney will not say he put it there by chance, and I am of opinion his information would not be good without it. But to shew that it is the princi-

pal thing, which, in my opinion, makes a libel, I put the case, the information had been for printing and publishing a certain true libel, would that be the same thing? Or could Mr. Attorney support such an information by any precedent in the English law? No, the falshood makes the scandal, and both make the libel. And to shew the Court that I am in good earnest, and to save the Court's time, and Mr. Attorney's trouble, I will agree; that if he can prove the facts, charged upon us to be false, I'll own them to be scandalous, seditious, and a libel. So the work seems now to be pretty much shortened, and Mr. Attorney has now only to prove the word false, in order to make us guilty.

Mr. *Attorney.* We have nothing to prove; you have confessed the printing and publishing; but if it was necessary (as I insist it is not), how can we prove a negative? But I hope some regard will be had to the authorities that have been produced; and that supposing all the words to be true, yet that will not help them; that chief justice Holt, in his charge to the jury, in the case of Tutchin, made no distinction, whether Tutchin's papers were true or false; and as chief justice Holt has made no distinction in that case, so none ought to he made here; nor can it be shewn in all that case, there was any question made about their being false or true.

Mr. *Hamilton.* I did expect to hear, that a negative cannot be proved; but every body knows there are many exceptions to that general rule; for if a man is charged with killing another, or stealing his neighbour's horse; if be is innocent in the one case, he may prove the man said to be killed to be really alive; and the horse said to be stolen, never to have been out of his master's stable, &c. and this I think is proving a negative. But we will save Mr. Attorney the trouble of proving a negative, and take the *onus probandi* upon ourselves, and prove those very papers that are called libels to be true.

Mr. *Chief Justice.* You cannot be admitted, Mr. Hamilton, to give the truth of a libel in evidence. A libel is not to be justified; for it is nevertheless a libel that it is true.

Mr. *Hamilton.* I am sorry the Court has so soon resolved upon that piece of law; I expected first to have been heard to that point. I have not in all my reading met with an authority that says, we cannot be admitted to give the truth in evidence, upon an information for a libel.

Mr. *Chief Justice.* The law is clear, that you cannot justify a libel.

Mr. *Hamilton.* I own that, may it please your honour, to he so; but with submission I understand the word, justified, there to be a justification by plea, as it is in the case upon an indictment for murder, or an assault and battery; there the prisoner cannot justify, but plead Not Guilty: yet it will not be denied but he may, and always is admitted to give the truth of the fact, or any other matter in evidence, which goes to his acquittal; as in murder he may prove it was in defence of his life, his house, &c. and in assault and battery, he may give in evidence, that the other party struck first, and in both cases he will be acquitted. And in this sense I understand the word justify, when applied to the case before the Court.

Mr. *Chief Justice.* I pray shew that you can give the truth of a libel in evidence.

Mr. *Hamilton.* I am ready, both from what I understand to be the authorities in the case, and from the reason of the thing, to shew that we may lawfully do so. But here I beg leave to observe, that informations for libels is a child, if not born, yet nursed up, and brought to full maturity, in the Court of the Star-Chamber.

is Mr. *Chief Justice.* Mr. Hamilton, you'll find yourself mistaken; for in Coke's Institutes you'll find informations for libels, long before the Court of Star-Chamber.

Mr. *Hamilton.* I thank your honour; that is an authority I did propose to speak to by and bye: but as you have mentioned it, I'll read that authority now. I think it is in the 3 Co. Inst. under title Libel; it is the case of John de Northampton for a letter wrote to Robert de Ferrers, one of the king's privy council, (Coke 3 Inst. 174,) concerning sir William Scot, chief justice, and his fellows; but it does not appear to have been upon information; and I have good grounds to say it was upon indictment, as was the case of Adam de Ravensworth, just mentioned before by lord Coke under the same title; and I think there cannot be a greater, at least a plainer authority for us, than the judgment in the case of John de Northampton, which my lord has set down at large. "Et quia prædictus Johannes cognovit dictam Literam per se scriptam Roberto de Ferrers, qui est de Concilio Regis, quæ litera continet in se nullam veritatem," &c. Now Sir, by this judgment it appears the libellous words were utterly false, and there the falshood was the crime, and is the ground of that judgment: and is not that what we contend for? Do not we insist that the falshood makes the scandal, and both make the libel? And how shall it be known whether the words are libellous, that is, true or false, but by admitting us to prove them true, since Mr. Attorney will not undertake to prove them false? Besides, is it not against common sense, that a man should be punished in the same degree for a true libel (if any such thing could be) as for a false one? I know it is said, that truth makes a libel the more provoking, and therefore the offence is the greater, and consequently the judgment should be the heavier. Well, suppose it were so, and let us agree for once, that truth is a greater sin than falshood: yet as the offences are not equal, and as the punishment is arbitrary, that is, according as the judges in their discretion shall direct to be inflicted; is it not absolutely necessary that they should know whether the libel is true or false, that they may by that means be able

to proportion the punishment? For would it not be a sad case, it the judges, for want of a due information, should chance to give as severe a judgment against a man for writing or publishing a lie, as for writing or publishing a truth? And yet this (with submission,) as monstrous and ridiculous as it may seem to be, is the natural consequence of Mr. Attorney's doctrine, that truth makes a worse libel than falshood, and must follow from his not proving our papers to be false, or not suffering us to prove them to be true. But this is only reasoning upon the case, and I will now proceed to shew, what in my opinion will be sufficient to induce the Court to allow us to prove the truth of the words, which in the information are called libellous. And first I think there cannot be a greater authority for us, than the judgment I just now mentioned in the case of John de Northampton, and that was in early times, and before the Star-chamber came to its fulness of power and wickedness. In that judgment, as I observed, the falshood of the letter which was wrote, is assigned as the very ground of the sentence. And agreeable to this it was urged by sir Robert Sawyer in the trial of the Seven Bishops,* that the falsity, the malice, and seditions of the writing, were all facts to be proved. But here it may be said, sir Robert was one of the Bishops' counsel, and his argument is not to be allowed for law: but I ofter it only to shew, that we are not the first who have insisted, that to make a writing a libel, it must be false. And if the argument of a counsel must have no weight, I hope there will be more regard shewn to the opinion of a judge; and therefore I mention the words of justice Powel in the same trial, where he says (of the Petition of the Bishops, which was called a libel, and upon which they were prosecuted by information,) that, to make it a libel, it must be false and malicious, and tend to sedition; and declared, as he saw no falshood or malice in it, he was of opinion, that it was no libel. Now, I should think this opinion alone, in the case of the king, and in a case which that king had so much at heart, and which to this day has never been contradicted, might be a sufficient authority, to entitle us to the liberty of proving the truth of the papers, which in the information are called false, malicious, seditious, and scandalous. If it be objected, that the opinion of the other three judges were against him, I answer, that the censures the judgments of these men have undergone, and the approbation justice Powel's opinion, his judgment and conduct upon that trial, has met with, and the honour he gained to himself, for daring to speak truth at such a time, upon such an occasion, and in the reign of such a king, is more than sufficient, in my humble opinion, to warrant our insisting on his judgment, as a full authority to our purpose; and it will lie upon Mr. Attorney to shew, that this opinion has, since that time, been denied to be law; or that justice Powel, who delivered it, has ever been condemned or blamed fur it, in any law-book extant at this day; and this, I will venture to say, Mr. Attorney cannot do. But, to make this point yet more clear, if any thing can be clearer, I will, on our part, proceed and shew, that in the case of sir Samuel Barnardiston, his counsel, notwithstanding he stood before one of the greatest monsters that ever presided in an English court (judge Jefferies,) insisted on the want of proof to the malice and seditious intent of the author, of what was called a libel. And in the case of Tutchin, which seems to be Mr. Attorney's chief authority, that case is against him; for he was, upon his trial, put upon shewing the truth of his papers, but did not; at least the prisoner was asked by the king's counsel,* whether he would say they were true? And as he never pretended that they were true, the chief justice was not to say so. But the point will still be clearer, on our side, from Fuller's case,† for falsely and wickedly causing to be printed a false and scandalous libel, in which (amongst other things) were contained these words. "Mr. Jones has also made oath, that he paid 5,000*l.* more, by the late king's order, to several persons in places of trust, that they might complete my ruin, and invalidate me for ever. Nor is this all; for the same Mr. Jones will prove, by undeniable witness and demonstration, that he has distributed more than 180,000*l.* in eight years last past, by the French king's order, to persons in public trust in this kingdom." Here, you see, is a scandalous and infamous charge against the late king; here is a charge, no less than high treason, against the men in public trust, for receiving money of the French king, then in actual war with the crown of Great Britain; and yet the Court were far from bearing him down with that Star-chamber doctrine, to wit, that it was no matter, whether what he said was true or false; no, on the contrary, lord chief justice Holt asks Fuller, "Can you make it appear they are true? Have you any witnesses? You might have had subpoenas for your witnesses against this day. If you take upon you to write such things as you are charged with, it lies upon you to prove them true, at your peril. If you have any witnesses, I will hear them. How came you to write those books which are not true? If you have any witnesses produce them. If you can offer any matter to prove what you have wrote, let us hear it." Thus said, and thus did, that great man, lord chief justice Holt, upon a trial of the like kind with ours; and the rule laid down by him, in this case, is, that he who will take upon him to write things, it lies upon him to prove them at his peril. Now, Sir, we have acknowledged the printing and publishing of those papers, set forth in the information, and (with the leave of the Court) agreeable to the rule

† See his Case, vol. 14, p. 513. * See the Case, vol. 12, p. 183.

* See his Case, vol. 14, p. 1123.

† See his Case, vol. 14, p. 518.

laid down by chief justice Holt, we are ready to prove them to be true, at our peril.

Mr. *Chief Justice.* Let me see the book.

Here the Court had the Case under consideration a considerable time, and every one was silent.

Mr. *Chief Justice.* Mr. Attorney, you have heard what Mr. Hamilton has said, and the cases he has cited, for having his witnesses examined, to prove the truth of several facts contained in the papers set forth in the information. What do you say to it?

Att. Gen. The law, in my opinion, is very clear: they cannot be admitted to justify a libel; for, by the authorities I have already read to the Court, it is not the less a libel because it is true. I think I need not trouble the Court with reading the cases over again; the thing seems to be very plain, and I submit it to the Court.

Mr. *Chief Justice.* Mr. Hamilton, the Court is of opinion, you ought not to be permitted to prove the facts in the papers: these are the words of the book, "It is far from being a justification of a libel, that the contents thereof are true, or that the person upon whom it is made had a bad reputation, since the greater appearance there is of truth in any malicious invective, so much the more provoking it is."

Mr. *Hamilton.* These are Star-chamber cases, and I was in hopes that practice had been dead with the Court.

Mr. *Chief Justice.* Mr. Hamilton, the Court have delivered their opinion, and we expect you will use us with good manners: you are not to be permitted to argue against the opinion of the Court.

Mr. *Hamilton.* With submission, I have seen the practice in very great courts, and never heard it deemed unmannerly to—

Mr. *Chief Justice.* After the Court have declared their opinion, it is not good-manners to insist upon a point in which you are over-ruled.

Mr. *Hamilton.* I will say no more at this time: the Court, I see, is against us in this point; and that I hope I may be allowed to say.

Mr. *Chief Justice.* Use the Court with good-manners, and you shall be allowed all the liberty you can reasonably desire.

Mr. *Hamilton.* I thank your honour. Then, gentlemen of the jury, it is to you we must now appeal, for witnesses to the truth of the facts we have offered, and are denied the liberty to prove; and let it not seem strange, that I apply myself to you in this manner; I am warranted so to do, both by law and reason. The law supposes you to be summoned out of the neighbourhood where the fact is alleged to be committed; and the reason of your being taken out of the neighbourhood is, because you are supposed to have the best knowledge of the fact that is to be tried. And were you to find a verdict against my client, you must take upon you to say, the papers referred to in the information, and which we acknowledge we printed and published, are false, scandalous, and seditious; but of this I can have no apprehension. You are citizens of New York: you are really, what the law supposes you to be, honest and lawful men; and, according to my brief, the facts which we offer to prove were not committed in a corner; they are notoriously known to be true; and therefore in your justice lies our safety. And as we are denied the liberty of giving evidence, to prove the truth of what we have published, will beg leave to lay it down as a standing rule in such cases, That the suppressing of evidence ought always to be taken for the strongest evidence; and I hope it will have that weight with you. But since we are not admitted to examine our witnesses, I will endeavour to shorten the dispute with Mr. Attorney; and to that end, I. desire he would favour us with some standard definition of a libel, by which it may be certainly known, whether a writing be a libel, yea or not.

Att. Gen. The books, I think, have given a very full definition of a libel: they say (1 Hawk. chap. 73, § 1, *et seq.*) it is, "in a strict sense, taken for a malicious defamation, expressed either in writing or printing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and to expose him to public hatred, contempt or ridicule. § 2. But it is said, That, in a larger sense the notion of a libel may be applied to any defamation whatsoever, expressed either by signs or pictures, as by fixing up a gallows against a man's door, or by painting him in a shameful and ignominious manner. §. 3. And since the chief cause for which the law so severely punishes all offences of this nature, is the direct tendency of them to a breach of public peace, by provoking the parties injured, their friends and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which, of all others, are most sensibly felt; and since the plain meaning of such scandal, as is expressed by signs or pictures, is as obvious to common sense, and as easily understood by every common capacity, and altogether as provoking as that which is expressed by writing or printing, why should it not be equally criminal? § 4. And from the same ground it seemeth also clearly to follow, that such scandal, as is expressed in a scoffing and ironical manner, makes a writing as properly a libel, as that which is expressed in direct terms; as where a writing, in a taunting manner reckoning up several acts of public charity done by one, says, You will not play the Jew, nor the Hypocrite, and so goes on in a strain of ridicule to insinuate, that what he did was owing to his vainglory; or where a writing, pretending to recommend to one the characters of several great men for his imitation, instead of taking notice of what they are generally esteemed famous for, pitched on such qualities only which their enemies charge them with the want of;

as by proposing such a one to be imitated for his courage, who is known to be a great statesman, but no soldier; and another to be imitated for his learning, who is known to be a great general, but no scholar, &c. which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so."

Mr. *Hamilton.* Ay, Mr. Attorney; but what certain standard rule have the books laid down, by which we can certainly know whether the words or the signs are malicious? Whether they are defamatory? Whether they tend to the breach of the peace, and are a sufficient ground to provoke a man, his family, or friends, to acts of revenge, especially those of the ironical sort of words? And what rule have you to know when I write ironically? I think it would be hard, when I say, Such a man is a very worthy, honest gentleman, and of fine understanding, that therefore I meant he was a knave or a fool.

Ait. Gen. I think the books are very full: it is said in 1 Hawk. p. 193, just now read, "That such scandal as is expressed in a scoff, ing and ironical manner, makes a writing as properly a libel, as that which is expressed in direct terms; as where a writing, in a taunting manner says, reckoning up several acts of charity done by one, You will not play the Jew or *the* hypocrite; and so goes on to insinuate, that what he did was owing to his vain-glory, &c. which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so." I think nothing can be plainer or more full than these words.

Mr. *Hamilton.* *I* agree the words are very plain; and I shall not scruple to allow (when we are agreed that the words are false and scandalous, and were spoken in an ironical and scoffing manner, &c.) that they are really libellous; but here stiil occurs the uncertainty, which makes the difficulty to know what words are scandalous, and what not; for you say, they may be scandalous, true or false : besides, how shall we know whether the words were spoke in a scoffing and ironical manner, or seriously? Or how can you know, whether the man did not think as he wrote? For, by your rule, if he did, it is no irony, and consequently no libel. But, under favour, Mr. Attorney, I think the same book, and the same section, will shew us the only rule by which all these things are to be known. The words are these; 'which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if they had directly and expressly done so.' Here, it is plain, the words are scandalous, scoffing, and ironical, only as they are understood; I know no rule laid down in the books but this; I mean, as the words are understood.

Mr. *Chief Justice.* Mr. Hamilton, do you think it so hard to know when words are ironical, or spoke in a scoffing manner?

Mr. *Hamilton.* I own it may be known; but I insist, the only rule to know is, as I do or can understand them : I have no other rule to go by, but as I understand them.

Mr. *Chief Justice.* That is certain. All words are libellous, or not, as they are understood. Those who are to judge of the words, must judge whether they are scandalous or ironical, tend to the breach of the peace, or are seditious : there can be no doubt of it.

Mr. *Hamilton.* *I* thank your honour; I.am glad to find the Court of this opinion. Then it follows, that those twelve men must understand the words in the information to be scandalous, that is to say, false; for I think it is not pretended they are of the ironical sort; and when they understand the words to be so, they will say we are guilty of publishing a false libel, and not otherwise.

Mr. *Chief Justice.* No, Sir. Hamilton; the jury may find that Mr. Zenger printed and published those papers, and leave it to the Court to judge whether they are libellous. You know this is very common: it is in the nature of a Special Verdict, where the jury leave the matter of law to the Court.

Mr. *Hamilton.* I know, may it please your honour, the jury may do so; but I do likewise know they may do otherwise. I know they have the right, beyond all dispute, to determine both the law and the fact; and where they do not doubt of the law, they ought to do so. This of leaving it to the judgment of the Court, whether the words are libellous or not, in effect, renders juries useless (to say no worse) in many cases; but this I shall have occasion to speak to by-and-bye : and I will, with the Court's leave, proceed to examine the inconveniences that must inevitably arise from the doctrines Mr. Attorney has laid down; and I observe, in support of this prosecution, he has frequently repeated the words taken from the case of Libellis Famosis, in 5 Co. This is indeed the leading case, and that to which almost all the other cases upon the subject of libels dx> refer; and I must insist upon saying, that, according as this case seems to be understood by the Court and Mr. Attorney, it is not law at this day : for though I own it to be base and unworthy to scandalize any man, yea, I think it is even villainous to scandalize a person of public character; and I will go so far into Mr. Attorney's doctrine as to agree, that if the faults, mistakes, nay even the vices, of such a person be private and personal, and don't affect the peace of the public, or the liberty or property of our neighbour, it is unmanly and unmannerly to expose them, either by word or writing. But when a ruler of the people brings his personal failings, but much more his vices, into his administration, and the people find themselves affected by them, either in their liberties or properties, that will alter the case mightily; and all the high things that are said in favour of rulers, and of dignities, and upon the side of power, will not be able to stop people's mouths when, they feel themselves op-

pressed, I mean in a free government. It is true, in times past, it was a crime to speak truth; and in that terrible court of Star-chamber, many worthy and brave men suffered for so doing; and yet, even in that court, and in those bad times, a great and good man durst say, what I hope will not be taken amiss of me to say in this place, to wit, "The practice of informations tor libels is a sword in the hands of a wicked king, and an arrand coward, to cut down and destroy the innocent; the one cannot because of his high station, and the other dares not, because of his want of courage, revenge himself in another manner."

