attorney (the defendant himself being absent in Ireland), and also to the person who had made the affidavit of the truth of the plea, and to the **[94]** treasurer of the theatre, for the required information; but that these parties had refused to give it, except upon condition that the action against the defendant should be discontinued.

Moore shewed cause against the rule, and contended, that the defendant had done all he was bound to do, by giving the plaintiffs a better writ, and that, at all events, the condition of discontinuing the action was reasonable.

The Court held, that substantially the defendant had not given to the plaintiffs a better writ, and that the information ought to be given without any such condition as had been required. For, possibly, the plaintiffs might ascertain, when the information was given, that the present action was proper, and might choose to reply to the plea, rather than abandon the action.

Rule absolute.

[95] THE KING *against* SIR FRANCIS BURDETT, BART. Monday, November 27th, 1820. On an information for writing, composing, and publishing a libel in the county of L. it appeared that the defendant, on the 22d August, wrote and composed the libel in L., and that he was seen in L. on that and the following day. On the 24th the libel was delivered in the county of M. (100 miles off) by A. to B., being inclosed in an envelope addressed to A., containing written directions to A. to forward the libel to B., by whom it was subsequently published in M. The envelope was open; and it was not proved that there was on it any trace of a seal or post-mark. A. was not called at the trial as a witness by either party; nor was it proved that he was a resident, or had been about that time in L.: Held, by three justices, (dissentiente Bayley J.) that this was evidence on which the jury might properly be left to presume that the libel was delivered open to A. in L. Held, also, by three justices, (Bayley J. dubitante,) that a delivery at the post-office in L. of a sealed letter, inclosing a libel, is a publication of the libel in L. Held, also, by three justices, (Bayley J. dubitante) where a defendant writes and composes a libel in L. with the intent to publish, and afterwards publishes it in M., that he may be indicted for a misdemeanor in either county. And, per totam Curiam, where a libel imputes to others the commission of a triable crime: Held, that evidence of the truth of it is inadmissible. Held, also, where, in summing up, the Judge told the jury that the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances; and that, if its contents were likely to excite sedition, &c. defendant must be presumed to intend that which his act was likely to produce; and that, if they found such to be the intent, he was of opinion it was a libel; and that they were to take the law from him, unless they were satisfied that he was wrong; that this was a correct mode of leaving the question to the jury under 32 G. 3, c. 60, s. 1. Quære, whether the writing and composing of a libel with intent to publish, but not following by publication, be an offence.

[See S. C. 3 B. & Ald. 717; 106 E. R. 823 (with note). For subsequent proceedings see 4 B. & Ald. 314.]

The Attorney and Solicitor-General, with whom were Vaughan Serjt., Clarke, Reader, and Balguy, were heard in last term against the rule for the new trial. (Vide vol. iii. p. 717.) Besides the cases referred to in their argument, they cited *The King* v. *Hensey* (1 Burr. 642), to shew that the circumstances of a letter being dated in a given place was evidence that it was written there. Scarlett was then heard in support of the rule; and, in this term, Denman, Phillipps, Blackburne, and Evans, were heard on the same side. The arguments in support of the rule were as follow (*b*):

The writing of a libel, without publication, does not constitute an indictable offence. The crime of libel consists in the tendency to a breach of the peace pro-**[96]**-duced by the communication of slander to the minds of others, by writing. No crime is

(*b*) See the evidence at length in the judgment of Best J.