Alt. Gen. Pray, Mr. Hamilton, have a care what you say; don't go too far neither : I don't like those liberties.

Mr. *Hamilton.* Sure, Mr. Attorney, you won't make any applications: All men agree, that we are governed by the best of kings; and I cannot see the meaning of Mr. Attorney's caution: My well known principles, and the sense I have of the blessings we enjoy under his present majesty, make it impossible for me to err, and, I hope, even to be suspected, in that point of duty to my king. May it please your honour, I was saying, that notwithstanding all the duty and reverence claimed by Mr. Attorney to men in authority, they are not exempt from observing the rules of common justice, either in their private or public capacities; the laws of our mother-country know no exception. It is true, men in power are harder to be come at, for wrongs they do, cither to a private person, or to the public; especially a governor in the plantations, where they insist upon an exemption from answering complaints of any kind in their own government. We are indeed told, and it is true they are obliged to answer a suit in the king's courts at Westminster, for a wrong done to any person here: But do we not know how impracticable this is to most men among us, to leave their families, (who depend upon their labour and care for their livelihood) and carry evidences to Britain, and at a great, nay, a far greater expence, than almost any of us are able to bear, only to prosecute a governor for an injury done here? But when the oppression is general, there is no remedy even that way : No, our constitution has (blessed be God) given us an opportunity, if not to have such wrongs redressed, yet, by our prudence and resolution, we may in a great measure prevent the committing of such wrongs, by making a governor sensible, that it is his interest to be just to those under his care; for such is the sense that men in genera! (I mean freemen) have of common justice, that when they come to know that a chief magistrate abuses the power with which he is intrusted for the good of the people, and is attempting to turn that very power against the innocent, whether of high or low degree, I say, mankind in general seldom fail to interpose, and, as far as they can, prevent the destruction of their fellow subjects. And has it not often been seen (and, I hope, it will always be seen) that when the representatives of a free people are, by just representations or remonstrances, made sensible of the sufferings of their fellow subjects, by the abuse of power in the hands of a governor, they have declared (and loudly too) that they were not obliged by any law to support a governor who goes about to destroy a province or colony, or their privileges, which by his majesty he was appointed, and by the law he is bound, to protect and encourage. But I pray it may be considered, of what use is this mighty privilege, if every man that suffers must be silent? And if a man must be taken up as a libeller, far telling his sufferings to his neighbour, I know it may be answered, Have you not a legislature? have you not a House of Representatives, to whom you may complain? And to this I answer, We have : But what then? Is an Assembly to be troubled with every injury done by a governor? Or are they to hear of nothing but what those in the administration will please to tell them? Or what sort of a trial must a man have? And how is he to be remedied; especially if the case were, as I have known it to happen in America in my time, that a governor who has places (I will not say pensions, for, I believe they seldom give that to another which they can take to themselves) to bestow, and can or will keep the same Assembly (after he has modelled them so as to get a majority of the House in his interest) for near twice seven years together? I pray, what redress is to be expected for an honest man, who makes his complaint against a governor to an Assembly, who may properly enough be said to be made by the same governor against whom the complaint is made? The thing answers itseif. No, it is natural, it is a privilege — I will go farther, it is a right which all freemen claim, and are intitled to, to complain when they are hurt; they have a right publicly to remonstrate against the abuses of power, in the strongest terms, to put their neighbours upon their guard, against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it, as one of the greatest blessings heaven can bestow. And when a House of Assembly, composed of honest freemen, sees the general bent of the people's inclinations, that is it which must and will (I'm sure it ought to) weigh with a legislature, in spite of all the craft, caressing, and cajoling, made use of by a governor, to divert them from hearkening to the voice of their country. As we all very well understand the true reason, why gentlemen take so much pains, and make such great interest, to be appointed governors, so the design of their appointment is not less manifest. We know his majesty's gracious intentions to his subjects; he desires no more than that his people in the plantations should be kept up to their duty and allegiance to the crown of Great Britain; that peace may be preserved amongst

them, and justice impartially administered; that we may be governed so as to render us useful to our mother-country by encouraging us to make and raise such commodities as may be useful to Great Britain. But will any one say, that all or any of these good ends are to be effected by a governor's setting his people together by the ears, and by the assistance of one part of the people to plague and plunder the other? The commission which governors bear, while they execute the powers given them, according to the intent of the royal grantor, expressed in their commissions, requires and deserves very great reverence and submission; but when a governor departs from the duty enjoined him by his sovereign, and acts as if he was less accountable than the royal hand that gave him all that power and honour which he is possessed of, this sets people upon examining and enquiring into the power, authority, and duty of such a magistrate, and to compare those with his conduct; and just as far as they find he exceeds the bounds of his authority, or falls short in doing impartial justice to the people under his administration, so far they very often, in return, come short in their duty to such a governor. For power alone will not make a man beloved; and I have heard it observed, that the man who was neither good nor wise before his being made a governor, never mended upon his preferment, but has been generally observed to be worse: for men who are not endowed with wisdom and virtue, can only be kept in bounds by the law: and by how much the farther they think themselves out of the reach of the law, by so much the more wicked and cruel they are. I wish there were no instances of the kind at this day. And wherever this happens to be the case of a governor, unhappy are the people under his administration, and in the end he will find himself so too; for the people will neither love him nor support him. I make no doubt but there are those here, who are zealously concerned for the success of this prosecution; and yet I hope they are not many; and even some of those, I am persuaded (when they consider to what lengths such prosecutions may be carried, and how deeply the liberties of the people may be affected by such means) will not all abide by their present sentiments; I say, not all: for the man who, from an intimacy and acquaintance with a governor, has conceived a personal regard for him; the man who has felt none of the strokes of his power; the man who believes that a governor has a regard for him, and confides in him; it is natural for such men to wish well to the affairs of such a governor; and as they may be men of honour and generosity, may, and no doubt will, wish him success, so far as the rights and privileges of their fellow-citizens are not affected. But as men of honour, I can apprehend nothing from them; they will never exceed that point. There are others that are under stronger obligations, and those are such as are in some sort engaged in support of a governor's cause, by their own or their relations dependence on his favour for some post or preferment: such men have, what is commonly called, duty and gratitude to influence their inclinations, and oblige them to go his lengths. I know men's interests are very near to them, and they will do much, rather than forego the favour of a governor, and a livelihood at the same time; but I can with very just grounds hope, even from those men, whom I wilt suppose to be men of honour, and conscience too, that when they see the liberty of their country is in danger, either by their concurrence, or even by their silence, they will, like Englishmen, and like themselves, freely make a sacrifice of any preferment or favour, rather than be accessary to destroying the liberties of their country, and entailing slavery upon their posterity. There are indeed another set of men, of whom I have no hopes; I mean, such who lay aside all other considerations, and are ready to join with power in any shape, and with many or any sort of men, by whose means or interest they may be assisted to gratify their malice and envy, against those whom they have been pleased to hate; and that for no other reason, but because they are men of abilities and integrity, or at least are possessed of some valuable qualities far superior to their own. But as envy is the sin of the devil, and therefore very hard, if at all, to be repented of, I will believe there are but few of this detestable and worthless sort of men, nor will their opinions or inclinations have any influence upon this trial. But to proceed: I beg leave to insist, that the right of complaining or remonstrating is natural; and the restraint upon this natural right is the law only, and that those restraints can only extend to what is false: for as it is truth alone which can excuse or justify any man for complaining of a bad administration, I as frankly agree, that nothing ought to excuse a man who raises a false charge or accusation, even against a private person, and that no manner of allowance ought to be made to him who does so against a public magistrate. Truth ought to govern the whole affair of libels, and yet the party accused runs risk enough even then; for if he fails of proving every tittie of what he has wrote, and to the satisfaction of the Court and Jury too, he may find to his cost, that when the prosecution is set on foot by men in power, it seldom wants friends to favour it. And from thence (it is said) has arisen the great diversity of opinions among judges, about what words were or were not scandalous or libellous. I believe it will be granted, that there is not greater uncertainty in any part of the law, than about words of scandal: it would be mis-spending of the Court's time to mention the cases; they may be said to be numberless; and therefore the utmost care ought to be taken in following precedents; and the times when the judgments were given, which are quoted for authorities in the case of libels, are much to be regarded. I think it will be agreed, that ever since the time of the Star-Chamber, where the most arbitrary and destructive judgments and opinions

were given, that ever an Englishman heard of, at least in his own country: I say, prosecutions for libels since the time of that arbitrary court, and until the glorious Revolution, have generally been set on foot at the instance of the crown, or its ministers; and it is no small reproach to the law, that these prosecutions were too often and too much countenanced by the judges, who held their places at pleasure (a disagreeable tenure to any officer, but a dangerous one in the case of a judge). To say more to this point may not be proper. And yet I cannot think it unwarrantable, to shew the unhappy influence that a sovereign has sometimes had, not only upon judges, but even upon parliaments themselves.

It has already been shewn, how the judges differed in their opinions about the nature of a libel, in the case of the Seven Bishops. There you see three judges of one opinion, that is, of a wrong opinion, in the judgment of the best men in England, and one judge of a right opinion. How unhappy might it have been for all of us at this day, if that jury had understood the words in that information as the Court did? Or if they had left it to the Court to judge, whether the Petition of the Bishops was or was not a libel? No! they took upon them, to their immortal honour, to determine both law and fact, and to understand the Petition of the Bishops to be no libel, that is, to contain no falsehood nor sedition, and therefore found them Not Guilty. And remarkable is the case of sir Samuel Barnardiston, who was fined 10,000*l*, for writing a letter, in which, it may be said, none saw any scandal or falsehood but the Court and Jury; for that judgment was afterwards looked upon as a cruel and detestable judgment, and therefore was reversed by parliament. Many more instances might be given of the complaisance of court-judges about those times, and before; but I will mention only one case more, and that is the case of sir Edward Hales, who, though a Roman Catholic, was by king James 2, preferred to be a colonel of his army, notwithstanding the statute of 25 Ch. 2, chap. 2, by which it is provided, That every one that accepts of an office, civil or military, &c. shall take the oaths, subscribe the declaration, and take the sacrament, within 3 months, &c. otherwise he is disabled to hold such office, and the grant for the same to be null and void, and the party to forfeit 500*l*, Sir Edward Hales did not take the oaths or sacrament, and was prosecuted for the 500*l*. for exercising the office of a colonel by the space of three months, without conforming as in the act is directed. Sir Edward pleads, That the king, by his letters patent, did dispense with his taking the oaths and sacrament, and subscribing the declaration, and had pardoned the forfeiture of 500*l*. And whether the king's dispensation was good, against the said act of parliament? was the question. I shall mention no more of this case, than to shew how in the reign of an arbitrary prince, where judges hold their seats at pleasure, their determinations have not always been such as to make precedents of, but the contrary; and so it happened in this case, where it was solemnly judged, That, notwithstanding this act of parliament, made in the strongest terms, for preservation of the Protestant religion, that yet the king had, by his royal prerogative, a power to dispense with that law; and sir Edward Hales* was acquitted by the judges accordingly. So the king's dispensing power being by the judges set up above the act of parliament, this law, which the people looked upon as their chief security against Popery and arbitrary power, was, by this judgment, rendered altogether ineffectual. But this judgment is sufficiently exposed by sir Robert Atkins, late one of the judges of the Court of Common Pleas, in his Enquiry into the King's Power of Dispensing with Penal Statutes; wherein it is shewn, who it was that first invented dispensations; how they came into England; what ill use has been made of them there; and all this principally owing to the countenance given them by the judges. He says of the dispensing power, ' The Pope was the inventor of it; our kings have borrowed it from them; and the judges have, from time to time, nursed and dressed it up, and given it countenance; and it is still upon the growth, and encroaching, till it has almost subverted all law, and made the regal power absolute, if not dissolute.' This seems not only to shew how far judges have been influenced by power, and how little cases of this sort, where the prerogative has been in question in former reigns, are to be relied upon for law : but I think it plainly shews too, that a man may use a greater freedom with the power of his sovereign, and the judges in Great Britain, than it seems he may with the power of a governor in the plantations, who is but a fellow-subject. Are the words with which we are charged, like these? Do Mr. Zenger's papers contain any such freedoms with his governor, or his council, as sir Robert Atkins has taken with the regal power and the judges in England? And yet I never heard of any information brought against him for these freedoms.

If then, upon the whole, there is so great an uncertainty among judges (learned and great men) in matters of this kind; if power has had so great an influence on judges, how cautious ought we to be in determining by their judgments, especially in the plantations, and in the case of libels? There is heresy in law as well as in religion, and both have changed very much; and we well know that it is not two centuries ago that a man would have been burnt as an heretic, for owning such opinions in matters of religion as are publicly wrote and printed at this day. They were fallible men, it seems, and we take the liberty not only to differ from them in religious opinions, but to condemn them and their opinions too; and I must presume, that in taking these freedoms in thinking and speaking about matters of faith

* See his Case, vol. 11, p, 1166.

or religion, we are in the right: For, though it is said there are very great liberties of this kind taken in New-York, yet I have heard of no information preferred by Mr. Attorney for any offences of this sort. From which I think it is pretty clear, that in New-York a man may make very free with his God, but he must take special care what he says of his governor. It is agreed upon by all men, that this is a reign of liberty; and while men keep within the bounds of truth, I hope they may with safety both speak and write their sentiments of the conduct of men in power, I mean of that part of their conduct only, which affects the liberty or property of the people under their administration; were this to be denied, then the next step may make them slaves. For what notions can be entertained of slavery, beyond that of suffering the greatest injuries and oppressions, without the liberty of complaining; or if they do, to be destroyed, body and estate, for so doing.

It is said, and insisted upon by Mr. Attorney: That government is a sacred thing; that it is to be supported and reverenced; it *is* government that protects our persons and estates; that prevents treasons, murders, robberies, riots, and all the train of evils that overturns kingdoms and states, and ruins particular, persons; and if those in the administration, especially the supreme magistrates, must have all their conduct censured by private men, government cannot subsist This is called a licentiousness not to be tolerated. It is said, that it brings the rulers of the people into contempt, and their authority not to be regarded and so in the end the laws cannot be put in execution. These, I say, and such as these, are the general topics insisted upon by men in power, and their advocates. But I wish it might be considered at the same time, how often it has happened, that the abuse of power has been the primary cause of these evils, and that it was the injustice and oppression of these great men, which has commonly brought them into contempt with the people. The craft and art of such men is great, and who, that is the least acquainted with history or law, can be ignorant of the specious pretences, which have often been made use of by men in power, to introduce arbitrary rule, and destroy the liberties of a free people. I will give two instances, and as they are authorities not to be denied, nor can be misunderstood, I presume they will be sufficient.

The first is the statute of 3d of Hen. 7, cap. 1. The preamble of the statute will prove all, and more than I have alleged. It begins: 'The king our sovereign lord remembereth, how by unlawful maintenances, giving of liveries, signs and tokens, &c. untrue demeanings of sheriffs in making of pannels, and other untrue returns, by taking of money, by injuries, by great riots and unlawful assemblies; the policy and good rule of this realm is almost subdued; and for the not punishing these inconveniencies, and by occasion of the premisses, little or nothing may be found by enquiry, &c. to the increase of murders, &c. and unsureties of all men living, and losses of their lands and goods.' Here is a fine and specious pretence for introducing the remedy, as it is called, which is provided by this act; that is, instead of being lawfully accused by twenty-four good and lawful men of the neighbourhood, and afterwards tried by twelve like lawful men, here is a power given to the lord chancellor, lord treasurer, the keeper of the king's privy seal, or two of them, calling to them a bishop, a temporal lord, and other great men mentioned in the act, (who, it is to be observed, were all to be dependants on the court) to receive information against any person for any of the misbehaviours recited in that act, and by their discretion to examine, and to punish them according to their demerit.

The second statute I proposed to mention, is the 11th of the same king, chap. 3d, the preamble of which act has the like fair pretences as the former; for the king calling to his remembrance the good laws made against the receiving of liveries, &c. unlawful extortions, maintenances, embracery, &c. unlawful games, &c. and many other great enormities, and offences committed against many good statutes, to the displeasure of Almighty God, which, the act says, could not, nor yet can, be conveniently punished by the due order of the law, except it were first found by twelve men, &c. which, for the causes aforesaid, will not find nor yet present the truth. And therefore the same statute directs, that the justices of assize, and justices of the peace, shall upon information for the king before them made, have full power, by their discretion, to hear and determine all such offences. Here are two statutes that are allowed to have given the deepest wound to the liberties of the people of England of any that I remember to have been made, unless it may be said that the statute made in the time of Henry 8th, by which his proclamations were to have the effect of laws, might in its consequence be worse. And yet we see the plausible pretences found out by the great men to procure these acts. And it may justly be said, that by those pretences the people of England were cheated or awed into the delivering up their ancient and sacred right of trials by grand and petit juries. I hope to be excused for this expression, seeing my lord Coke calls it (4 Inst.) 'unjust and strange act, that tended in its execution to the great displeasure of Almighty God, and the utter subversion of the common law.'

These, I think, make out what I alleged, and are flagrant instances of the influence of men in power, even upon the representatives of a whole kingdom. From all which, I hope, it will be agreed, that it is a duty which all good men owe to their country, to guard against the unhappy influence of ill men when entrusted with power, and especially against their creatures and dependents, who, as they are generally more necessitous, are surely more covetous and cruel. But it is worthy of observation, that though the spirit of liberty was

borne down and oppressed in England that time, yet it was not lost; for the parliament laid hold of the first opportunity to free the subject from the many insufferable oppressions and outrages committed upon their persons and estates by colour of these acts, the last of which being deemed the most grievous, was repealed in the first year of Hen. 8th. Though it is to be observed, that Hen. 7th, and his creatures, reaped such great advantages by the grievous oppressions and exactions, grinding the faces of the poor subjects, as my lord Coke says, by colour of this statute by information only, that a repeal of this act could never be obtained during the life of that prince. The other statute being the favourite law for supporting arbitrary power, was continued much longer. The execution of it was by the great men of the realm; and how they executed it, the sense of the kingdom, expressed in the 7th of Charles 1st, (by which the Court of Star-Chamber, the soil where informations grew rankest) will best declare. In that statute Magna Charta, and the other statutes made in the time of Edw. 3, which, I think, are no less than five, are particularly enumerated as acts, by which the liberties and privileges of the people of England were secured to them, against such oppressive courts as the Star-Chamber, and others of the like jurisdiction. And the reason assigned for their pulling down the Star-Chamber, is, That the proceedings, censures and decrees of the Court of Star-Chamber, even though the great men of the realm, nay, and a bishop too (holy man) were judges, had by experience been found to be an intolerable burthen to the subject, and the means to introduce an arbitrary power and government. And therefore that court was taken away, with all the other courts in that statute mentioned, having like jurisdiction.