therefore committed until the slander is so communicated; or, in other words, until the publication, for till then there can be no tendency to a breach of the peace. This is deducible from the very nature of the crime. It has been observed by Mr. Starkie, in his Preface to the Law of Libel, that crimes which affect the visible property or persons of men, are much more obvious to the understanding than the crime of libel, which is of a more intellectual nature; and, therefore, the law respecting the former is much more likely to be founded on just principles in its commencement in the more simple state of society, than those laws which, arising out of a more complicated state of society, and relating to a more refined object, call for more refinement in observation and greater discrimination between the good to be done by enacting penalties, and the mischief to be done by repressing a practice generally useful. One of the most refined conclusions at which a refined state of society can arrive, is, that a man should have a solid property in his reputation. It is one of the greatest privileges that belong to the nature of man, that he possesses a sensibility to fame and a love of glory, and that the individual, by the combination of opinion and the force of character, begets in his own reputation a property more valuable than the mere materials to which the crude notions of property are first applied. The circulation of written papers, and the art of printing, would give rise to great variety in the degrees of this offence. When it was found to injure the opinion and respect in which a man was held, or by which the Government was supported, as the character of individuals as well as the security of a Government, not upheld by **[97]** brute force, are founded on opinion and respect, it became important to punish those who destroyed that opinion and respect by written slander. It was long after it was the habit in enlightened Rome for every man of respectable rank to be in possession of books, that the law De Libellis Famosis was promulgated. [Abbott C.J. Cicero, in a fragment of his, book 4, "De Republica," says, that it was to be found amongst the laws of Twelve Tables.] That passage in Cicero has a reference to the practice of exhibiting individuals on the stage. It is to be found in the fragments of his book "De Republica," preserved by St. Augustine in his book "De Civitate Dei," and the passage is as follows: "Nostræ contra duodecim tabulæ cum perpaucas res capite sanxisent, in hanc quoque sanciendam putaverunt; si quis actitavisset, sive carmen condidisset, quod infamiam afferret flagitiumve alteri; præclare, judiciis enim ac magistratuum disceptationibus legitimis propositam viam non poetarum ingeniis habere debemus, nec probrum audire, nisi ea lege ut respondere liceat et judicio defendere." The probrum audire refers to the hearing of the actor, who represents the character attacked by the malum carmen of the poet. In one of the fragments of the same work, also preserved by the same author, St. Augustine, there is a reference to the poets who composed for representation, "probris et injuriis poetarum subjectam vitam famamque habere noluerunt capite etiam puniri sancientes tale carmen condere si quis auderet." By tale carmen is meant such a composition as was actually represented on the stage, and not a mere private unpublished composition. In order to explain this, some illustration may be found among the poets themselves, and particularly in the 2d book of Horace's Epistles, **[98]** verse 139, where he alludes to the very law of the Twelve Tables, by which the infamy must have been attached and fixed to the individual by representation, which was a publication. The words of the law are these: "Si quis occentasset malum carmen sive condidisset quod infamiam faxit flagitiumve alteri, capital esto." The words, it is to be observed, are not ad infamiam tendens but infamiam faxit; and so in the interpretation of Cicero, in the fragment quoted, the words are, "quod infamiam afferret flagitiumve alteri." It would seem, therefore, that the infamy must have attached, and that the mischief must have occurred before punishment could be inflicted on the author or actor. It appears also, from Suetonius, De Vitâ Augusti, c. 55, that the law De Famosis Libellis did not exist in early times in Rome. "Etiam sparsos, de se in curia famosos libellos, nec expavit nec magnâ curâ redarguit: Ac ne requisitis quidem auctoribus: Id modo censuit cognoscendum posthac de iis qui libellos aut carmina ad infamiam cujuspiam, sub alieno nomine edant." It is remarkable, that Augustus, if there was already in existence a law to punish libels with death, should not only have prosecuted none of them against himself, but should have introduced another law to subject those which were anonymous to legal restraint. Tacitus, in the first book of his annals, says, "Primus Augustus cognitionem de famosis libellis specie legis ejus (i.e. legis majestatis) tractavit; commotus Cassii Severi libidine, quâ viros fœminasque illustres procacibus