I do not mention this statute, as if by the taking away the Court of Star-Chamber, the remedy for many of the abuses or offences censured there, was likewise taken away; no, I only intend by it to shew, that the people of England saw clearly the danger of trusting their liberties and properties to be tried, even by the greatest men in the kingdom, without the judgment of a jury of their equals. They had felt the terrible effects of leaving it to the judgment of these great men to say what was scandalous and seditious, false or ironical. And if the parliament of England thought this power of judging was too great to be trusted with men of the first rank in the kingdom, without the aid of a jury, how sacred soever their characters might be, and therefore restored to the people, their original right of trial by juries, I hope to be excused for insisting, that by the judgment of a parliament, from whence no appeal lies, the jury are the proper judges of what is false at least, if not of what is scandalous and seditious. This is an authority, not to be denied, it is as plain as it is great, and to say, that this act indeed did restore to the people trials by juries, which was not the practice of the Star-Chamber, but that it did not give the jurors any new authority, or any right to try matters of law, I say this objection will not avail; for I must insist, that where matter of law is complicated with matter of fact, the jury have a right to determine both. As for instance; upon indictment for murder, the jury may, and almost constantly do, take upon them to judge whether the evidence will amount to murder or manslaughter, and find accordingly; and I must say, I cannot see, why in our case the jury have not at least as good a right to say, whether our news-papers are a libel or no libel, as "another jury has to say, whether killing of a man is murder or manslaughter. The right of the jury to find such a verdict as they in their conscience do think is agreeable to their evidence, is supported by the authority of Bushel's case,* in Vaughan's Reports, page 135, beyond any doubt. For, in the argument of that case, the chief-justice who delivered the opinion of the Court, lays it down for law : (Vaughan's Rep. p. 150.) That in all general issues, as upon non. cul. in trespass, non tort. nul disseizin in assize, &c. though it is matter of law, whether the defendant is a trespasser, a disseizer, &c. in the particular cases in issue, yet the jury, find not (as in a special verdict) the fact of every case, leaving the law to the Court; but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately. It appears by the same case, that though the discreet and lawful assistance of the judge, by way of advice to the jury, may be useful, yet that advice or direction ought always to be upon supposition, and not positive and upon coercion. The reason given in the same book is, (page 144, 147.) Because the judge (as judge) cannot know what the evidence is which the jury have, that is, he can only know the evidence given in court; but the evidence which the jury have, may be of their own knowledge, as they are returned of the neighbourhood. They may also know from their own knowledge, that what is sworn in court is not true; and they may know the witnesses to be stigmatized, to which the Court may be strangers. But what is to my purpose, is, that suppose that the Court did really know all the evidence which the jury know, yet in that case it is agreed, That the judge and jury may differ in the result of their evidence, as I well as two judges may, which often happens. And in page 148, the judge subjoins the reason, why it is no crime for a jury to differ in opinion from the Court, where he says, That a man cannot see with another's eye, nor hear by another's ear; no more can a man conclude or infer the thing by another's understanding or reasoning. From all which (I insist) it is very plain, that the jury are by law at liberty (without any affront to the judgment of the Court) to find both the law and the fact, in our case, as they did in the case I am speaking to,

* See it, vol. 6, p. 999.

which I will beg leave just to mention, and it was this: Mr. Penn and Mead being Quakers, and having met in a peaceable manner, after being shut out of their meeting-house, preached in Grace-Church-street in London, to the people of their own persuasion, and for this they were indicted; and it was said, That they with other persons, to the number of 300, unlawfully and tumultuously assembled, to the disturbance of the peace, &c. To which they pleaded, Not Guilty. And the petit jury being sworn to try the issue between the king and the prisoners, that is, whether they were guilty, according to the form of the indictment? Here there was no dispute but they were assembled together, to the number mentioned in the indictment; but, whether that meeting together was riotously, tumultuously, and to the disturbance of the peace? was the question. And the Court told the jury it was, and ordered the jury to find it so; for (said the Court) the meeting was the matter of fact, and that is confessed, and we tell you it is unlawful, for it is against the statute; and the meeting being unlawful, it follows of course that it was tumultuous, and to the disturbance of the peace. But the jury did not think fit to take the Court's word for it, for they could neither find riot, tumult, or any thing tending to the breach of the peace committed at that meeting; and they acquitted Mr. Penn and Mead.* In doing of which they took upon them to judge both the law and the fact; at which the Court (being themselves true courtiers) were so much offended, that they fined the jury 40 marks apiece, and committed them till paid. But Mr. Bushel, who valued the right of a juryman and the liberty of his country more than his own, refused to pay the fine, and was resolved (though at a great expence and trouble too) to bring, and did bring, his Habeas Corpus, to be relieved from his fine and imprisonment, and he was released accordingly; and this being the judgment in his case, it is established for law, That the judges, how great soever they be, have no right to fine, imprison, or punish a jury, for not finding a verdict according to the direction of the Court. And this, I hope, is sufficient to prove, that jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings in judging of the lives, liberties, or estates of their fellow subjects. And so I have done with this point.

This is the second information, for libelling of a governor, that I have known in America. And the first, though it may look like a romance, yet, as it is true, I will beg leave to mention it. Governor Nicholson, who happened to be offended with one of his clergy, met him one day upon the road; and as it was usual with him (under the protection of his commission) used the poor parson with the worst of language, threatened to cut off his ears, slit his nose, and at last to shoot him through the head. The parson, being a reverend man, continued all this time uncovered in the heat of the sun, until he found an opportunity to fly for it; and coming to a neighbour's house, felt himself very ill of a fever, and immediately writes for a doctor; and that his physician might be the better judge of his distemper, he acquainted him with the usage he had received; concluding, that the governor was certainly mad; for that no man in his senses would have behaved in that manner. The doctor unhappily shews the parson's letter: The governor came to hear of it, and so an information was preferred against the poor man for saying, He believed the governor was mad; and it was laid in the information to be false, scandalous and wicked, and wrote with intent to move sedition among the people, and bring his excellency into contempt. But by an order from the late queen Anne, there was a stop put to the prosecution, with sundry others set on foot by the same governor against gentlemen of the greatest worth and honour in that government.

And may not I be allowed, after all this, to say, that, by a little countenance, almost any thing which a man writes, may, with the help of that useful term of art called an innuendo, be construed to be a libel, according to Mr. Attorney's definition of it, that whether the words are spoke of a person of a public character, or of a private man, whether dead or living, good or bad, true or false, all make a libel; for according to Mr. Attorney, after a man hears a writing read, or reads and repeats it, or laughs at it, they are all punishable. It is true, Mr. Attorney is so good as to allow, after the party knows it to be a libel; but he is not so kind as to take the man's word for it.

[Here were several cases put to shew, that though what a man writes of a governor was true, proper, and necessary, yet, according to the foregoing doctrine, it might be construed to be a libel. But Mr. Hamilton, after the trial was over, being informed, that some of the cases he had put had really happened in this government, he declared he had never heard of any such; and as he meant no personal reflections, he was sorry he had mentioned them, and therefore they are omitted here.]

Mr. *Hamilton.* If a libel is understood in the large and unlimited sense urged by Mr. Attorney, there is scarce a writing I know that may not be called a libel, or scarce any person safe from being called to account as a libeller: for Moses, meek as he was, libelled Cain; and who is it that has not libelled the Devil? For, according to Mr. Attorney, it is no justification to say one has a bad name. Echard has libelled our good king William; Burnet has libelled, among many others, king Charles and king James; and Rapin has libelled them all. How must a man speak or write, or what must he hear, read, or sing? Or when must he laugh, so as to be secure from being taken up as a libeller? I sincerely believe, that were some persons to go through the streets of New York, now-a-days, and read a part of the

* See the Case, vol. 6, p. 951.

Bible, if it was not known to be such, Mr. Attorney, with the help of his innuendos, would easily turn it into a libel. As for instance, Is. xi. 16. "The leaders of the people cause them to err, and they that are led by them are destroyed." But should Mr. Attorney go about to make this a libel, he would read it thus: 'The leaders of the people' [innuendo, the governor and council of New-York] 'cause 'them' [innuendo, the people of this province] 'to err, and they' [the governor and council meaning] 'are destroyed' [innuendo, are deceived into the loss of their liberty]; which is the worst kind of destruction. Or if some persons should publicly repeat, in a manner not pleasing to his betters, the 10th and the 11th verses of the 56th chap. of the same book, there Mr. Attorney would have a large field to display his skill, in the artful application of his innuendos. The words are; 'His watchmen 'are blind, they are ignorant, &c. Yea, they 'are greedy dogs, that can never have enough.' But to make them a libel, there is, according to Mr. Attorney's doctrine, no more wanting but the aid of his skill, in the right adapting his innuendos. As tor instance; 'His watch-'men' [innuendo, the governor's council and assembly] ' are Wind, they are ignorant,' [innuendo, will not see the dangerous designs of his excellency.] 'Yea, they' [the governor and council meaning] 'are greedy 'dogs, which can never have enough' [innu-'endo, enough of riches and power.] Such an instance as this seems only fit to be laughed at; but I may appeal to Mr. Attorney himself, whether these are not at least equally proper to be applied to his excellency, and his ministers, as some of the inferences and innuendos in his information against my client. Then if Mr. Attorney is at liberty to come into court, and file an information in the king's name, without leave, who is secure, whom be is pleased to prosecute as a libeller? And as the crown law is contended for in bad times, there is no remedy for the greatest oppression of this sort, even though the party prosecuted is acquitted with honour. And give me leave to say, as great men as any in Britain have boldly asserted, that the mode of prosecuting by information (when a grand jury will not find *Billa vera*) is a national grievance, and greatly inconsistent with that freedom which the subjects of England enjoy in most other eases. But if we are so unhappy as not to be able to ward off this stroke of power directly, let us take care not to be cheated out of our liberties by forms and appearances; let us always be sure that the charge in the information is made out clearly, even beyond a doubt; for though matters in the information may be called form upon trial, yet they may be, and often have been found to be, matters of substance upon giving judgment.

Gentlemen, the danger is great, in proportion to the mischief that may happen through our too great credulity. A proper confidence in a court is commendable; but as the verdict (whatever it is) will be yours, you ought to refer no part of your duty to the discretion of other persons. If you should be of opinion, that there is no falsehood in Mr. Zenger's papers, you will, nay, (pardon me for the expression) you ought to say so; because you. don't know whether others (I mean the Court) may be of that opinion. It is your right to do so, and there is much depending upon your resolution, as well as upon your integrity.

The loss of liberty, to a generous mind, is worse than death; and yet we know there have been those in all ages, who, for the sake of preferment, or some imaginary honour, have freely lent *a* helping hand to oppress, nay, to destroy their country. This brings to my mind that saying of the immortal Brutus, when he looked upon the creatures of Caesar, who were very great men, but by no means good men: "You Romans," said Brutus, "if yet I may call you so, consider what you are doing; remember that you are assisting Cæsar to forge those very chains, which one day he will make yourselves wear." This is what every man (that values freedom) ought to consider: he should act by judgment, and not by affection or self-interest; for where those prevail, no ties of either country or kindred are regarded; as upon the other hand, the man who loves his country, prefers its liberty to all other considerations, well knowing that without liberty life is a misery.

A famous instance of this you will find in the history of another brave Roman, of the same name; I mean Lucius Junius Brutus, whose story is well known; and therefore I shall mention no more of it, than only to shew the value he put upon the freedom of his country. After this great man, with his fellow-citizens, whom he had engaged in the cause, had banished Tarquin the Proud, the last king of Rome, from a throne which he ascended by inhuman murders, and possessed by the most dreadful tyranny and proscriptions, and had by this means amassed incredible riches, even sufficient to bribe to his interest many of the young nobility of Rome, to assist him in recovering the crown; but the plot being discovered, the principal conspirators were apprehended, among whom were two of the sons of Junius Brutus. It was absolutely necessary that some should be made examples of, to deter others from attempting the restoring of Tarquin, and destroying the liberty of Rome. And to effect this it was, that Lucius Junius Brutus, one of the consuls of Rome, in the presence of the Roman people, sat judge, and condemned his own sous, as traitors to their country : and to give the last proof of his exalted virtue, and his love of liberty, he with a firmness of mind, (only becoming so great a man) caused their heads to be struck off in his own presence; and when he observed that his rigid virtue occasioned a sort of horror among the people, it is observed he only said: "My fellow-citizens, do not think that this proceeds from any want of natural affection: No, the death of the sons of Brutus can affect Brutus only; but the loss of liberty will affect

my country." Thus highly was liberty esteemed in those days, that a father could sacrifice his sons to save his country. But why do I go to heathen Rome, to bring instances of the love of liberty? The best blood in Britain has been shed in the cause of liberty; and the freedom we enjoy at this day, may be said to be (in a great measure) owing to the glorious stand the famous Hampden, and others of our countrymen, in the Case of Ship-Money,* made against the arbitrary demands, and illegal impositions, of the times in which they lived; who, rather than give up the rights of Englishmen, and submit to pay an illegal tax of no more, I think, than three shillings, resolved to undergo, and, for the liberty of their country, did undergo the greatest extremities in that arbitrary and terrible court of Star-Chamber; to whose arbitrary proceedings (it being composed of the principal men of the realm, and calculated to support arbitrary government) no bounds or limits could be set, nor could any other hand remove the evil but a parliament.

Power may justly be compared to a great river; while kept within its due bounds, it is both beautiful and useful; but when it overflows its banks, it is then too impetuous to be stemmed; it bears down all before it, and brings destruction and desolation wherever it comes. If then this is the nature of power, let us at least do our duty, and like wise men (who value freedom) use our utmost care to support liberty, the only bulwark against lawless power, which, in all ages, has sacrificed to its wild lust, and boundless ambition, the blood of the best men that ever lived.

I hope to be pardoned, Sir, for my zeal upon this occasion: it is an old and wise caution, "That when our neighbour's house is on fire, we ought to take care of our own." For though, blessed be God, I live in a government where liberty is well understood, and freely enjoyed; yet experience has shewn us all (I'm sure it has to me), that a bad precedent in one government, is soon set up for an authority in another; and therefore I cannot but think it mine, and every honest man's duty, that (while we pay all due obedience to men in authority) we ought at the same time to be upon our guard against power, wherever we apprehend that it may affect ourselves or our fellow-subjects.

I am truly very unequal to such an undertaking, on many accounts. And you see I labour under the weight of many years, and am borne down with great infirmities of body; yet old and weak as I am, I should think it my duty, if required, to go to the utmost part of the land, where my service could be of any use, in assisting to quench the flame of prosecutions upon informations, set on foot by the government, to deprive a people of the right of remonstrating, (and complaining too) of the arbitrary attempts of men in power. Men who injure and oppress the people under their administration, provoke them to cry out and complain; and then make that very complaint the foundation for new oppressions and prosecutions. I wish I could say there were no instances of this kind. But to conclude; the question before the Court, and you, gentlemen of the jury, is not of small nor private concern; it is not the cause of a poor printer, nor of New York alone, which you are now trying: No! It may, in its consequence, affect every freeman that lives under a British government on the main of America. It is the best cause; it is the cause of liberty; and I make no doubt but your upright conduct, this day, will not only entitle you to the love and esteem of your fellow-citizens; but every man, who prefers freedom to a life of slavery, will bless and honour you, as men who have baffled the attempt of tyranny; and, by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbours, that to which nature and the laws of our country have given us a right — the liberty — both of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth.

Here Mr. *Attorney* observed, that Mr. Hamilton had gone very much out of the way, and had made himself and the people very merry; but that he had been citing cases not at all to the purpose. He said, there was no such cause as Mr. Bushel's, or sir Edward Hale's, before the Court; and he could not find out what the Court or Jury had to do with dispensations, riots, or unlawful assemblies: all that the jury had to consider of, was Mr. Zenger's printing and publishing two scandalous libels, which very highly reflected on his excellency, and the principal men concerned in the administration of this government, which is confessed; that is, the printing and publishing of the Journals set forth in the information is confessed. And concluded, that as Mr. Hamilton had confessed the printing, and there could be no doubt but they were scandalous papers, highly reflecting upon his excellency, and the principal magistrates in the province; and therefore he made no doubt hut the jury would find the defendant guilty, and would refer to the Court for their direction.

Mr. *Chief Justice.* Gentlemen of the jury, the great pains Mr. Hamilton has taken to shew how little regard juries are to pay to the opinion of the judges, and his insisting so much upon the conduct of some judges in trials of this kind, is done, no doubt, with a design that you should take but very little notice of what I may say upon this occasion. I shall therefore only observe to you, that, as the facts or Words in the information are confessed, the only thing that can come in question before you is, whether the words, as set forth in the information, make a libel; and that is a matter of law, no doubt, and which you may leave to the Court. But I shall trouble you no further with any thing more of my own; but read to you the words of a learned and upright judge, in a case of the

* See it in this Collection, vol. 3. p. 826.

like nature. [Lord Chief Justice Holt, in Tutchin's Case.*]

"To say that corrupt officers are appointed to administer affairs, is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; for it is necessary for all governments that the people should have a good opinion of it; and nothing can be worse to any government, than to endeavour to procure animosities. As to the management of it, this has been always looked upon as a crime, and no government can be safe without it be punished."

Now you are to consider, whether these words I have read to you do not tend to beget an ill opinion of the administration of the government; to tell us, that those that are employed know nothing of the matter, and those that do know are not employed. Men are not adapted to offices, but offices to men, out of a particular regard to their interest, and not to their fitness for the places. This is the purport of these papers.

Mr. *Hamilton.* I humbly beg your honour's pardon; I am very much misapprehended, if you suppose what I said was so designed.

Sir, you know I made an apology for the freedom I found myself under a necessity of using upon this occasion. I said, there was nothing personal designed; it arose from the nature of our defence.

The Jury withdrew, and in a small time returned; and being asked by the clerk,

Whether they were agreed of their verdict, and whether John Peter Zenger was Guilty of printing and publishing the libels in the information mentioned?

They answered, by Thomas Hunt, their foreman, Not Guilty.

Upon which there were three huzzas in the Hall, which was crowded with people; and the next day I was discharged from my imprisonment.

City of New York, ss.

At a Common Council, held at the City-hall of the said city, on Tuesday the 16th day of September, A. D. 1735. — PRESENT, Paul Richards, esq. Mayor; Gerardus Stuyvesant, esq. Deputy Mayor; Daniel Horsemanden, esq. Recorder. — *Aldermen,* William Roome, esq. Simon Johnson, esq. John Walter, esq. Christopher Fell, esq. Stephen Bayard, esq. Johannes Burger, esq. — *Assistants,* Mr. Johannes Waldron, Mr. Ede Myer, Mr. John Moore, Mr. John Fred, Mr. Charles Le Roux, Mr. Evert Byvank.

Ordered, That Andrew Hamilton, esq. of Philadelphia, barrister at law, be presented with the Freedom of this Corporation: and that alderman Bayard, alderman Johnson, and alderman Fell, be a Committee to bring in a draught thereof.

City of New York, ss.

At a Common Council, held at the City-hall of the said city, on Monday the 29th day of September, being the feastday of St. Michael the Archangel, A. D. 1735.— PRESENT, Paul Richards, esq. Mayor; Daniel Horsemanden, esq. Recorder. — *Aldermen,* William Roome, esq. Simon Johnson, esq. John Walter, esq. Christopher Fell, esq, Stephen Bayard, esq. Johannes Burger, esq. — *Assistants,* Mr, Johannes Waldron, Mr. John Fred, Mr. Charles le Roux, Mr. Evert Byvank, Mr. Henry Bogert.

Stephen Bayard, Simon Johnson, and Christopher Fell, esqrs. aldermen, to whom it was referred to prepare the draught of the Freedom of this Corporation, to be presented to Andrew Hamilton, esq. make the Report thereon in the words following, (to wit) That they have prepared the form of the grant to the said Andrew Hamilton, esq. of the Freedom of the city of New York, in these words, (to wit.)

"City of New York, *ss.*

"Paul Richards, esq. the Recorder, Aldermen, and Assistants of the city of New York, convened in Common Council, to all to whom these presents shall come greeting. Whereas honour is the just reward of virtue, and public benefits demand a public acknowledgment: We therefore, under a grateful sense of the remarkable service done to the inhabitants of this city and colony by Andrew Hamilton, esq. of Pennsylvania, barrister at law, by his learned and generous defence of the rights of mankind, and the liberty of the press, in the case of John Peter Zenger, lately tried on an information exhibited in the supreme court of this colony, do, by these presents, bear to the said Andrew Hamilton, esq. the public thanks of the freemen of this Corporation for that signal service, which he cheerfully undertook under great indisposition of body, and generously performed, refusing any fee or reward : and in testimony of our great esteem for his person, and sense of his merit, do hereby present him with the Freedom of this Corporation. These are therefore to certify and declare, that the said Andrew Hamilton, esq. is hereby admitted, received, and allowed a freeman and citizen of the said city: to have, hold, enjoy, and partake of all the benefits, liberties, privileges, freedoms and immunities whatsoever, granted or belonging to a freeman and citizen of the same city. In testimony whereof, the Common Council of the said city, in Common Council assembled, have caused the seal of the said city to be hereunto affixed, this 29th day of September, A. D. 1735. By order of the Common Council.

WILLIAM SHARPAS, Clerk.

* See his Case, vol. 14, p. 1095.

"And we do further report, that sundry of the members of this corporation, and gentlemen of this city, have voluntarily contributed sufficient for a gold-box of five ounces and a half, for inclosing the seal of the said freedom; upon the lid of which, we are of opinion, should be engraved the arms of the city of New-York. Witness our hands this 29th day of Sept. 1735.

STEPHEN BAYARD.
SIMON JOHNSON.
CHRISTOPHER FELL."

Which Report is approved by this Court, and ordered, That the Freedom and Box be forthwith made, pursuant to the said Report; and that Mr. Sbarpas, the common clerk of this city, do affix the seal of the same Freedom, and inclose it in the said Box.

Mr. Alderman Bayard going to Philadelphia, and offering to be the bearer, of the said Freedom to Mr. Hamilton; Ordered, That Mr. Sharpas deliver it to Alderman Bayard for that purpose; and that Alderman Bayard do deliver it to Mr. Hamilton, with assurances of the great esteem that this corporation have for his person and merit.

City of New York, *ss.*

At a Common Council, held at the City hall of the said city, on Wednesday the 15th day of October, A. D. 1735.—PRESENT, Paul Richards, esq. Mayor; Daniel Horsemanden, esq. Recorder.—*Aldermen*, John Walter, esq. Simon Johnson, esq. William Roome, esq. Johannes Burger, esq. — *Assistants*, Mr. Johannes Waldron, Mr. Abraham De Peyster, Mr. Gerardus Beekman, Mr. Peter Stoutenburgh, Mr. Henry Bogert.

Ordered, That the Freedom granted by this Corporation to Andrew Hamilton, esq. with the Report of the Committee for preparing a draught of the same, and the order of this court thereon, may be printed. WM. SHARPAS.

Round on the lid of the box, mentioned in the abovesaid Report and Order, there are engraved not only the arms of the city of New York, but also this motto in a garter; "Demersæ Leges — timefacta Libertas — hæc tandem emergunt."

On the inner side of the lid of the box, shewing itself at the same time with the certificate of the freedom, there are engraven, in a flying garter, these words; "Non nummis, Virtute paratur."

As an incentive to public virtue, on the front of the rim of the said box, there is engraven a part of Tully's wish; "Ita cuique eveniat, ut de republica meruit."

Which Freedom and Box were presented in the manner that had been directed, and gratefully accepted by the said Andrew Hamilton, esq.*

* In the celebrated Tract, intitled, "A Letter concerning Libels, Warrants, Seizure of Papers, &c. by The Father of Candour;" which has been ascribed to Lord Chancellor Camden, and also to Lord Ashburton, it is noticed that the Preface to Zenger's Trial contains many things very well worth reading.

REMARKS

ON THE TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL, WHO WAS LATELY TRIED AND ACQUITTED, FOR PRINTING AND PUBLISHING TWO LIBELS AGAINST THE GOVERNMENT OF THAT PROVINCE.†

Sir; It has been a common remark among those who have observed upon the capricious dispensation's of fortune, that great events are

† "These Remarks were written by two eminent lawyers in one of our colonies in America, immediately after the publication of the Trial of Mr. Zenger, which it seems had been industriously spread over that part of the world, before it reached England.

"As the doctrines contained in that trial, or rather in the speech of Mr. Hamilton, are of so new a cast, and so absolutely contradictory to all the resolutions and judgments that have been settled and established for so many ages, and by judges of the highest reputation, and most unquestionable characters, for their integrity, virtues and abilities, it could not be imagined so wild and idle an harangue could have had any weight, or have met with any reception here, where the laws relating to libels have been so often canvassed, and are generally so well understood; and therefore the person to .whom these Remarks were sent, never thought of making any other use of them than to satisfy his own curiosity, and that of his friends.

"But seeing, to his great surprize, that this extraordinary declamation has been mentioned with an air of applause and triumph in several news-papers, as striking out some new lights with regard to the doctrine of libels; and, upon the credit of that recommendation, the whole Trial not only twice printed here, but retailed out in scraps in the public news-papers, whereby many well meaning people may be deceived, and led into wrong notions concerning the laws of their country in this point: He has thought fit to communicate these Remarks to the public, in order to remove any mistakes or errors that persons may fall into for want of an adequate judgment in these matters; and the rather, because if such false opinions should happen to influence the conduct or practice of any, the consequences may be very dangerous; it being an established maxim in our law, that neither ignorance nor mistake is an excuse to any one who has broke it, from the penalty of it." Preface to the Remarks,

often produced by instruments that are not seemingly adequate; nay, that the same apparent causes have quite contrary effects; and the road that leads one man to wealth, honour, and power, sometimes carries another to poverty, infamy, and ruin. Hence comes that confused distribution of axes and coronets, halters and ribbons, which history displays by numerous shocking examples; and thus it is, that fate seems to play at cross-purposes with mankind; or to speak in Scripture-phrase, in this sense *as* well as many others, "the wisdom of this world is foolishness."

I find myself drawn into these grave reflections, by reading the Trial of John Peter Zenger, at New-York, upon an information for printing and publishing a libel. This piece, it seems, has been lately printed there, and was put into my hand the other day by a friend, who has both a general acquaintance and a correspondence with the northern colonies, as a rare production, containing many things new and surprising. And, in truth, I must say it affords a lively specimen, in miniature, of the justness of the foregoing remarks: I mean that part of it which is attributed to Andrew Hamilton, esq. of Philadelphia, barrister at law; together with the sequel, describing the munificent behaviour of the citizens, in common council assembled, to the learned gentleman, for his singular performance on that occasion.

I must at the same time assure you, that if Zenger's trial had been printed by order of the Court that tried him, or from a copy taken by a private hand at the trial, or by any other means that excluded Mr. Hamilton's approbation or privity, I should have enjoyed my own opinion without troubling you or any body else about it, and had the charity to resolve all the extravagancies that occur throughout his declamation, into a right discernment of the people he talked to, and a dexterity in captivating them, which had its effect in the acquittal of his client. But when a gentleman of the bar takes the pains to write over a long discourse (he being the only lawyer, of either side, who gave the printer his notes), in order to send it abroad through the world, as a specimen of his abilities, sentiments and principles; as a solemn argument in the law, fit to see the light, and abide the test in all places; and, above all, as a task of duty, which he thought himself bound to perform, even by going to the utmost parts of the land for the purpose; and all this, without fee or reward, under the weight of many years, and great infirmities of body: When a barrister, I say, thus becomes a volunteer for error, and presumes to obtrude bad law and false reasoning upon the sense of mankind, because the sage magistrates of New-York have put their seal to it; I think myself at liberty, without using any other apology, to exercise the judging privilege of a reader, since the gentleman himself has put me into the possession of it.

In doing this, I shall not in the least gratify a vain itch of writing; for there are no extraordinary talents necessary for refuting gross absurdities; but I shall have the honest merit of endeavouring to undeceive such of my fellow-subjects in the plantations as may, from the late uncommon success of the doctrine, mistake the liberty of the press for a licence to write and publish infamous things of their superiors, and of all others, at their pleasure, provided they write and publish nothing but what is true. In the next place, I would preserve, as far as I am able, the dignity of the profession of the law in these remote parts of the British dominions; and prevent its learned professors in England, who probably wilt see the renowned piece above mentioned (if we may judge from the industry used in dispersing it), from suspecting that all their American brethren use the like arts 1o gain popularity and honourable rewards. The former, having the advantage of going daily to the great school of law at Westminster, are already apt enough to think meanly of the accomplishments of the latter, who are far removed from instruction; and their opinion must be strongly confirmed in this respect, if such a rhapsody, as was uttered at New-York, should not only be applauded and rewarded publicly there, but printed and scattered in reams through the other colonies, without being followed by a suitable animadversion.

Neither will it be amiss to take some notice, in this place, of the quackery of the profession in general, without any particular application, as it has been practised with vast success in some of our colonies. You will often see (if common fame may be trusted) a self-sufficient enterprising lawyer, compounded of something between a politician and a broker, who, making the foibles of the inhabitants his capital study, and withal taking advantage of the weakness of his judges, the ignorance of some of his brethren, the modesty of others, and the honest scruples of a third sort (without having any of his own), becomes insensibly an oracle in the courts, and acquires by degrees a kind of dominion over the minds, as well as the estates of the people; an influence never to be obtained but by the help of qualities very different from learning and integrity. Whenever such a man is found, the wonder is not great, if, from a long habit of advancing what he pleases, and having it received for law, he comes in time to fancy that what he pleases to advance is really law.

I have taken the pains, during this short vacation between our monthly courts, candidly to examine this new system of libels, lately composed and propagated on the continent; the discovery of which cost the good city of New-York five ounces and a half of gold, a scrip of parchment, and three Latin sentences. My intention is to consider things, not persons, having no other knowledge of the gentleman principally concerned, than what is derived from the paper now before me; and being wholly a stranger to the merit of those disputes that gave rise to the prosecution of this printer.

Much less shall I turn advocate for any lawless power in governors; God forbid I should be guilty of such a prostitution, who know by experience of what stuff they are commonly made: the wrong impressions they are apt to receive of themselves and others; their passions, prejudices, and pursuits; though when all reasonable allowances are made for certain circumstances that attend their mission from home, and their situation abroad, a considerate person may be tempted to think — it is well they are no worse than they are.

But to come to my remarks on Mr. Zenger's trial.

In considering the Defence made for the defendant (Mr. Zenger) by his counsel (Mr. Hamilton), upon Not Guilty pleaded to an information for printing and publishing a libel, it is not to the purpose to inquire how far the matters charged in the information are in their nature libellous; nor whether the innuendoes are properly used, to apply the matters to persons, things and places. It is only necessary to examine the truth of this single proposition, upon which the whole Defence is grounded, and to which the several parts of it refer; namely, That the several matters charged in the information are not, and cannot be libellous, because they are true in fact.

This is the cardinal point upon which the learned gentleman's whole argument turns, and which he lays down, over and over, as the first principle that governs the doctrine of libels; and accordingly he confesses the printing and publishing of the papers laid in the information, and puts it upon the king's counsel to prove the facts contained in them to be false; alleging, at the same time, that, unless that were done, the defendant could not be guilty; but if the same were proved to be false, he would own the papers containing them to be libels. To this, it seems the Attorney General answered, that a negative is not to be proved; and the other replied in these words, which I choose to set down, that I may not be thought to do him wrong — "I did expect to hear that a negative cannot be proved; but every body knows, there are many exceptions to that general rule: For if a man is charged with killing another, or stealing his neighbour's horse; if he is innocent in the one case, he may prove the man said to be killed to be still alive; and the horse said to be stolen never to have been out of bis master's stable, &c. and this, I think, is proving a negative." Now, I must think, that it is strange a gentleman of his sagacity, who owns he was prepared for the objection, could not yet hit upon some of these many exceptions which every body knows; for he does no more than give two instances of one affirmative being destroyed by another, that infers a negative of the first; at which rate most negatives may be proved, and then the old rule may be discarded. Thus, if it is shewn that a man is alive, it follows clearly that he was not killed; and if a horse is proved to have been always in his master's stable (for this is what must be understood of his being never out of the stable), it certainly follows that he could not be stolen. So that, according to this new scheme of proof, he who is accused of killing a man, or stealing an horse, is to be put upon proving that he did not kill or steal, because it is possible that such proof may be had sometimes: And so, in the principal case, if a question arises whether a certain magistrate has done particular acts of injustice or not, the method is to shew that he did not do such acts, not that he did them. I have touched upon this, not for its importance, but as a specimen of the learned barrister's manner of reasoning, and of the spirit with which he sets out from the begining.

At length however he takes the *onus probandi* upon himself; and rather than the thing should go unproved, generously undertakes, at his client's peril, to prove the matters, charged in the information as libellous, to be true. But I would be glad to know, by the way, how this undertaking gentleman could have proved the truth of divers facts contained in the paper which the defendant published, supposing the Court had been so much overseen as to let him into a proof of this sort. Could he prove for example, that judges were arbitrarily displaced, and new courts erected, in the province of New York, without consent of the legislature? For, I am credibly informed, there never was a pretence or surmise of more than one judge being displaced, or more than one court erected, under Mr. Cosby's administration, both which happened upon one and the same occasion. Now I would not have this esteemed a captious exception, when I have to deal with a man of law, who must or ought to know, that, if such a justification as he offered were at all allowable, it ought to be full and express, so as to leave no room for a libeller to multiply and exaggerate facts at his pleasure, when he is disposed to traduce persons in authority; there being a manifest difference between a single act of power without or against law (from which perhaps few governments have been free), and an habitual abuse of power in repeated instances of the same species. I would further ask, how he could prove, that the law itself was at an end, and that trials by juries were taken away when a governor pleased; for, if I mistake not, he was at that time speaking to a jury in a regular court of law, and in a prosecution which the governor had much at heart (as the gentleman himself insinuates), and would have been highly pleased to convict his client; yet would not attempt it, but in the ordinary course of trial by a jury; and then too, could not find a jury that would convict him. I think I am warranted in putting these questions, even by the authority of the barrister himself, who says, "Truth ought to govern the whole affair of libels, and yet the party accused runs risk enough even then; for if he fails of proving every tittle he has wrote, and to the satisfaction of the court and jury too, he may find to his cost," &c.

But for the present, I will suppose Mr. Hamilton was able to prove all these things; nay, that the jury knew them all to be true. I will go further, and allow, that juries in criminal cases may determine both law and fact, when they are complicated, if they will take such a decision upon their consciences (which is almost the only point in which I can have the honour of agreeing with him); yet, after all these concessions, the main question rests still between us, viz. Whether a writing can be a libel, in legal acceptation, if the matter contained in it be true? He is pleased, indeed, to express his dislike of infamous papers, even when they are true, if levelled against private vices and faults; and in this case he calls them base, unworthy, scandalous, unmanly and unmannerly. But surely it might be expected, when a point of law was in question, that he would have told us, whether they were lawful or unlawful, innocent, or criminal, since these last are the only epithets that were relative to his subject, though the first might have their weight in a sermon or moral essay. But, it is plain, he was aware of the consequence of being explicit upon this head; for had he owned such writings to be lawful, because true, he would have alarmed the common sense of mankind, by opening a door for exposing at mercy the frailties, vices, defects and misfortunes of every person, high and low, which must inevitably destroy the peace of families, and beget ill blood and disorders. If, on the other hand be had acknowledged such writings to be unlawful, inasmuch as they concerned private miscarriages and transactions; hut that every man might write as much truth as be pleased about the administration of the government, not only by pointing out faults and mistakes, but by publishing bis own comment and inferences, in order to fill the minds of the people with all the jealousies and apprehensions his imagination can form; it must have shocked men of understanding to be thus told, that the law bad provided against private quarrels and breaches of the peace, occasioned by virulent writing; but had taken no care to prevent sedition and public disturbance arising from the same cause.

His favourite position, however, was to be maintained at all events; and therefore, when the Chief-justice rightly instructed him, that he could not be admitted to give the truth of a libel in evidence, that the law was clear that he could not justify a libel; for it is nevertheless a libel, though it is true; the discerning gentleman was pleased to understand by the word justify, a justification by plea, as it is in the case of an indictment for murder, or an assault and battery: there (says he) the prisoner cannot justify, but plead Not Guilty; yet in murder, he may prove it was in defence of his life, his house, &c. and in assault and battery, he may give in evidence, that the other party struck first; and in both these cases he will be acquitted.