scriptis diffamaverat." And Suetonius, in his life of Tiberius, has this passage on the subject of libels, chapter 28, "Adversus convitia malosque rumores, et famosa de se ac suis carmina firmus ac patiens, subinde jactabat in civitate liberâ linguam mentemque liberas [99] esse debere. Et quondam Senatu cognitionem de ejusmodi criminibus ac reis flagitante, non tantum inquit otii habemus ut implicare nos pluribus negotiis debeamus." So that when the Senate requested him to punish those who circulated libels against him, Tiberius replied "that he should have too much upon his hands, if he were to add any care of his own person and reputation to that which he was bound to bestow upon the safety and dignity of the State." The same author says of Julius Cæsar, that he was so regardless of certain epigrammata famosa and scurrilous verses that were current against him, that he proposed a reconciliation with one of the authors, and invited another to sup with him. Now, notwithstanding the clemency of Cæsar, it is extraordinary that such things should circulate if they were the subject of capital punishment. It seems unaccountable, indeed, how the word famosus was introduced unless it had a reference to publication. The very word has relation to a thing bruited abroad and bottomed in fame. In the best period of Roman literature, it had, indeed, acquired a bad meaning. Cicero uses famosa to express a courtesan, "ad famosas mater me vetat accedere," where it combines the reputation of being public with an actual want of chastity. So, there is a passage in Horace, "Si quis mœchus foret, aut sicarius, aut alioqui famosus." Here alioqui famosus means otherwise notorious for some vice. The word famosus, therefore, in its natural sense refers to notoriety. Unless that notoriety is effected in a libel by its publication where is the offence? There must be something done to stimulate individual revenge or public discontent. If it is kept secret it wants the very essence of the meaning of the word famosus, by which the civilians describe [100] it. The very essence of the crime, whether it be against an individual or the public; whether we look to the nature of the crime itself, or the word by which it is described, consists in the publication. The passages already referred to from the civil law, apply to a case of publication; for, to make it a crime, according to those authorities, it must be ad infamiam. It cannot be ad infamiam unless the fame of some person be affected by it, and that cannot be done unless it is published.

Lord Coke, in *Lamb's case*, means to say, that the actual publisher was guilty, though he was neither the writer nor composer. Assuming the publication, he says this; "That every man who shall be convicted of a libel, either ought to be a contriver of the libel, or a malicious publisher of it, knowing it to be a libel;" meaning, that if he is the malicious publisher, though neither the author or contriver, he is guilty of the libel. If this be taken according to the very letter, it would not only establish, that the writing, without publication, would be an offence, but that the person who publishes it, without knowing it to be a libel, would be guilty of no offence which is contrary to the law as now established. Mr. Starkie, in his Treatise on the Laws of Libel, after reviewing all the cases upon the subject, seems to be of opinion, that by the law, as now understood, publication is necessary, to constitute the offence; and that opinion has generally prevailed in the profession, since the case of *Entick* v. *Carrington* (19 Howell, St. Tr. 1030). The case of *The King* v. *Payne*, no judgment ever having been pronounced in it, must be considered as one of doubtful authority. The opinion of the Court, as given in [101] 5 Mod. 167, is this: "The making of a libel is an offence, though never published; and if one dictate and another write, both are guilty of making it. To what purpose should any one write or copy after another, but to shew his approbation of the contents, and to enable him to keep it in his memory, that he may repeat it to others. Now though the bare reading of a libel may not be a crime, because a man may be surprised, and not understand what he is about to read; yet, when one takes it from another, and hears it spoken before he writes it, this cannot be by surprise, because he has time to exercise his thoughts before he writes; so that it is not a libel by repeating but by writing. If one repeat, and another write a libel, and a third approve what is written, they are all makers of it; for all persons who concur, and shew their assent and approbation to do an unlawful act, are guilty. So that murdering a man's reputation, by a scandalous libel, may be compared to murdering his person; for if several are assisting and encouraging the man in the act, though the stroke was given by one, yet all are guilty of homicide." According to this authority, if any man shews his friend an epigram, in which there is a reflection on another, and he takes a copy of it to look