If the party in either case is acquitted, the reason is, I presume, because the matter given in evidence amounts to a justification in law of the fact charged on him, and is equivalent to a confession and avoidance in pleading. In like manner, if truth be a sufficient justification of a libel, the defendant will be acquitted upon proving the contents of his paper to be true. Now let it be observed, that the words of the book which the chief-justice relied on are these: —— It is far from being a justification of a libel, that the contents thereof are true — since the greater appearance there is of truth in any malicious invective, so much the more provoking it is. That this is good law, I hope I shall be able to shew fully hereafter, as I shall shew, in the mean time, that it is an express authority against the well-read barrister, who declares, he has not in all his reading met with an authority that says, he cannot be admitted to give the truth in evidence, &c.

He seems to take it for granted (and I shall not dispute it with him now) that matter of justification cannot, in any case, be pleaded specially to an indictment of assault or murder; but the party is to take advantage of it in evidence upon Not Guilty pleaded. Let it be so; yet still this matter must be a sufficient justification, or the party can have no benefit from it any way. In an action of assault and battery, where the first assault must be pleaded specially; the matter of justification is just the same, as in an indictment for the same offence, where it must be given in evidence upon the general issue. I ask then, Whether the first assault is a justification in an indictment of assault and battery? If the barrister should answer negatively, such answer is against all sense, for the party is acquitted by virtue of the justification only. If he should answer affirmatively, he is inconsistent with himself; for he has but just affirmed that when the book says, truth is no justification, it must be understood of a justification by plea, by which he must mean that nothing else is a justification but what is pleaded, or he must mean nothing at all. For the words of the book are — it is far from being a justification, &c. it is not said, — you are far from being at liberty to plead it in bar. In truth, the author is not there speaking of the forms and rules of proceedings upon libels, (1 Hawk. chap. 73, § 5, 6, 7,) but upon the substance and nature of the crime, what shall and what shall not excuse or justify it. This is manifest from the reason subjoined to support his assertion, viz. Since the greater appearance there is of truth, &c. which is a solid reason grounded on the wisdom of the law, which punishes libels even against private persons, as public offences, because they provoke men to acts of revenge and breaches of the peace. I hope it will not be said that a libel is less provoking, because the truth of it is to be given in evidence, than if it was to be pleaded in bar.

But all this is Star-chamber doctrine with the barrister, and the very mention of that court serves him for an answer to every thing,

for which he has no other answer; because the memory of that tribunal is justly detested on account of many illegal and exorbitant proceedings. No; this is the authority of Mr. serjeant Hawkins (though he uses marginal references to some Star-chamber cases), whose name is too great to receive any addition from this paper, and who, after a long and studious search in the crown-law, laid down this proposition for law at the time he wrote his book; and I believe it will appear in the sequel that he was not mistaken. And now I come to join issue with the barrister upon this point, whether Mr. Serjeant or he is in the right; or, in other words, whether falsity in fact be essential to a libel, so that the truth of the fact may be given in evidence to prove a writing to be no libel.

He maintains the affirmative of the question, both from what he understands to be the authorities in the case, and from the reason of the thing. All which shall be considered in their older.

The authorities cited by Mr. Hamilton to support the proposition formerly stated, consist principally of four cases, which I shall consider in the order as they were produced.

The first is the case of John de Northampton, 18 Edw. 3, 3 Inst. 174, which he observes does not appear to have been a case upon an information, but that he has good grounds to say it was upon an indictment. This is what I shall not contest with him, because it is not material, or indeed easy to be determined, without seeing the record; though I conceive there are grounds to say it was not upon an indictment, as was the case of Adam de Ravensworth, mentioned by lord Coke in the same chapter. The case, however, stands thus: 'John de Northampton, an attorney of the King's-bench, wrote a letter to one Ferrers, one of the king's council, that neither sir William Scot, a chief justice, nor his fellows the king's justices, nor their clerks, any great thing would do by the commandment of our lord the king, &c. which said John being called, confessed the letter, &c. Et quia prædictus Johannes cognovit dictam literam per se scriptam Roberto de Ferrers, qui est de concilio Regis, quæ litera continet in se nullam veritatem: Prætextu cujus Dom. Rex erga Curiam et Justiciarios suos habere posset indignationem, quod esset in scandalum Justic. et Curiæ. Ideo dictus Johannes committitur, &c.' Here says the barrister, by this judgment it appears the libellous words were utterly false, and there the falsehood was the crime, and is the ground of the judgment. For my own part, I can neither see truth nor falsehood in the words at the time they were wrote, for they refer to a future contingency that might, or might not be as he said; and in this respect, they were the same as if the man had said, the roof of Westminster-hall would fall upon sir William Scot and his fellows. Besides, the words taken by themselves have no ill meaning; for I imagine it will be allowed that most of the great things which judges do as judges, are such as ought neither to be done, nor left undone by the king's commandment. Where then was the offence? The record, I think, shews that in the following words: "prætextu cujus Dom. Rex erga Curiam et Justitic. suos habere posset indignationem!" &c. "Ideo dictus Johannes committitur," &c. It is observable, that the author of this letter was an attorney of the Court, and by the contents thereof he presumes to undertake for the behaviour of the judges in some great matters that concerned their office. The letter was addressed to a person who was of the king's council, and might possibly communicate the contents of such a letter to the king; the consequence of which might naturally be, that "Dom. Rev habere posset indignationem erga Curiam," &c. for great things were sometimes done, in those days, by the king's commandment; and the judges, besides, held their posts at will and pleasure.

The words "quæ litera centinel in se nullam veritatem," were therefore proper for the judges to insert, in order to acquit themselves to the king; but they are no more the ground of the judgment than these other words, "qui est de Concilio Regis;" both being only incidental clauses that come in by way of description; for it is not said, "Quia litera prædicta continet in se nullam veritatem." After all, I would not have this construction of the case, plain and natural as it is, pass merely upon my own credit; for I shall shew that this case was so understood by one of the greatest lawyers of his time, before lord Coke's 3d Inst. appealed in the world.

21 Jac. B. R. Tanfield *v.* Hiron. Godbolt 405, 6.

The plaintiff brought an action upon the case against the defendant, for delivering of a scandalous writing to the prince, &c. Noy for the plaintiff cited, 18 Ed. 3, a letter was sent to Ferrers one of the king's council, the effect of which was, that Scot chief-justice, and his companions of the same bench, would not do a vain thing at the command of the king; yet because he sent such a letter to the king's council, although he spake no ill, yet because it might incense the king against the judges, he was punished. If no ill was said, will it be pretended that the falshood of what was said could be a reason for punishing a man? Is it not ridiculous to say, that the falshood of innocent or insignificant words can be criminal? This book, therefore, follows the record of Northampton's case, and says, because it might incense the king against the judges, he was punished; which is almost a translation of 'prætextu cujus,' &c. which Was the ground of the judgment, "Ideo committitur.'

The next case which the barrister called to his aid, is that of the Seven Bishops.* And here he relies on a flourish of one of the counsel for the bishops, and a dubious expression of

* See it in this Collection, vol. 12, p. 183.

one of the judges, separated from the rest of bis discourse.

Sir Robert Sawyer, it is true, says, "Both the falsity of it (the libel) and that it was malicious and seditious, ate all matters of fact, which they (the king's counsel) have offered to the jury no proof of," &c. This, I must confess, proves one point to which the barrister adduced it, viz. that he was not the first who insisted that to make a writing a libel, it must be false. And when I have allowed this, I may almost venture to say, it is the only point he does prove from the beginning to the ending of his long elaborate speech.—Let me, however, oppose to this the reply of sir Thomas Powls, in these words: "Whether a libel be true or not, as to the matter of fact; was it ever yet permitted in any court of justice to be made a question, whether the party be punishable for it? And therefore J wonder to hear these gentlemen say, that because it is not a false one, therefore it is not a libel." Fol. 382.

Mr. Justice Powel also does say, that to make it a libel, it must be false; it must be malicious; and it must tend to sedition. Upon which words of this learned and worthy judge, I would not presume to offer any comment except that which other words of his own afford, that plainly shew in what sense he then spoke. His subsequent words are these: "They," the bishops "tell his majesty, it is not out of averseness to pay all due obedience; nor want of tenderness to their dissenting fellow-subjects, but because they do conceive the thing that was commanded them, was against the Jaw of the land. They say, they apprehend the Declaration is illegal, because it is founded on a dispensing power. I do not remember in any case in all our law, that there is any such power in the king; and the case must turn upon that. In short, if there be no such dispensing power in the king, then that can be no libel which they presented to the king, which says that the Declaration being founded upon such a pretended power, is illegal." So that the judge put the whole upon that single point, whether it be true that the king had such a dispensing power, or not; which is a question of law, and not of fact; and accordingly the judge appeals to his own reading in the law, not to witnesses or other testimony, for a decision of it. In truth, the Petition of the Bishops is not capable of having falshood or truth applied to it in any other sense, there being nothing else affirmed or denied in it, but that they thought they could not do what was commanded them, because it was against the law. This was the behaviour, these were the sentiments of that upright judge, that gained him so much honour among all good men, as the barrister takes notice; not any opinion of his, that the contents of a libel must be false in fact, to make it a libel; as he would unfairly insinuate.

Sir Samuel Barnardiston's case is the third that is touched upon; and here too the gentleman finds nothing that can be strained to his purpose, but the defendant's counsel insisting on the want of proof to the malice and seditious intent of the author. He seems to have forgot that the same gentleman insisted also to have it proved, that the defendant was a person of a turbulent and unquiet spirit, because these words were set forth in the information; and he takes no manner of notice how all this was answered, which I must now do for him, in the words of the Court: "Certainly the law supplies the proof, if the thing itself speaks malice and sedition. As it is in murder; we say always in the indictment, he did it by the instigation of the devil: can the jury, if they find the fact, find he did it not by such instigation? No, that does necessarily attend the very nature of such an action or thing. So in informations for offences of this nature, we say, he did it falsely, maliciously, and seditiously, which are the formal words; but if the nature of the thing be such as necessarily imports malice, reproach and scandal to the government, there needs no proof but of the fact done; the law supplies the rest." How shall any man prove another person's malice, which is a thing that lies only in a man's mind? How should any man know that I am malicious against the government, but by my actions? These words, indeed, were pronounced by the chief justice Jefferies, who was then the mouth of the Court; but though he was really an intemperate judge, (or a monster, as the barrister, in his bar-language, delights to call him) yet I may safely refer it to all men of law, whether these words could have discredited the best mouth that ever spoke upon that bench.

An instance of this sort may not be impertinent, where a chief justice (who was no monster) addresses himself to a jury, that was trying a libel in this manner: "I will not repeat the particulars to you, only something to what the defendant has said, that you may not be misled. He says, it does not appear that, he did it maliciously or knowingly. There are some things that you that are of the jury are not to expect evidence for, which it is impossible to know but by the act itself. Malice is conceived in the heart; no man knows it, unless he declares it: as in murder, I have malice to a man; no man knows it. I meet this man and kill him; the law calls this malice. If a man speak scandalous words against a man in his calling or trade, he lays his action, malice; though he cannot prove it but by the words themselves; yon may see, there is malice supposed to a private person in that slander, much more to the king and the slate."

Tutchin's case, the barrister does not properly cite, but endeavours to answer as a case urged against him by the king's counsel; and therefore I shall observe upon it in another place.

But the case of cases is still behind, which he reserved for the last, to make the point clearer on his side, than all the rest put together could do. It is Fuller's case. And it deserves notice, that although Fuller was charged with writ-

ing a libel, yet that was not the gist of the information. He was, in truth, prosecuted for being a cheat and impostor, by order of the House of Lords, as the king's counsel declare in the opening.

The information accordingly sets forth, "That W. F. intending the late king William and his subjects to deceive, and to get several great sums of money fraudulently and deceitfully from the said king, concerning a correspondency between divers officers and subjects of the said late king, and the late king James, falsely pretended to be had; did write and print a libel, intituled, Original Letters, &c. with the deposition of T. J. and T. F. esqrs. proving the corruption lately practised in this nation; and the said W. F. afterwards did publish, utter, and for truth affirm, the said several false and scandalous libels, without any lawful authority; whereas in truth, the said T. J. did not depose, upon his oath, as is contained in the said false and scandalous libel; but the said scandalous libels are false, feigned, and altogether contrary to truth, &c." Here it is manifest he was accused of a cheat, in forging the correspondence and the depositions just mentioned, with a design of getting money by his pretended discovery. And hence it comes, that the judge very properly asks him, "Have you any witnesses? If you take upon you to write such things as you are charged with, it lies upon you to prove them true, at your peril. How came you to write these books that are not true? If you have any witnesses, produce them." Thus said and thus did that great man, lord chief justice Holt; hut not upon a trial of the like kind with Mr. Zenger's, as his counsel would have it thought. For, in this case, the cheat and the imposture was the offence, which consisted wholly in the falsity; that is, in affirming such things for realities, when they were nought but fictions. On the contrary, had he been able to prove those letters and those depositions to be authentic, the discovery would have been valuable, and might intitle him perhaps to favour and protection, instead of punishment, however irregular he was in taking such a method to publish matters of that high consequence. After this, let the learned barrister, in all his reading, shew an information or indictment for a libel, where the falsity is assigned in form with an *ubi re vera,* as the foundation of the offence, which is done in Fuller's case; and then I will acknowledge, that the questions put here by lord Holt would have been proper, upon the trial of his client.

This is the sum of the barrister's law-cases. And is it not high time to ask, whether such gross misrepresentations of the books can proceed from ignorance or disingenuity? Be that as it will, it might certainly be expected, that a proposition, advanced with so much assurance, by a man of years and reading, should have been supported by some one authority in point, rather than by a series of low prevarication and quibble. Could he not find, in all the book-cases and trials at large, concerning libels (which are sufficient of themselves to make a large volume,) one example of proof being received to the truth or falsity contained in a libellous writing? Indeed, there is nothing like it to be found; though the occasions have been many, where such proof might be had, if it were proper; nay, where the truth of the thing was notorious to all men, and yet no question ever moved concerning it. This shall fully appear in the sequel.

If any thing can be necessary further to expose Mr. Hamilton's doctrine of libels, after answering his own cases, it is only to subjoin some others, that will shew how much he is mistaken in almost every thing he has offered on the subject. I shall therefore mention a very few, that will bear a particular application to his crude notions, without entering into a multitude of others, to tire the reader.

16 Car. 2, the King *v.* Pym, 1 Sid. 219, B. R.

Pym was indicted at Exeter for a libel, which he delivered to a parson to be published in church there, and was to this effect: "You are desired to bewail the sodomitry, wickedness, whoredom, lewdness, that is of late broken out in this formerly well-governed city; that God would turn their hearts from committing those wickednesses which go unpunished by the magistrates." Pym confessed the indictment, and was fined 100*l.* He afterwards brought a Writ of Error, and assigned for error, that this was no offence, because though he says, go unpunished by the magistrates; yet be does not say that the magistrates knew of it, and wickedness unknown cannot be punished. It was answered by the Court, that this contains matter of great scandal to the government of the city; for it makes the late government better than the present, &c. Hide, Twisden, Keelyng, Windham, Just.

I have pitched upon this case, because the barrister is fond of comparing the plantations to large corporations; and he will find here, that even those are not left to the mercy of libellers, although they do not put in a claim to the sacred rights of majesty : and that a misbehaviour of this kind to the magistrates of a corporation is not entirely innocent, because it is not to be judged of, or punished, as a like undutifulness would be to our sovereign.

This case was adjudged about four years after the Restoration, when the memory of the preceding usurpation was fresh in every body's mind. It is strange, therefore, Mr. Pym did not put himself on his trial at Exeter; for it was evident, beyond contradiction, to the people of that age from their own knowledge, as it is now to us from history, that the wickedness specified in the libel was restrained by a stricter hand before, than after the Restoration. But this notorious truth, it seems, did not avail Mr. Pym.

22 Car. 2, the King *v.* Saunders. Raym. 201. B. R.

Information for writing a scandalous libel to H. Rich, who was indebted to him, and kept

him out of his money three years by obtaining a protection, and at length getting into the prison of the King's-bench. Saunders wrote him a letter, wherein he tells him, That if he had any honesty, civility, sobriety, or humanity, he would not deal so by him; and that he would the day be damned, and be in hell for his cheating; and cited several places of Scripture to make good his allegations. The defendant was found guilty, and moved in arrest of judgment, that the substance of the letter is not scandalous, but impertinent and insignificant, &c. Cur. The letter is provocative, and tends to the incensing Mr. Rich to break the peace. The Court adjudged the letter scandalous, and fined him 40 marks. Keelyng, Twisden, Rainsford, Moreton, Just.

I would intreat the clear-sighted barrister to look carefully into the words of this libel, and try if he can discover any truth or falshood in them that was capable of proof. And I must remark upon both these cases, that though they were adjudged in the reign of king Charles 2, yet neither of them was upon a state prosecution, or at a time when the spirit of plots and factions had infected the courts of justice; but they remain unquestionable authorities at this day.

The case of Tutchin is strong against him; a case adjudged since the Revolution, before that learned and upright judge sir John Holt, and plainly shew the fallacy that runs throughout his whole argument.

The points insisted on by this chief justice, in his charge to the jury, were these: "To say that corrupt officers are appointed to administer affairs, is certainly a reflection on the government. If people should not he called to an account for possessing the people with an ill opinion of the government, no government can subsist: Now you are to consider, whether these words I have read to you do not tend to beget an ill opinion of the administration of the government; to tell us, that those that are employed know nothing of the matter, and those that do know are not employed. Men are not adapted to offices, but offices to men, out of a particular regard to their interest, and not to their fitness for the places. This is the purport of these papers." If this was the purport of the papers, and so criminal as hath been just said, it is amazing surely, that Mr. Tutchin did not offer to prove the truth of these allegations, and thereby take out their sting! Could not he possibly think of as many corrupt or incompetent officers, ecclesiastical, civil, or military in England, preferred by interest rather than merit, as there were judges displaced and courts erected in New-York? Or if he was restrained, by the hard-hearted judge, from disporting himself in this pleasant and spacious field, could he not apply to the private knowledge which the jurors (as well as the rest of mankind) had of these matters? For I imagine it will be allowed, that if no instances of this sort could be shown at the time of Tutchin's trial, it was the only period within the memory of man, or the reach of history, that wanted the like.