at for his amusement, he is guilty, because he may publish; but it might as well be contended that a man can be guilty of shooting at another by keeping a gun, merely because somebody might take it and charge it. Again, the offence of libel is compared to that of murder; but how is a man's reputation murdered by a libel never published? In *The King* v. *Beare* (1 Ld. Raym. 414. Carth. 407. 2 Salk. 417), Lord Holt says, that "It was objected that writing a libel may be a lawful act, as by the clerk who draws the **[102]** indictment, or by a student who takes notes of it, and so the defendant's might be a lawful writing:" to which the Judge said, "That the matter, abstractedly considered, is unlawful; therefore the general finding shall be taken to be criminal; and that if the writing was innocent, as in the case objected, there ought to be a special finding of those particulars which distinguish and excuse it. If an action be brought on the Statute of Maintenance it is sufficient to say quod manu tenuit, yet in some circumstances a man may lawfully maintain a suit as an attorney or near relation." The answer to the last observation is obvious; the words of a statute are always deemed sufficient in a declaration or indictment upon that statute; for the words must receive the same construction on the record as they do in the statute, and the defendant has, therefore, the opportunity, when charged in the words of the statute, of insisting upon all the proofs required, and making all the defences allowed by the statute. The principle laid down by Lord Holt is this: if a man should write a libel, or buy it of a bookseller, and keep the libel locked up in his closet, and there it should be found, the onus probandi is cast upon him, to shew an innocent intention. Look to the consequences of such a rule. It has been laid down that a man may be guilty of a libel on those who have gone before him, and even upon a foreign prince or Government. Now, there is hardly any book that does not in some passage contain a libel on the living or the dead, on princes or on Governments. Or, suppose a man writes a libel and puts it in his closet, who can prove his intention but himself? and he, if prosecuted, would not be a competent witness for that purpose. Lord Holt proceeds; "That the jury having found the **[103]** defendant guilty of writing a libel, he must be taken to be guilty of writing the original, and a copy could not be given in evidence; on the other side, if the copy of a libel be a libel, then the writing of it is a great offence; but that people may not go away with a notion that writing of a copy, though by one that has no warrantable authority, is not libelling, the Chief Justice said, that such a copy contained all things necessary to the constitution of a libel, viz. the scandalous matter and the writing. It has the same pernicious consequences; for it perpetuates the memory of the thing, and some time or other comes to be published." That is an assumption, and Lord Holt had no right to assume that they would ever be published; and the possibility of their being subsequently published never can constitute an offence. There were authorities decided a very few years before *The King* v. *Beare*, fully justifying the doctrine laid down by Lord Holt, and which, no doubt, he had strongly in his mind at the time. In *The King* v. *Eades* (2 Shower, 468), the defendant was tried at Bar, in the second year of James the Second, on an information for commending a book in which were several seditious sentences and clauses, and convicted; and although there was a motion in arrest of judgment, on the ground that it was not averred that he either read or knew these sentences to be therein; yet, afterwards, all exceptions were waived, and, upon the defendant's submission, he was fined 100l. In *The King* v. *Williams* (ib. 471), the information was for publishing a libel, called "Dangerfield's Narrative." The defendant pleaded that by the law and custom of England the Speakers of the House of Commons signed and published the Acts **[104]** of the House, and that he signed the paper in question as an Act of and by order of the House. He was, however, fined 10,000l. for this offence. These cases would not be considered as authority at the present day, but they may possibly have been considered as such by Lord Holt, having been decisions which no Act of Parliament had reversed, and which no resolution of Parliament had condemned. It is true that before the cases of *The King* v. *Payne* and *The King* v. *Beare*, the Revolution had intervened; but the statute for licensing the press was in existence after the Revolution. Upon the expiration of the Licensing Act, in the reign of Charles the Second, the twelve Judges were assembled to discover whether the press might not be as effectually restrained by the common law as by that Act. They came to this resolution, that it was criminal at common law not only to write public seditious papers and false news, but likewise to publish any news without a licence from the