But the misfortune was, the poor man was not blessed with such skilful counsel as is to be had in Philadelphia, to think of these good things for him; otherwise you might have heard an alert advocate (after returning thanks to his lordship for nothing) address himself to the jury in this or the like eloquent strain: "Then, gentlemen of the jury, it is to you we must appeal for witnesses to the truth of the facts we have offered, and are denied the liberty to prove: the law supposes you to be summoned out of the neighbourhood where the fact is alleged to be committed; and the reason of your being taken out of the neighbourhood is, because yon are supposed to have the best knowledge of the fact that is to be tried. And were you to find a verdict against my client, you must take upon you to say, the papers referred to in the information, and which are proved to be written and published by us, are false, scandalous, and seditious. You are citizens of London, honest and lawful men, and the facts which we offer to prove were not committed in a corner; they are notoriously known to be true. And as we are denied the liberty of giving evidence to prove the truth of what we have published, I will beg leave to lay it down as a standing rule in such cases, that the suppressing of evidence ought always to be taken for the strongest evidence; and I hope it will have that weight with you. Lay your hands upon your hearts, gentlemen, and recollect: do none of you know, nay, do not all of you know, certain persons, who shall be nameless, that have been lately promoted, by favour and interest, to places of trust and profit, both in church and state, army and navy, whom you must know and believe in your consciences, to be ill men, and no way qualified for such preferment; as my sagacious client has most seasonably remonstrated to the neighbours, by virtue of that right which every free-born subject hath of publishing his complaints, when the matters so published can be supported with truth?" But is lord Holt asleep all this time? Can any reasonable man, who has but common notions of judicature, imagine that this great judge would suffer such trash as this to be thrown out in any court where he sat in judgment? But what must he have said, if the libeller before him had offered to prove, that the law itself was at an end; that trials by juries were taken away when a minister pleased; that no man could call any thing his own, or enjoy any liberty, longer than those in the administration would condescend to let him do it? Would he have said, that these things did not tend to possess the people with an ill opinion of the government; and that governments might well subsist, though men should not be called to an account for punishing the like? Or would he have said, it was no matter what opinion the people had

of the government, nor whether it subsisted or not, provided these assertions were true; and so have discharged the man as a publisher of precious and useful truths, to put the neighbours on their guard?

But here also the barrister lays hold of a random question, put by one of the king's counsel to Mr. Montague, who was for the defendant, and was then touching upon the affairs of the navy: Saith the former, Will you say they are true? Now the latter had hinted as much as that these things were true; but did it with that caution which a man of skill uses, when he would say something in support of a lame cause, but don't care to press an impropriety too far. For that learned gentleman was very sensible, that if he had presumed to insist expressly on the truth of the matters contained in his client's papers, a severe reprimand was the best thing that could have befallen him. His words are these: "Nobody can say, that we never had any mismanagements in the royal navy; and whenever that has happened; the merchants of England, in all probability, have suffered for it." But does the judge, in his charge to the jury, vouchsafe to give this matter any answer, or so much as to mention it? Lord Holt did not usually pass by material things, that were offered in defence of persons tried before him; yet, in this case, he makes no question OF scruple about the truth or falshood of Tutchin's papers, although they contained many things which his lordship, the jury, and all the world knew to be ****. This candid judge, however, puts the merits of the whole upon the scandal of the government, and the evil tendency of such writings. And therefore I must once more call upon the northern barrister to shew a single instance, where witnesses have been produced by counsel, and admitted by the Court to prove the truth of a libel. When he does this, it will deserve consideration; but till then, he may talk by the hour without any meaning.

I could mention some cases of a more modern date, that have been adjudged in Westminster-hall, when this wild doctrine was not so much as thought of, and when it would not have been altogether useless, had it been practicable; but I have chose to mention such only as are reported, that the books may speak for themselves, and judge between us.

But this lawyer seems to be above having his points of law decided by the authorities of the law; and has something in reserve, which may serve to overthrow not only what has been offered in this paper, but even all the books of the law. This is what he calls the reason of the thing; but is truly and properly a sketch of his own politics; which leads me to shew, that the true reason of the thing here agrees with the law, and consequently both these are against this expert master of law and reason.

The reason of the thing, as well as it can be collected from a heap of particulars huddled together without order and method, may be reduced to the three following heads:

1. The form of an information for a libel, and the necessity of knowing the truth or falshood of its contents, in order to direct the judges in awarding arbitrary punishrnent.

2. The right every man hath of publishing his complaints, when the matters so published can be supported with truth.

3. The necessity there is of using this right, in the plantations especially, by reason of the difficulty of obtaining redress against evil governors by any other means.

1. It will not be improper to premise, under the first head, that a gentleman of the law, who takes upon him to pronounce so magisterially as the northern barrister has done concerning libels, ought to have considered well the nature and extent of his subject, it might be expected, that he is not unknowing in any part of learning necessary to fix his idea of a libel; and yet the present case would appear to be quite different. This learned gentleman might have informed himself, by reading some of the ancient laws before the Conquest, that when the falsity of virulent writings and speeches was taken into the description of the crime, there was a specific penalty annexed, viz. Cutting out the offender's tongue, Lamb. Sax. Laws. But this severity seems to have fallen into disuse under the Norman kings; and accordingly Bracton, who wrote in the reign of Henry 3, gives a description of these offences, as they were understood in his days, wherein falsity is neither expressed nor implied. These are his words: "Fit autem injuria, non solum cum quis pugno percussus fuerit, verberatus, vulneratus, vel fustibus cæsus; verum cum ei Convitium dictum fuerit, vel de eo factum Carmen famosum et hujusmodi," fol. 155. Indeed, here is no mention of libels against the king, or the state; the reason of which seems plainly to be, that offences of this sort were considered as a species of treason, not only in that age, but in several ages after, notwithstanding the statute 25 Ed. 3, and though they have by happy degrees dwindled into misdemeanours, yet nobody, except the barrister, will say they are come to have a greater indulgence from the law, than the like offences against private persons. How far, therefore, Bracton's acceptation of a libel has prevailed ever since, must be submitted upon what has been offered in the preceding part of the Remarks.

Here the barrister throws in a shrewd question, arising from the form of the information, which charges the libel to be false: This word 'false,' says he, must have some meaning, else how came it there? I hope Mr. Attorney will not say he put it there by chance; and, I am of opinion, his information would not be good without it. By way of answer to this, I must take leave to put a question or two in the same strain. Suppose a man brings an action of trespass for violating his wife, and he fairly sets forth the troth of the case, viz. That the defendant, by amorous addresses, letters, pre-

sents, &c. did gain the consent of the plaintiff's wife, and at length debauched her: I would ask, whether an action of trespass thus laid can be supported? I fancy not; and yet this is a more just account of the matter, than when *vi et armis, viz.* swords, staves, knives, &c. are introduced as instruments of invading this tender part of our neighbour's property. Suppose further, a man kills another, whom he never saw or heard of before, and he is accused of murdering him of malice fore-thought, how come such words to be put into an indictment for a fact so circumstanced? They must have some meaning; surely they are not put there by chance; and, I am of opinion, the indictment would not be good without them? Why, there is this short answer to be given to all these childish questions: there are many words used in pleadings of most kinds, sometimes for aggravations, sometimes for comprehension, often in compliance with ancient usage, which are not traversable, and many times are incapable of proof. The form of indictments and informations follows the nature of the fact, and sets it out in its worst dress; and if the fact is made appear to he unlawful, all the hard names are supplied by implication of law.

This is not all, quoth the counsellor: "It is said, that truth makes a libel the more provoking: well, let us agree for once, that truth is a greater sin than falsehood; yet, as the offences are not equal, and as the punishment is arbitrary, is it not absolutely necessary that they should know whether the libel it. true or false, that they may by that means be able to proportion the punishment? For would it not be a sad case, if the judges, for want of a due information, should chance to give as severe a judgment against a man for writing or publishing a lie, as for writing or publishing a truth?" Now is it not a sad case, that he should want to be told, that human laws don't strictly regard the moral pravity of actions, but their tendency to hurt the community, whose peace and safety are their principal objects; so that by this standard only are punishments measured? If this profound sophister is of another opinion, let him give a reason why it should be a greater crime in our law for a man to counterfeit a silver shilling, than to cut his father's throat.

2. The right of remonstrating or publishing just complaints, the barrister thinks the right of all freemen; and so think I, provided such remonstrances and complaints are made in a lawful way. But when he comes to explain, it is not a court of justice, it is not a house of representatives, it is not a legislature that is to he troubled (as he phrases it) with these things. Who then, I pray, is to be troubled with them; for the king, it seems, is out of the question? Let the barrister speak for himself; They have a right, (says he) publicly to remonstrate against the abuses of power in the strongest terms, to put their neighbours upon their guard, &c. and in another place, he speaks of it as a hardship, if a man must be taken. up as a libeller, for telling his sufferings to his neighbour. Now, though I wish and hope, as earnestly as he can do, that a free people may never want the means of uttering their just complaints, and of redressing their wrongs too, when their complaints are not beard; yet I always thought these things were better understood than expressed in a court of law; and I shall probably remain in that opinion, till the learned gentleman can produce something from the common or statute law to shew, that a British subject has a right of appealing publicly to his neighbours (that is, to the collective body of the people) when he is injured in his person, rights or possessions. When I am assured that he can do this, I promise him I shall not grudge a voyage to that country, where liberty is so well understood, and so freely enjoyed, that I may receive the important discovery from *bis* own instructive mouth.

I know the law-books assert the right of complaining to the magistrates and courts of justice, to the parliament, to the king himself; but a right of complaining to the neighbours is what has not occurred to me. After all, I would not be thought to derogate, by any thing I have said, or shall say, from that noble privilege of a free people, the liberty of the press. I think it the bulwark of all other liberty, and the surest defence against tyranny and oppression. But still it is a two-edged weapon, capable of cutting both ways, and is not therefore to be trusted in the hands of every discontented fool, or designing knave. Men of sense and address (who alone deserve public attention) will ever be able to convey proper ideas to the people, in a time of danger, without running counter to all order and decency, or crying fire and murder through the streets, if they chance to awake from a frightful dream. But I must again urge, that these points are not fit to be discussed in a court of justice, whose jurisdiction is circumscribed by positive and known laws. Besides, they take place properly in a sovereign state, which has no superior on earth; and where an injured people can expect no relief, but from an appeal to heaven. This is far from being the case of colonies; and therefore I come to shew, under the third head, that the barrister's reason of the thing is no other than reason inverted, which possibly may help the projects of a demagogue in America, but can never be reconciled to the sentiments of a lawyer, or the principles of a patriot, considered as a subject of Great Britain.

3. I have hitherto been taught to believe, that when a brave and free people have resorted to measures unauthorised by the ordinary course of the laws, such measures have been justified by the extraordinary necessity of the case, which excluded all other means of redress: and, as far as I understand the constitution, and have heard accounts of the British colonies, such a case cannot well happen, and has never yet happened among them. But here the barrister is ready to ask, how must we behave when we are oppressed by a governor,

in a country where the courts of law are said to have no coercive power over his person, and where the representatives of the people are, by his intrigues, made accomplices of his iniquity? Certainly it can't be a new discovery to tell this lawyer that as the governor is a creature of the crown, so the most natural and easy course is to look up to the hand that made him. And I imagine it may be affirmed (without catching an occasion of offering incense to majesty) that if one half of the facts contained in Zenger's papers, and vouched for true by bis counsel, had been fairly represented and proved at home, Mr. Cosby would not have continued much longer in his government; and then the city of New York might have applied to itself the inscription of the gold box, "Demersæ leges, timefacta libertas hæc tandem emergunt," with greater propriety and security, than could possibly be derived from the impetuous harangue of any lawyer whatsoever. I am the more emboldened to say thus much, because though it is my lot to dwell in a colony where liberty has not always been well understood, at least not freely enjoyed, yet I have known a governor brought to justice, within these last 20 years, who was not only supported by a council and assembly, besides a numerous party here, but also by powerful friends at home; all which advantages were not able to screen him from censure, disgrace, and a removal from the trust he had abused.

It is not always necessary, that particular persons should leave their affairs and families in the plantations to prosecute a governor in Westminster-hall, unless their fortunes are equal to the expence; for it is seldom seen, that the violence of a bad governor terminates in private injuries, inasmuch as he can't find his account in any thing less than what is of a general and public nature. And when this is the case, I hope none of our colonies are, even at this time, so destitute, but that they can find the means of making a regular application to their sovereign, either in person, or in his courts at Westminster, as their case may require.

But the wild inconsistency that shines through most parts of this orator's speech, is peculiarly glaring in that part of it now before me. The remedy which he says our constitution prescribes, for curing or preventing the diseases of an evil administration in the colonies, I shall give in his own words: "Has it not been often seen (and I hope it will always be seen) that when the representatives of a free people are, by just representations or remonstrances, made sensible of the sufferings of their fellow-subjects, by the abuse of power in the hands of a governor, they have declared (and loudly too) that they were not obliged by any law to support a governor, who goes about to destroy a province or colony," &c. One would imagine, at first sight, that this man had the same notion, with the rest of mankind, of just representations and remonstrances to the representatives of a free people, which has ever been understood to be by way of petition or address, directed and presented to them in form; in which case it is hoped that they, being moved by the complaints of the people, will stretch forth their arms to help them. But, alas! we are all mistaken; for he tells us, in the same breath, that the right way is by telling our sufferings to our neighbours in gazettes and newspapers; for the representatives are not to be troubled with every injury done by a governor; besides, they are sometimes in the plot with the governor, and the injured party can have no redress from their hands; so that the first complaint (instead of the last resort) must be to the neighbours, and so come about to the representatives through that channel.

Now I would be very glad to know, what the neighbours can do towards effecting the desired reformation, that will be attended with so good success, and so few ill consequences, as a regular application to his majesty would be. It would be pleasant, doubtless, to hear this politician speak out and explain himself at forge upon this subject. I confess it surpasses my comprehension to conceive what the neighbours, inspired with weekly revelations from the city journalist, can do with their governor and assembly, unless it be to reform them by those persuasive arguments which the *major vis* never wants good store of. If this be the patriot's meaning, his words may possibly be understood; but without this meaning they are mere jargon,

In a word, I shall agree with the barrister (and so take my leave of him), that the liberty of exposing and opposing arbitrary power is the right of a free people; and he ought, at the same time, to admit, that the order of things, and the peace of society, require that extraordinary means should not be used for this purpose, till the ordinary have failed in the experiment. The supreme magistrate of an independent kingdom or state, cannot always be controuled by the one, and then the other is justified by that consideration. But in colonies that are from their creation subordinate to their mother-country, there is no person who is not controulable by regular and well known methods of proceeding; and consequently there can be no absolute necessity of flying to extremities, at least in the first instance. From all which, I conceive, it follows, that local considerations, upon which the gentleman lays so great stress, conclude directly against him; and I hope the security which the British constitution affords to every man's person, property, and reputation, as well as to the public tranquillity, is not lessened by any distance from the fountain of power and justice; but that a libel is a libel, and punishable as such in America, as well as in Europe.

I am sensible, there is a freedom of expression used in these papers, of which I should disapprove in the common cases of controversy: but I found myself under a necessity of shewing no respect to the performance under consideration, unless I were to forfeit the little that

might be flue to the Remarks. For though a lawyer is free, nay obliged by the duty of his profession, to make the most of the cause he espouses, (his real sentiments being suspended for that time, by reason of the biass under which he acts) yet when he draws his private opinion into the debate, and interests his passions in the success of it, he then departs from his character, and becomes a party, rather than an advocate. In short, there is an air of self-sufficiency and confidence mixed with the whole Jump, enough to give a disrelish even to good sense and good law; but is nauseous, beyond all bearing, when neither of these is found. Among lawyers, I was sure this lawyer deserved no answer; and yet an answer seemed indispensable, not only for the reasons given at my setting out, but also in order to save many well-meaning people from reverencing a piece of buffoonery, that had been thrust into the world with so much florid conceit, and a gold box tagged to the end of it: a piece, wherein the whole common-place of popular declamation (equally adapted to all popular occasions) is exhausted, and the Holy Scriptures brought in to season his jokes. But as this last seems designed only for a sally of wit and humour, I shall not offer to detract from its merit; considering too, it had so happy an effect as to set the good people a laughing, when they heard the Word of God most ingeniously burlesqued in a Christian court: a piece that hardly shews the author to have been serious when he pronounced it, or his wise benefactors when they rewarded him; but that his solemn professions of principle and duty compel a charitable mind to suspect ins knowledge rather than his sincerity; and citizens are ever thought to be in earnest, when they part with their gold and shew their learning.

Sir, I ought to make an apology to you for trespassing so long upon your patience, which might have been better employed; but I flatter myself with the hopes of having some allowance made for an honest, though weak attempt to rescue the profession of the law, and the interest of lawful liberty from the disgrace thrown upon both in one of our sister-colonies. This is the truth, and let it be my excuse. I am yours, &c. ANGLO-AMERICANUS.

LETTER II.

Sir; It must be mortifying, no doubt, to a person who has received peculiar marks of public approbation, to be told, that the very act which procured it was so far from being commendable, that it really deserved a severe censure; and one would the rather decline such an office, how just soever the occasion, because it cannot be done without condemning at the same time the judgment of those whose suffrage had been thus unworthily obtained. But when the laws are openly perverted, and courts of justice, with an air of gravity, drolled out of their established rules, by such whose profession supposes them ministers of justice; and when this too shall be dignified with applause, and made highly meritorious; I conceive neither good-nature, nor the solemnity of public seals, should restrain an honest pen from exploding the practice, in order as well to stop the progress of its evil effects, as to prevent the like attempts for the future.

Virtue and merit, it is most certain, ought to be encouraged, especially by all in authority; bat when that which is merely counterfeit shall gain esteem, stand in the room of what is truly genuine, and be actually loaded with the rewards thereof, it does not only frustrate the original intention of such rewards, but likewise give countenance to the impostor, and furnish him with still farther means of vending his false wares, in prejudice of the public. Now this, with all due submission, I take to be the case of the Corporation in North America, with regard to the honours they were lately pleased to confer on a noted barrister in those parts, for his supposed services in the affair of Zenger the printer, whose trial has been so plentifully dispersed here, and in other places. Aggregate bodies, we find, may be mistaken, and too often are, as well as private men; and when they do err, it is of the more dangerous consequence, on account of the extent of their power and influence. The province in general of New York, or the city in particular, might, for aught I know, have sufficient cause of complaint, in some respects, against their then commander in chief, and his administration; but it is to be considered, that as there never was one absolutely free from faults, so it is the great privilege of the inhabitants of every British government, that a proper channel is chalked out, in all such events, and a way open for relief. The method, therefore, which the constitution prescribes ought to be strictly pursued; and any illegal deviation is not only inconsistent, and unjustifiable in itself, but has besides, a tendency to introduce mischiefs more to be dreaded even than those that were sought to be redressed. It is the law which must be the standard of right and wrong; and whoever has recourse to any other aid, or knowingly advises thereto, in the case of particular grievances, cannot act on a true principle of public spirit, but must be influenced by unworthy motives, and is always more or less an enemy to the community, according to his situation, and in proportion to the talents he happens to possess. If Mr. Zenger then will avowedly publish seditious libels against the government under which he lives, and his counsel will offer to support him by artifices unbecoming the long robe, and advancing propositions manifestly contrary to law; as the former deserves to be punished by it, so the latter, I humbly presume to say, whatever he may claim from his client, ought not to be paid his wages by any set of men who owe their being to the law, and cannot exist without it.