King, though it were true; and in *The King* v. *Harris* (7 Howell's State Trials, 929), Scroggs C.J. lays down the same rule. Now Lord Holt, and the Judges who assisted him, some years after the Revolution, were placed in the same predicament as the Judges stood in at the expiration of the Licensing Act, in the reign of Charles the Second. In the 5 W. 3 the Licensing Act, having been prolonged for one year, had expired. An ineffectual attempt was made to renew it in Parliament. It was, therefore, not unnatural that Lord Holt and the other Judges might, to a certain extent, feel themselves bound by the authority of the Judges on the like occasion, and conceive that there was some principle of law that warranted them in the determination that they made in these **[105]** cases; and they might, perhaps, be willing rather to refer to antecedent authorities for the opinions they had imbibed than to the authority of those later Judges, whose memories were brought into merited odium, by their attempts to support arbitrary power. *The King* v. *Eades*, which was a prosecution for approving a libel, was, however, the only authority for that doctrine, which was again laid down in *The King* v. *Payne*. Lord Holt, indeed, refers to the authority of Lord Coke, in the case *De Libellis Famosis*, 5 Rep. 125, and to *Lamb's case*. The charge in the former case was, for composing and publishing a libel, and three points were resolved, first, every libel which is called famosus libellus seu infamatoria scriptura, is made either against a private man or against a magistrate or public person. If it be against a private man, it deserves severe punishment; for although the libel be made against one, yet it excites all those of the same family, kindred, or society, to revenge, and so tends per consequens to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience. Here Lord Coke gives the definition of the crime, and states it to consist in its tendency to excite a breach of the peace. But how can it tend to a breach of the peace unless the individual libelled, or some person connected with him, should see it. The very definition of the offence, therefore, shews that it lies in the publication. Lord Coke then states the different modes of publication; but there is nothing to shew that he thought that the bare act of writing, without publication, was a crime. In *Lamb's case*, 9 Rep. 59, a bill was exhibited in the Star Chamber against certain persons for publishing two libels, and the question was, what constituted that sort of publication which, in that par-**[106]**-ticular case, justified the conviction; and it was considered how far the writer or contriver of the libel should, in that case, be deemed the publisher; and Lord Coke says, "If a person writes a copy of a libel, and does not publish it to others, it is no publication; for every one who shall be convicted ought to be the contriver, procurer, or publisher of it, knowing it to be a libel; but it is great evidence that he published it when he, knowing it to be a libel, writes a copy of it, unless he can prove that he delivered it to a magistrate." Now, it is singular that Lord Coke should lay down with so much exactness the presumptive evidence of writing to support a charge of publication; and yet not mention that the act of writing alone, without publication, would constitute an offence. It appears, from the report of the same case in Moore, that the whole question was, what should be evidence of a publication. The case of *John of Northampton*, referred to by Lord Holt, is a case of publication, or at least if it does not sufficiently appear that the letter had been received, it is then ambiguous and of doubtful authority. It appears, from *Edwards and Wootton*, 12 Coke, 35, that it was even doubted in the Star Chamber whether a sending a libel to the party libelled was such a publication as to give that Court jurisdiction. It never could have been imagined, therefore, by those who presided there, that the mere writing without publication was criminal. *The King* v. *Knell* (1 Barnardiston, 305), was a mere Nisi Prius case, where the party is reported to have been found guilty of the printing, and acquitted of the publishing; but printing is a species of publication, for copies must at least be delivered out to be revised and corrected.

[107] When the libel bill was in its progress through Parliament, the Judges were summoned by the House of Peers, and certain questions were put to them. And in answer to one of these questions, Lord Chief Baron Eyre, in delivering the opinion of the Judges, states expressly, that (*a*) "the crime consists in publishing a libel; a criminal intention in the writer is no part of the definition of the crime of libel at the common law." This is an authority of the twelve Judges in modern times, to shew

(*a*) 22 How. St. Tr. 300.

that the offence consists in the publication. It is admitted, that to support a civil action there must be a publication; because, otherwise, there can be no damage. If so, there can be no wrong without publication, and shall it be said, that a man shall not have an action when there is no publication, because there is no wrong without publication, but that the King shall indict for the mere writing, when the individual is neither wronged in his character nor roused in his feelings? The public offence grows out of the private injury to the individual. It arises out of the injury to his name and reputation, which cannot be effected till the writing is published, or in other words, until its contents are communicated to the minds of others. It has been argued, that the offence of libel bears a strong analogy to forgery, at common law, and that inasmuch as the false making of an instrument, with intent to defraud, is an offence at common law, although the instrument never be uttered; it follows that the writing of a libel with intent to defame, is an offence, although that libel be never published. These offences, however, are very different in their nature. In the offence of forgery, the crimen falsi is completed by the very act of false making the instrument, accompanied with the intent to defraud. The offence of libelling, on **[108]** the other hand, is not complete until the contents of the libel are communicated to the minds of others, because until that time the reputation of the party is not injured, nor is his resentment roused. If this doctrine is to prevail, that the mere writing is primâ facie criminal, there is not any one work that has adorned the literature of any country, or that has lashed the vices of any age, or that forms part of the intellectual riches of any nation, that might not have been the subject of criminal prosecution; and the extreme absurdity of such a consequence surely affords no inconsiderable argument, that the premises from which it is deduced are fallacious. The mere writing and composing a libel not followed by publication, is, therefore, no offence known to the criminal law of England.

It has been further argued, that where several acts constituting an offence, take place in different counties, the offender may be indicted in any of those counties; and that in this case, inasmuch as the offence is composed of the writing and publishing, and the writing took place in Leicestershire, that the defendant may be indicted in that county, although the libel was only published in Middlesex. The case of a windmill erected in one county and proving a nuisance in another, has been mentioned. Assuming that it may be indicted in the county where it operates as a nuisance, how is it to be abated? How is the sheriff to execute, out of his own county, the judgment quod prosternatur nocumentum. This shews that the party can only be indicted in that county where he does the act. In misdemeanors, which are trespasses, the venue must be laid in the county where the trespass is committed. This part of the case was so fully argued when the rule nisi was moved for; **[109]** and the several authorities upon the subject so fully considered, that it is unnecessary to pursue it any further. If the rule contended for be the correct one, the power which it would give to the Crown to multiply its tribunals would be indeed alarming. For, if a man, conceiving libellous matter, bought the paper, pen, and ink in A., wrote the libel in B., put it into the post in C., and caused it to be delivered in D., there to be published; then, according to the argument, the party might be indicted in any one of these four counties. And the Crown would thereby have the power of selecting that county in which they might obtain a jury disposed to convict the defendant. Such an option would naturally excite a strong suspicion of partiality in the administration of criminal justice, and would, therefore, be against sound policy.

It has been further contended, that in this case there was evidence of a publication in Leicestershire; and it is said, that where a libel has been put into circulation by the act of the defendant, it must be taken to be published by him in the place in which he parted with the possession of it for the purpose of publication; and that, in this case, it was clear, at all events, from the evidence, that the defendant did part with the possession of the libel in Leicestershire, either by putting it into the post, or delivering to a servant or to some other person for the purpose of transmitting it to London. The case of *The King* v. *Watson* (1 Campb. 215), was cited as an authority to shew that the putting a sealed letter into the post is a publication; but that is only a Nisi Prius case, and therefore of no great authority; and, besides, Lord Ellenborough did not decide that that was a publication, for there being no proof that it had the genuine post-mark on it, he held **[110]** the proof of publication insufficient. *Rex* v. *Williams* (2 Campb. 506), was the case of sending a letter with intent to provoke