But I shall not scruple to acknowledge here, and I do it on no superficial observation, that

there can't he a more pernicious creature, in a distant colony, than that of a practitioner of the law, with much assurance, little knowledge, and no morals; a character not unheard of in more than one of his majesty's plantations, and which yet I would by no means apply to Mr. Hamilton, any otherwise than may appear to be just, from the performance he has, it seems, taken so much pains to publish to the world. The judicious Remarks already made upon it by Anglo-Americanus, will hardly leave room for any thing to be added that is very material; and therefore I shall content myself with a few gleanings only, and make some cursory reflections thereon, whilst (hey afford me an opportunity of bearing my testimony also against what I think the most indecent behaviour at least, if it may not be called the boldest outrage, that ever was exhibited from the bar, without a suitable chastisement.

Whoever has enquired into the doctrine of libels, and the reason of their punishment, will perceive, that they take their degrees as they affect private persons, particular magistrates, or are aimed against the government itself; and I may venture to say, that no lawyer of reputation will deny but what is set forth in the information against John Peter Zenger was of this last kind, and that too conceived in the grossest terms, such as will not admit of a different construction, or of any other meaning than what is put upon them by the prosecutor for the crown. Now I am sensible, that great allowances are, with good reason, made to counsel in the heat of argument, and when supposed to be animated with a laudable zeal for their clients. Nor has it been usual to correct them for every harsh and hasty expression, provided they keep within bounds, and stick to that which is their duty, without running into matters that have no relation to the issue, and cannot fairly serve the side they espouse. Yet, as the lord chancellor Nottingham occasionally said, Counsel should not speak as if they would abet the guilt of their clients rather than advocate for their innocency. And since your ingenious correspondent has clearly evinced, that the truth of a libel cannot be given in evidence, that it is no justification, on the general issue, and consequently no proper defence to a charge of that nature (of all which Mr. Hamilton could not, or ought not to have been ignorant), it is worthy of consideration whether he did not involve himself in his client's crime, and partake of his guilt, by declaring in the most public manner, that the facts published in the news-papers, and contained in the information, were true; and offering to prove them to be so before a court, which had no power to redress the grievances complained of, 4 Co. 14. Hob. 166, 7.

Sir Bartholomew Shower, I remember, in his argument in the case of the king against Berchet *et al.* asserts, that "in all cases of contempts to a court, no presentment is necessary, no not so much as to convict; for if done *in Facie Curiæ,* a record may be made of it, and a punishment judicially inflicted, and thai executed immediately." Show. Rep. 110. And agreeable hereto, we find, that in a late case of the king against Thorogood, Trin. 9 Geo. primi, the defendant having made an affidavit in C. B. and appealing on summons, confessed that he made it, and that it was false; whereupon the Court recorded his confession, and ordered that he should be taken into custody and stand in the pillory, &c. which was executed accordingly the last day of the term. Mod. Ca. in Law & Eq. 179, 180. This is the more remarkable, because it was in the Court of Common-Pleas, which has ordinarily no jurisdiction in criminal cases. — May it not from hence be inferred (I hint it with a due saving to all the just privileges of the bar) that the Court at New-York might well have recorded some of the most seditious expressions in Mr. Hamilton's rhapsody, and committed him for the same, &c.? If they had, I doubt the blame must have centered in himself, and his own conduct; of which therefore he might then have had leisure to repent, as well as of his long journey to so ill a purpose.

But it will not be amiss, perhaps, for example sake, to give an instance of what has been done on the like occasion with that before us; and to this end I. shall cite a case in the Court of King's-bench, many years after that of the Star Chamber was at an end, and which, in the words of sir Thomas Raymond, was as followeth: "Memorandum, June 18, 1C80, Mr. Nathaniel Reading having been convicted (before justices of Oyer and Terminer by virtue of a special commission (for endeavouring to persuade Bedlow, who was a witness against the noblemen imprisoned in the Tower of London, to forbear his prosecution of them; and he the said Mr. Reading having had judgment executed upon him, by being set in the pillory, and fined 1,000*l.* and imprisoned for the same, but his fine since pardoned by the king, came this day into court, and demanded that an information, which he there brought in his hand, might be received by Mr. Astrey against the commissioners who condemned him, of which my brother Jones and brother Dolben were two, and that the information might be filed. But the Court did declare, that he was in the wrong way to exhibit, any information in this manner, and did cause his words, whereby he did accuse the two judges of oppression, to be recorded; and for these words, and for that he was infamous by having been on the pillory, the gentlemen at the bar did pray that his gown might be pulled over his ears, he having been formerly a practiser at the bar, which was ordered and executed in court; and he was also condemned in court to pay the king 500*l.* and to lie in prison till he paid it," Raym. Rep. 376. The trial of this gentleman referred to here, may be seen in the State Trials, on which occasion the lord chief-justice North made a speech aggravating the defendant's offence as he was a counsel, one who ought to be a man of knowledge, and a minister of justice to assist the

Court wherein he pleaded. He said, he thought the Court ought to shew a more than ordinary severity against such an one; and that it is a great credit and benefit to the profession, that the members of it for such offences should be dealt with more severely than we should deal in other cases. Id. p. 374, 5. Far be it from me to make any invidious comparison here betwixt the present practiser in Pennsylvania, and the quondam one in Westminster-hall, though they are both celebrated, the one in the trial of Mr. Zenger, and the other in his own. It may however be noted, that the latter was said to be artful and affectedly eloquent, and to have strove to lead the judges out of the way, while he was told by the chief-justice, that his defence was artificial, because it was nothing to the purpose; and by another of the judges, that he disgraced his profession by making so weak a defence. But without adverting to any particular beauties in the modern performance, this is certain, that counsellor Reading lost the bar-gown by his art, and counsellor Hamilton got a gold-box of five ounces, with the freedom of the city of New-York, by his. A pregnant instance of the capriciousuess of fate, and of the justness of your late correspondent's observation at the entrance to his excellent Remarks!

The gentlemen at the bar (as indeed it might well be expected from their education, and the nature of their business) have been remarkable for observing the regard that is due to all in authority with the utmost delicacy; and in return have always been used with suitable respect. But that the lawyer of Philadelphia may see the courts of justice in former ages, as well as of late years, did not spare the unruly members of the profession any more than others, tor much less faulty behaviour than that of the leading counsel in Zenger's trial, I will refer him to a ease which happened Mich. 13 Eliz. Rot. 39, when Henry Blaundford, a counsellor at law, was committed to the Fleet, and fined, for falsely reporting the opinion of the lord Leicester and secretary Cecil with these words, 'Humanum est errare.' And that even noblemen met with the like treatment on such occasions, will appear from the case of the lord Stourton, who, 19 Hen. 8, was committed by the Court, and fined for saying these words, "I am sorry to see rhetoric rule where law should."

Before I proceed, I will mention one case more, purely to shew how dangerous it is to afford any unlawful helps to persons on their trials in criminal prosecutions, even though it be merely by way of private instructions, when such instructions are to be publicly made use of, and import scandal to the government. It is the case of the King against Aaron Smith, Mich. 35 Car. 2, in B. R. "This term (says the book, which has the allowance of all the judges) Aaron Smith was brought into court, being formerly convicted on a trial at bar, for delivering to Stephen College, being upon his trial at Oxford for high-treason, a paper of instructions, full of scandalous reflections upon the king and government; as, That they might as well have hanged him at Tyburn as he came by, as brought him thither, only to murder him with a little more formality. For which the Court gave judgment, that he should pay a fine of 500*l.* stand on the pillory twice, and be of the good behaviour for a twelvemonth," Skinner's Rep. 124. I shall only observe this case was on an information, so much inveighed against by Zenger's counsel, and yet I never heard it censured at all, as was that of poor College, I own, with too good reason.

It is now time to take notice, that there is, amidst a heap of jargon and absurdities, one obvious mistake, which runs throughout Mr. Hamilton's ostentatious harangue, and that is in relation to the Court of Star-chamber. He would suggest, that because that court was abolished by act of parliament, on account of some insufferable abuses that had crept into it, all the cases that had been adjudged there, on informations for libels, were consequently of no authority. Whereas the judgments given there, in matters properly cognizable before them, which libelling especially was, are allowed to be good law at this day, and are constantly quoted as such in the Court of King's-bench. Indeed it is said, that the reason of disallowing the Star-Chamber-Court was because their authority was before, and now is, in B. R. and consequently that court unnecessary, Comb. 36. So the lord chief justice Holt declared, that B. R. possessed all the lawful power the Star-Chamber had, Id. 142. And that the Court of Star-Chamber was taken away, because the crimes were punishable here, 5 Mod. 464, which is likewise intimated by the statute itself. Now though [am as well satisfied perhaps with the taking away of the Court of Star-Chamber, considering the occasion that had been given, as our northern barrister can possibly be, and should equally rejoice, I hope, at the redressing any other public grievance; yet I cannot, with him, condemn by the lump, and argue, that because that court did some things amiss, therefore it did nothing right. At this rate, every court that had, or has a being, may be in danger of the same epithets he loves to bestow on that we are speaking of; and it may as well be supposed, that because a certain set of citizens, not unknown to Mr. Hamilton, lately did a very silly thing, they therefore never did a wise one. For which reason I presume it will not be altogether impertinent to produce the sentiments of that oracle of the law, sir Edward Coke, concerning the Court of Star-Chamber. "It is (says he) the most honourable court, our parliament excepted, that is in the Christian world, both in respect to the judges, and of their honourable proceedings according to their just jurisdiction, and the ancient and just orders of the Court. For the judges of the same are, the grandees of the realm, the lord chancellor, the lord treasurer, the lord president of the king's council, the lord privy seal, all the lords spiritual and temporal, and others

of the king's most honourable privy council, and the principal judges of the realm, and such other lords of parliament as the king shall name. And they judge upon confession, or deposition of witnesses. And the Court cannot sit for hearing of causes under the number of eight at the least. And it is truly said, "Curia Cameræ Stellatæ si vetustatem spectemus, est antiquissima, si dignitatem, honoratissima." This court, the right institution and ancient orders thereof being observed, doth keep all England in quiet." 4th Inst. p. 64. Conformable hereto, a late learned writer, who was advanced to the highest posts in the law in a neighbouring kingdom to that of our mother country, and wherein he died, has a paragraph, which I believe will give us a truer account of the Court itself, and the abolishment of it, than what is to be learned from our barrister's speech at New York, and therefore I will insert it here.* "The court of Star-chamber, whilst kept within due bounds, was certainly of the greatest use to preserve the peace and security of the kingdom; and perhaps was the only court which by its ordinary and proper jurisdiction, could effectually prevent and punish riots, perjuries, and other misdemeanors of the highest nature. But being made use of by the Court to support proclamations and orders of state, and to vindicate illegal commissions and monopolies, that extension of their power became a grievance insupportable, and the nation was never easy till that court was entirely suppressed by act of parliament. The House of Commons were so eager in their zeal to destroy what they called a Court of Inquisition, that though the Bill was of so great consequence, yet they sent it up to the Lords, with only once reading it, and without its being ever committed, which was a thing, perhaps, never before heard of in parliament." Cla. v. 1. 223.

I need only add on this head, that the crime of libelling is the same now as it was while the Court of the Star Chamber subsisted, and the nature of the offence the same then as now; a crime that must necessarily be punished as long as there are states and communities established in the world. And our assuming barrister will not find an author that treats of the crown law since the statute of 16 Cha. 1. cap. 10, any more than before, but makes use of the cases adjudged in the Star-Chamber generally as good law, and of equal authority in those matters with such as were afterwards adjudged in the King's-bench. Some indeed are justly liable to exception in the former, as we have also known too many in the latter, particularly during the next succeeding reign of Cha. 2, none whereof are, however, God be praised, to be met with, or heard of since the glorious and happy Revolution in 1688, which, I trust, has for ever excluded all partiality and oppression from Westminster-hall.

But the learned lawyer of Philadelphia declares, That he has not, in all his reading, met with an authority that says we cannot be admitted to give the truth in evidence upon an information for a libel. I don't know what this gentleman's reading may be; but if he had read some of the cases above-mentioned, which could not well escape him, it might reasonably have been expected he would have taken warning, been a little more cautious, and not have ventured to incur the penalties which others before him had so justly suffered. By all his reading, he would insinuate, I suppose, that he had read all: and if that was true, it might well be thought he had read to very little purpose, who could make so ill an use of it, or think it a duty on him to go to the utmost parts of the land, to propagate doctrines and principles diametrically opposite to, and just the reverse of what he must have read. We shall soon discover that the barrister's reading is not quite so extensive as he would have it imagined. But it is previously to be observed, that if there was no such authority *in terminis* as that he calls for, a man who reads with any tolerable understanding would of course infer the same thing, when all the books on the subject of libels lay it down as a rule, which they unanimously do, that it is not material whether the libel be true or false. For if that be not material, to what end should the truth be offered in evidence? Or, how should it be rejected before it was offered, which undoubtedly is the reason that there have been no late instances of that sort. It might suffice therefore to undertake, as often as this well-read lawyer produced a precedent of its being demanded from the bar to give evidence of the truth of a libel, to shew that it was as often denied by the Court. And though I admit it has been attempted before, on trials for libels of the less enormous kinds, yet he is probably the only one that has done it in any case within these hundred years. However, if we would find an instance of that sort, we must necessarily have recourse to the proceedings of the Court where that crime was usually punished. The Star-Chamber Reports then may satisfy Mr. Hamilton, that Term Pasc. 7 Car. 1, there was the case of Coston, gent. *v.* Hitcham, Mil. Servient. ad legem, as follows : "The defendant, the morning before he went to the sessions, being a justice of the peace, received scandalous and libellous articles against the plaintiff, carried them to the sessions in his pocket, and, in open court, in disgrace of the plaintiff, pulled them out and said, You shall see what a lewd fellow this is, and not fit to speak in this place; and then caused the said libellous articles to be read in the public sessions. And the plaintiff then desiring a copy of them, and to be tried upon them, the witnesses to prove them being noted in the margin, the defendant did not suffer him to have a

* See A Discourse concerning Treasons and Bills of Attainder, p. 94, printed anno 1716, wrote by Mr. West, afterwards Lord Chancellor of Ireland, who also wrote an ingenious and learned treatise, entitled, An Inquiry into the Manner of creating Peers. *Former Edit.*

copy, or to be tried thereupon, nor took any course that he might at the next sessions, or at any time after be questioned for them, but took the articles again out of the sessions and carried them away. And after, further to disgrace the plaintiff in his practice (being an attorney,) sent the said articles to Mr. Justice Harvey, at the reference of a cause to him, which Coston attended; and a jury having given a verdict against the defendant, he sent for the jurors and questioned them about their verdict, and told them they were a company of fools, and that if there had been but one vise man among them, their verdict had not been so. And tor these offences he was committed to the Fleet, and fined 200*l*. In this cause, the defendant would have had witnesses to prove the matter of the said scandalous articles to be true, but that was disallowed by the Court." Rush. Col. vol. 3, p. 36, in Append. This, I presume, the barrister, when he is serious, will allow to be in point, though it happened not to fall in the way of his reading. He cannot object, surely, that it does not appear to be on an information preferred by the Attorney-General, since it is a much stronger case than if it bad. For if the Court would not receive such evidence in a cause depending on the complaint of a petty solicitor for being libelled, and this too preferred against a justice of peace, a knight, and a serjeant at law; *a fortiori*, they would never admit it on an information exhibited, by bis majesty's attorney general, against a private person, for libelling the government.

There was also, as I have learned, divers years before, viz. Mich. 2 Jac. the case of Peter Brereton, clerk, for writing a scandalous letter to Loyd, register to the bishop of St. Asaph, and sent to himself, who was therein charged with bribery and extortion in his office; for which libellous letter the defendant was sentenced, though, as the book has it, he would have undertaken to prove the contents of the letter to be true. Here then are two precedents of what the barrister himself had never met with all in his reading; the one in a ease for libelling a practising attorney, and the other of the register of a bishop's court; but I believe I may defy this gentleman, if he were to read as many more years as he has done, to produce a third, where the offence under prosecution, being of the highest degree, and levelled at the government, like that tor which he was so zealous an advocate, the counsel for the defendant dared to offer evidence of the truth of it. On the contrary, if he had dipt into the lord chief justice Keelyng's Reports, fol. 23, (before he left his chambers) he would have there found it resolved by the whole court, that though a counsellor at law may plead his client's cause against the king, yet, if under colour of that he takes upon him to vent sedition, he is to be punished.

ft is no Wonder, indeed, if our barrister should be unapprized of Brereton's case, it not being (at least to my knowledge) in print; and you perceive I was under no necessity of mentioning it, being before provided with an authority to my purpose. But it is reported, as above, in sir Thomas Mallet's MS. Treatise of the Court of Star-Chamber, a copy whereof has fallen into my hands by the favour of a friend. And since I have named this work, I shall, with his leave, take a paragraph out of it, which, I am persuaded, will not be deemed unsuitable to the present debate, after hinting that the book seems to be wrote in the time of James 1, when the doctrine now revived, and so tenaciously advanced by Mr. Hamilton, is said to have been long before exploded as a gross error. "There are," says sir Thomas, "two gross errors crept into the world concerning libels; the one, that it is no libel if the party put his hand unto it, and the other, that it is not a libel if it be true; both which have been long since exploded out of this court. For the first, the cause why the law punisheth libels is, for that they tend to raise the breach of the peace, which may as well be done, and more easily, when the hand is subscribed, than when it is not. And for the other, it hath been ever agreed, that it is not the matter but the manner which is punishable. For libelling against a common strumpet is as great an offence as against an honest woman, and perhaps more dangerous to the breach of the peace; for, as the woman said, she should never grieve to be told of her red nose, if she had not one indeed. Neither is it a ground to examine the truth or falshood of a libel, because it is *sub judice*, whether it be a libel or not; for that takes away *subjectum questionis*, and determines it to be no libel, by admitting the defendant to prove the truth; and the defendant in that case ought to plead a justification and demur in law. But if he plead Not Guilty, the question is gone, whether it be a libel or not." Thus, according to this author's opinion, who, if I mistake not, was one of the justices of the court of King's-bench in his time, Mr. Hamilton, could he really have persuaded himself that the matters charged in the information were not libellous, as he insists they are not, would have discovered more accuracy in his profession, as well as candour in his practice, by advising his client to demur to it, whereby he would have admitted no more than what was avowed at the trial on the general issue. Then, indeed, it would have fairly come before the Court to be considered whether the papers were libellous or not, and he, as counsel for the defendant, might regularly have been heard to it.