a challenge; the letter sealed was put into the post-office in Westminster, addressed to the prosecutor in London, by whom it was received. It was contended that there was no evidence of any offence having been committed in Middlesex, the letter not having been seen by any one there; but Lord Ellenborough held, that an offence had been committed in Middlesex, and he said that, had the letter never been delivered, the defendant's offence would have been the same. In that case the sending is the gist of the offence, and there need not be any publication. The crime of sending a challenge does not consist in its tendency to a breach of the peace, but has ever been considered as an actual breach of the peace. The act of writing and sending a challenge is therefore criminal, although the challenge never arrives; in like manner as the giving a loaded pistol to a man, and desiring him to shoot another, is criminal though no shot is fired. The act of sending is the crime in the one case and the other; for if in the one case he puts the challenge into his pocket, and in the other the loaded pistol, and changes his purpose, he has the benefit of the locus penitentiæ, and is not guilty; but if the pistol be actually given to the servant to shoot another, or the challenge actually sent, and before the orders are obeyed the person carrying the pistol or the challenge is intercepted by a magistrate and discloses the facts; can any man doubt that the party sending him might be indicted for a misdemeanor, though his objects were in neither case accomplished? In the crime of libel, how-[111]-ever, publication is essential to constitute the offence. If the intention to publish be defeated, the crime is prevented. Every indictment contains the charge of publication, but in the case of a challenge, publication is no part of the charge. The evil design manifested by some overt act of a criminal character, and of immediate danger, though arrested before its final object be accomplished, constitutes a crime, as in the case of delivering the loaded pistol. Publication means the making public; the law, indeed, declares that a communication to one individual is a making public, but neither the law nor common sense can call concealment a publication. It can be no publication, therefore, to put a seal upon a letter and put it into the post; it is an act towards a publication, and if the law defined that act as a crime per se, it might be indicted in the county where it was committed. But that act is in itself a concealment; and to indict a man for a concealment and call it a publication, in order to make a constructive crime, not only violates the principles of common sense, but perverts the plain meaning of words. It is trifling with common sense and common understanding, to say that a man is guilty of publishing a letter by the very act of taking the greatest pains to conceal its contents from every eye but that of the individual whom he intends to see them in another place. He may intend to publish it, and the putting of it into the post may be evidence of that intention, but the intention to do an act which is not done does not make that act; the intention to murder is not murder, nor the intention to publish a publishing. It may be said, however, that the term publication does not necessarily mean a communication of the contents of the instrument, and the publication of a will [112] or of an award may be referred to; there the term publication means no more than the execution or acknowledgment of the particular instrument in the presence of the witness who can identify it. The act of publication in both those cases is confined to the character and identity of the instruments, and therefore need not extend to their contents. The publication, therefore, which the law requires of a will or an award is a communication to others of the nature of the act done, and not of the contents of the instrument; but that term, when applied to a libel, must mean a communication of the contents of the libel, for until that takes place, there can be no tendency to a breach of the peace.

By the rules of pleading, the charge may either be stated upon the record in precise and understood words, or according to their legal effect; that is to say, you may either use a known word, or its legal definition. This is a general rule; there are certain exceptions in cases of a highly penal nature, where the law in favour of life, demands greater strictness; as in an indictment for murder, the word murder is indispensable, but in misdemeanor, the offence may be well described by its definition. Now the technical definition of the crime of libel is, that it is an excitement to a breach of the peace by means of a written instrument containing matter injurious to the fame and character of another. Suppose that the indictment omitted all words of publication, and charged the defendant in the language of the definition of the crime of libel: viz. that he in the county of Leicester, did unlawfully excite some particular person to commit a breach of the peace by means of a certain written paper, containing