He would then have been at liberty to exert his uncommon talents, manifest his extraordinary reading, his superior genius and great skill in language, and in explaining the true import of words, without so directly flying in the face of every authority, and opposing all the cases that ever were adjudged concerning libels, before he was born and since. But alas! that would not have answered the intention of our eloquent barrister. He would not then have had it in his power to use his arts, and play his game with a dozen honest men, of as good natural understandings, perhaps,

though not of equal experience and cunning with himself. If he had gone that way to work, he would have had no chance for the prize. Vain had been his expedition, and lost, entirely lost, all his labour. In a word, if the learning and integrity of the bar only were required, he might as well have staid at home, where, if I am rightly informed, there are instances in abundance of the blessed effects of Mr. Hamilton's well-known principles.

This sagacious gentleman begs leave to observe, that informations for libels is a child, if not born, yet nursed up and brought to full maturity in the Court of Star-Chamber: but what is particularly to be inferred from this shrewd observation, he does not at present tell us. If the Star-Chamber was the Court where crimes of this nature were generally punished, according to its ordinary and proper jurisdiction, as it certainly was, how should it be otherwise than that informations for libels must be met with there? And considering the antiquity of that court, it is more than probable the crime was first prosecuted and punished in it. But what then? Is the legitimacy of the child (if I may be allowed to carry on the metaphor) therefore to be called in question; or its education the less honourable? I might put our witty barrister in mind, that what I have mentioned is the very reason why the spurious brat he is so fond of, which was never brought to full maturity, nor ever will, first appeared in the Star-Chamber, though it has not been heard of since in any other court, till very lately, at New-York; I mean that of making falsehood to be essential to a libel, and claiming a right to give evidence of the truth of it by way of justification.

He must, however, intend by the foregoing passage, to impeach the legality of informations *qua* such (which by some words that drop from him many pages after, would seem to be what he aims at), or as they relate only to libels; and in either case he will again betray the scantiness of his reading and knowledge in the law. As to informations in general, it has been incontestibly proved, that this method of proceeding is no way contrariant to any fundamental rule of law, but agreeable to it. "That it was the constant usage, and had the approbation of the judges and lawyers of all ages, and in all reigns," Show. Rep. 106, to 125. And in the case of the information against seventy poor persons for a riot in pulling down fences, &c. 2 W. and M. (which probably may be the same) it was said by lord chief justice Holt, that "the lord chief justice Hales complained of the abuse of informations, but not that they were unlawful; that he should not come now and impeach the judgment of all his predecessors; that the Star Chamber was not set up by the statute of Hen. 7, but was as common-law, and informations were accordingly brought in that court and others. And the whole court were of opinion, that informations lay at common-law." 5 Mod. 463, 4. Now this I take to be as good an authority as the extrajudicial opinions of those anonymous great men who, Mr. Hamilton says, have boldly asserted that the mode of prosecution by information is a national grievance, and greatly inconsistent with the freedom which the subjects of England enjoy in most other cases; nor can one forbear observing, *en passant*, that he seems much more disposed, where there is no danger at least, to follow the example of bold, than of wise and judicious men.

This then being a legal course of proceeding in criminal cases, and for all public offences, it must undeniably be as proper in the case of libels as in any other. And sir B. Shower in reckoning up the several crimes that were cognizable in the court of Star-Chamber, includes libels among the rest, for which he says, There were always informations in the Star-Chamber and King's-bench. Show. 119. I am the more free in borrowing what I do from that eminent practiser, on the subject of informations, because he had studied it well, and taken more than usual pains therein; and as the judgment afterwards given by the court of King's-bench was pursuant thereto, so it seems to have put a period in Westminster-hall to all cavils against thai mode of prosecution.

If the barrister means notwithstanding to suggest moreover, that informations for libels are but of modern date, or little longer standing than about the time of the expiration of that court, where he supposes they had their origin, let him be further refuted by the abovementioned sir Thomas Mallet, who wrote professedly on the court of Star-Chamber, and may be supposed to be pretty well acquainted with his subject: he tells us, [Treatise of the court of Star-Chamber, *ubi supra*] that "in all ages libels have been severely punished in this court, but most specially when they began to grow frequent about 42 and 43 Eliz. when sir Edward Coke was her attorney general." And, treating of the antiquity of that court, he makes it very probable [Id. 1 Part, 4th Consid.] that it was the most ancient of any court of justice, and the mother-court of the kingdom; wherein he does not differ from sir Edward himself, in his 4th Inst. (54, already quoted. Now it was while this consummate lawyer, it seems, was attorney-general to the renowned queen Elizabeth, that informations for libels began to be most frequent, or, in Mr. Hamilton's elegant stile, when the child was brought to full maturity : and it is readily submitted to all who are versed in our history and constitution, whether that period will be any disparagement to the offspring.

But if informations for libels in particular, were one of the grievances of that court, nay the chief, as the barrister would labour to make his hearers believe, how came they to be practised after the abolishment of it? Or what will he say to the case of the king against Darby, which was an information exhibited against the defendant, being an attorney of the Common-Pleas, for defamatory words only of sir

John Kay, a justice of peace, concerning the exercise of his office? The words were, as they are set forth in Comb. 65. "Sir John Kay is a buffle-headed fellow, (a pretty thing to be proved in court!) understands not law, and is not fit to discourse it with me; he hath not done justice to my client." There it was argued for the defendant on a demurrer, (and I chuse to recite it because of the concessions of his counsel, against our northern advocate,) "That an information would not lie for scandalous words spoken only of a particular person, because he might have an action on the case to recompence him in damages. — It is true, such a proceeding might be warranted for libels, or for dispersing defamatory letters, because by such means the public peace might be disturbed, and discords fomented amongst neighbours, which might at last be a public injury: but there is no such thing alleged in this case, only words in common discourse, for which an action on the case might lie, but no information. On the other side it was insisted, that this information was founded on sufficient matter, because the prosecution is not only as it respects the person of sir John Kay, but it relates to him as he is a public magistrate, and who is subordinate to the government, and therefore such defamatory words are a reproach to the supreme governor, by whom magistrates are intrusted, and from whom they derive their authority; and it will not be denied, but that words reflecting on the public government are punishable at the suit of the king by an information. And for this reason the Court held that an information would lie, and thereupon gave judgment against the defendant, and fined him an hundred marks." Carth. 14, 15.

Mr. Hamilton, who would seem to be more knowing than his neighbours in many things, affects to be move ignorant than every body, of what constitutes a libel; and therefore, although he pretends freely to acknowledge there are such things as libels, yet he insists at the same time, that what his client is charged with, is not one; and if it be not, I will as freely acknowledge there can be no such thing. He desires the Attorney General to favour them with some standard definition of a libel, by which it may be certainly known, whether a writing be a libel, yea or not. And what is this for? Why, truly, to shorten the dispute. But what dispute does he speak of? The only point that could admit of dispute had been given up before by his confessing the matters in issue, and the prosecutor's witnesses being thereupon discharged. As to what he requires, either there was such a definition to be met with in the books, or there was not; if there was, he ought to have known it; if there was not, why should he desire Mr. Attorney to favour him with one? Yet after he had been indulged beyond measure, and a definition was produced from a good author, who besides refers to several others that are unquestionable, all which conclude against his client; is this loquacious advocate contented? No; there are two words to that bargain, as he had said before. He makes it a foundation for further disputes, and according to his wonted ingenuity and candour throughout his reverie, calls the concurrent sense of our books Mr. Attorney's rule, and Mr. Attorney's doctrine.

"But what certain standard rule," quoth he, "have the books laid down, by which we can certainly know whether the words are malicious? Whether they are defamatory? Whether they tend to a breach of the peace? and are a sufficient ground to provoke a man, his family or friends to acts of revenge?" &c. Now, these queries methinks do not so well become the mouth of an advocate, as they might that of his client, when abandoned to his own defence in a desperate cause. But I answer, no rules certainly can be of use to those who are determined to act without any, or in opposition to all rules, in which class our northern barrister must be placed, if we are to frame a judgment of him from the share he bore in this trial. The rule laid down in our books concerning libels (I speak of libels in the strict sense, according to the definition of Mr. Serjeant Hawkins, referred to in the trial, and which alone concerns the present case) is founded on the reason of the thing; and is the same which is to be observed in other matters that depend upon the construction of words and writings, which are signs only, or images of ideas intended to be conveyed to the understanding of the reader. There may, indeed, be divers rules applied, according to the circumstances of the case; and this, among the rest, that where words are capable of two senses, the one faulty, the other innocent, the latter is to be taken, provided such a construction may be made without violence to their natural import and meaning. From whence it will follow, that the same cases may happen that are doubtful, and do not come under any standard rule, on all which occasions honest and upright judges will incline to the favourable side: There may be others again so clear and evident, that a man must resign his reason, or resolve to sacrifice his conscience, that does not discern, or will not allow them to be libellous. But in none of these cases can it come properly to be a question before the jury) whether a libel or not, on the plea of Not Guilty, though it might afterwards be so, before the Court, in arrest of judgment. By what has been said, there appears to be latitude enough for a skilful pen (who notwithstanding must do it at his peril) to lash public and private vices, to caution the people against measures that may be hurtful to them, or to remonstrate against the evil practices even of those in power, without being always exposed to the penalties of the law. Such a liberty of writing and printing, under due restrictions, I own Englishmen ought not, and I hope never will, be deprived of; and where this is dexterously done, it would be ridiculous for private persons to put the cap on

their own heads, and no less impolitic for those in high stations to apply every thing to their administration. When such a work is undertaken by able hands, and with a generous view of serving the public, it is always laudable, and often very useful; but to succeed herein, requires a capacity and talents not to be discovered in Mr, Zenger's news-papers, or his counsel's speech.

I perceive my letter is unawares run to a great length, by the quotations that are interspersed, and which yet I am sensible is the least exceptionable part of it. I shall therefore take notice but of one thing more in this matchless harangue, which indeed ought not to be forgot, because it is made the basis and foundation of the whole; and that is, concerning the "right of freemen to complain when they are hurt." This our lawyer often asserts in general terms, with some variation only of the expression. As to which, I would ask, whether by it he means a right to remonstrate and complain in a legal way, or a right in all cases to appeal to the people by seditious and scandalous libels? If the former, nobody ever denied it, and what he said was not *ad idem;* so that he was fighting with the air, and quarrelling without an adversary : if the latter, he dishonoured his gown, by advancing what is notoriously repugnant to all laws, human and divine. It was ruled in the Court of B. R. Trin. 16 Car. That although a bill be preferred in the Star-Chamber against a judge for corruption, or any other for any great misdemeanor, yet if the plaintiff will tell the effect of his bill in a tavern, or any open place, and by that means scandalize the defendant, the same is punishable in another court. March, Rep. 76, 77. So in the Case of Hole and Mellers, 28 Eliz, in C. B. it was said by the Court, that although the queen is the head and fountain of justice, and therefore it is lawful for all her subjects to resort unto her ' ad faciendam Querimoniam;' yet if a subject, after the bill once exhibited, will divulge the matter therein comprehended, to the disgrace and discredit of the person intended, it is good cause of action, 3 Leon. 138. And to the same purpose, in a much later case, viz. that of Lake and King, reported in many of our books, to which Mr. Serjeant Hawkins refers, it seems agreed, as he observes, that whoever delivers a paper full of reflections on any person, in nature of a petition to a committee of parliament, to any other person except the members of parliament, may be punished as the publisher of a libel, in respect of such a dispersing thereof among those who have nothing to do with it. 1 Hawk. c. 74, § 12.

But our forward barrister, aged and infirm as he represents himself (which compared with his conduct, is the keenest satire that could be Suggested of him), ought to be further instructed, that even where complaints are to the king himself, they must be made in a proper and regular manner; a decency is to be observed, and a regard always had to the characters and stations of the persons against whom such complaints are made. In 13 R. 2, Rot. Parliament, N° 45, the Commons desired they might not he troubled for any matter that should be contained in petitions to the king; and the king answered, Let every man complain, so it be with law and reason. It is lawful therefore, no doubt, as it has been resolved, for any subject to petition to the king for redress, in an humble and modest manner, where he finds himself aggrieved by a sentence or judgment; for access to the sovereign must not be shut up, in case of the subjects distresses. But, on the other side, it is not permitted, under colour of a petition and refuge to the king, to rail upon the judge or his sentence, and to make himself judge in his own cause, by prejudging it before a re-hearing. Hob 220. Yet sir Rowland Flaxing was committed, and deeply fined, for reporting to the king, that he could have no indifferency before the Lords of the Council, 7 Feb. 18 Hen. 8. So likewise, in the time of Hen. 7, sir Richard Terrets was committed, fined, sent to the pillory, and adjudged to lose both his ears, for his slanderous complaint exhibited to the king, in a written book, against the chief-justice Fitz James. Which Cases are cited by chief-justice Montague, in the Case of Wraynham (who was severely punished for an offence of the same nature), as may be seen in this Collection, vol. 2, p. 1059. To these may be added, Jeffe's Case in the King's-bench, Mich. 5 Car. Jeffe was indicted for exhibiting an infamous libel, directed to the king, against sir Edward Coke, late chief-justice of the King's-bench, and against the said court, for a judgment given in the said court, in the Case of Magdalen-College, affirming the said judgment to be treason, and calling him therein traitor, perjured judge, and scandalizing all the professors of the law. He fixed this libel upon the great gate at the entrance of Westminster hall, and in divers other places; and being hereupon arraigned, prayed that counsel might be assigned him, which was granted; and he had them; but would not he ruled to plead as they advised, but put in a scandalous plea; and insisting upon it, affirmed he would not plead otherwise. Whereupon it was adjudged he should be committed to the marshal, and that he should stand upon the pillory at Westminster and Cheapside, with a paper mentioning the offence, and with such a paper be brought to all the courts of Westminster, and be continued in prison until he made his submission in every court; and that he should be bound with sureties to be of good behaviour during his life, and pay 1,000*l.* fine to the king. Cro. Car. 175, 6.

What now shall we say, or what must be thought of one, who, while ho pretends to great reading, and a thorough knowledge of these things, could yet, in the face of a court, and in defiance of its authority, and indeed of all authority, presume to justify the publication of the most audacious libels, against that very government under which he was breathing the sedition! A person, who, as a counsellor at law,

boasting at the same time of having seen the practice in very great courts, would dare to call such publication, addressed to the people, the just complaints of a number of men who suffer under a bad administration! Some of the words charged in the information, and which Mr. Hamilton offered to prove, are, That the law was at an end. I can't tell what proof he had to give of this fact; hut surely if his doctrine were to prevail, it must soon be the case; and, for my own part, I will confess, I have not hitherto heard of any thing, in that province, which looked so much like it, as that such a behaviour should not only go unpunished, but be attended with public munificence and applause. The truth is, this gentleman, though stiled a barrister at law in the order of the common-council of the city of New York, and which title, therefore, I have likewise given him, seems notwithstanding, instead of maintaining that character, in the trial before us, to be rather possessed with a fit of knight errantry, and to have sallied out from Philadelphia to the other province, with a full resolution to to encounter every thing that was law, and to level all to the ground that stood in his way. Let the reader then be judge, upon the whole, whether he comes within the description of that mischievous animal I mentioned towards the beginning of these sheets.

After all, I flatter myself if will not be imagined, that I wasstimulatedtothese hasty animadversions by a principle of enmity to Mr. Hamilton, or any disrespect to those who were pleased to patronize his performance, since they are utter strangers to sue, and probably will ever remain so. On the contrary, they may believe me, when I declare, that if the one had really merited what the others were of opinion he did, I should with much more pleasure have signified my approbation of the conduct of both, than I now take in shewing my dislike. It is on this score, Sir, that I cannot conclude, without publicly returning my share of the thanks that are due from the fraternity to your friend, the polite author of the former letter, who has done justice to the bar by his Remarks, which, in my humble apprehension, are worthy of any gentleman at it, either here or elsewhere. I am, &c. INDUS-BRITANNICUS.

With respect to Mr. Hamilton's mention (p. 719), that "as great men as any in Britain have boldly asserted that the mode of prosecuting by information (when a grand jury will not find *Billa vera*), is a national grievance, and greatly inconsistent with that freedom which the subjects of England enjoy in most other cases;" See in a Note to sir William Williams's Case, vol. 13, p. 1369, an account of what passed in parliament at the time of the Revolution respecting informations. See, also, Parl. Debates, vol. 19, 129, 548; vol. 20, p. 596; vol. 23, p. 1069.

The proceedings concerning Informations *ex officio*, which were had in parliament at the time of the Revolution, are noticed in the Letter concerning Libels, Warrants, &c. but I did not recollect this when I prepared sir W. Williams's Case.

491. The Trial of JOHN OLIPHANT and others, for drinking to the Health of the Pretender, and cursing the King: 1 GEORGE I. A. D. 1715.* [Now first published from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARIÆ, S. D. N. Regis, Tenta in prætorio burgi de Edinburgh vigesimo septimo die mensis Junij millesimo septingentesimo decimo quinto, Per honorabiles viros, Adamum Cockburn de Ormistoun Justiciarium Clericum, Dominos Gilbertum Elliot de Minto, Jacobum Mackenzie de Roystoun et Gulielmum Calderwood de Poltoun, Magistros Jacobum Hamilton de Pancaitland et Davidem Erskine de Dun, Commissionarios Justiciarij dict. S. D. N. Regis.

Curia legittime affirmata.

Intran'

John Oliphant, *Alexander Watson*, and Mr. *William Ramsay*, present bailies of Dundee: Mr. *William Lyon*, younger, of Ogill, town treasurer there, and Mr. *Thomas Wilson*, vintner there.

INDICTED and accused at the instance of sir David Dalrymple of Hailes, baronet, his majesties advocate for his highnesses interest, for the crime of drinking the Pretender's health and cursing the king. In manner mentioned in the criminal letters raised against them thereanent. Makeing mention that where, by the laws of Scotland made before the Union, particularly, the 4th act of the 1st session of her majestie queen Anne of blessed memory, her first parliament, intituled, Act anent Leasing-makers and Slanderers, and the acts therein recited, and by the laws of this and all well governed nations, leasing making and uttering of slanderous speeches, tending to excite sedition and alienate the affection of the leidges from his majesties person and government, for to sett up and encourage the falshood

* The transcripts of this and the three following Cases were not obtained in time for insertion in their proper chronological order.