the matters following; and then setting [113] forth the libel. Now, would it have been sufficient to prove that the defendant, in the county of Leicester, wrote the paper; that he there sealed it, and put it into the post, although the person to whom it was addressed never received it? Clearly not, because that would be no evidence of an excitement in the county of Leicester. Excitement is the operation of some act upon the mind of another, and the writing can have no tendency to a breach of the peace, according to the definition, till it begins to operate upon the mind of him whose passions it was intended to provoke. This is the technical definition of the offence of libel. But if we take that which is the more enlarged and correct definition, viz. an injury done to the feelings, the good fame, and the reputation of another, by means of a written instrument, and suppose that the indictment charged that defendant did at a certain place injure the feelings of another by means of certain writing; could it be contended that the merely putting the letter into the post would be any evidence that the feelings or fame of another had been injured? The definition shews that the reputation must be affected, or the mind of the individual wounded, and this must be proved to be done in some particular place; whereas, if the paper has never been seen by that individual, or any other, neither can his fame have been affected, nor his passions inflamed in any place. The crime is not consummated until some person has seen the paper; that is, until publication.

The only question, however, submitted to the jury upon the question of publication was, whether, inasmuch as the letter was never proved to have been sealed, Sir F. Burdett might not be presumed to have delivered it open in the county of Leicester. Now, that proposition [114] involves two parts: first, that Sir F. Burdett delivered the letter to some person in the county of Leicester; and, secondly, that he delivered it open. There was no evidence to support either part of this proposition. It was proved that the defendant's place of residence was within a few miles of the county of Rutland. He was seen riding in the county of Leicester on the 22d of August, and the following day; but there was no evidence whether the nearest post town was in the county of Leicester or of Rutland. If the nearest post town were in the latter county, the probability would be that the letter would be put into the post-office in that county; and if that be a publication, it would be a publication in the county of Rutland. It was incumbent on the prosecutor, however, to prove that the defendant parted with the possession of the letter in the county of Leicester. The second part of the proposition is, that the defendant delivered it open in the county of Leicester. Now, there not only was no evidence of that, but it is directly contrary to the evidence; for the letter arrived in London at the very time when it would have arrived in due course of post. The presumption, therefore, is, that it came by the post, the ordinary mode of conveying letters. It was enclosed in a cover containing written directions to Mr. Bickersteth. It is probable, therefore, that the defendant did not deliver it in person to Mr. Bickersteth; but that, when he parted with it, it was under seal, that being the ordinary mode of transmitting letters accompanied with confidential instructions, by the post or by a servant. Taking the case according to probability, the presumption is, that the letter was sent sealed by the post. The other presumption involves the supposition that Mr. Bickersteth [115] was in Leicestershire, of which there was no evidence at all, and is a presumption contrary to the ordinary course of things. It was incumbent on the prosecutor to establish the fact by calling Mr. Bickersteth. For no presumption ought to be made in a criminal case.

Another ground upon which the defendant is entitled to a new trial is, that the learned Judge rejected evidence of the truth of the facts represented in the libel to have taken place at Manchester. Now, that evidence ought to have been received; because the effect of it might be to alter wholly the nature of the libel. If the facts were true, the question, whether the publication were a libel or not, would depend upon this, viz. whether the comments were warranted by the facts. If, on the other hand, the facts were false, the very statement of them would constitute a libel.

Another ground of objection to the verdict is, that the learned Judge told the jury that they were to take the law from him as to whether this were a libel or not. Now, by the 32 Geo. 3, c. 60, the jury are empowered to give a general verdict upon the whole matter in issue; and, consequently, are to find whether the publication be a libel or not.

Cur. adv. vult.

There being a difference of opinion on the Bench, the Judges now delivered their opinions seriatim.

Best J.(*a*). This case came on for trial before me at the Spring Assizes for the

(*a*) The information being frequently alluded to by the learned Judges in delivering their opinions, it may be proper to give the first count:

Leicestershire to wit. Be it remembered that Sir Robert Gifford, Knight, Attorney-General of our present Sovereign Lord the King, who for our said lord the King prosecutes in this behalf in his proper person, comes here into the Court of our said lord the King, before the King himself at Westminster, on Saturday next after the morrow of All Souls, in this same term; and for our said lord the King gives the Court here to understand and be informed that Sir F. Burdett, late of Westminster in the county of Middlesex, Baronet, being a seditious, malicious, and ill-disposed person, and unlawfully and maliciously devising and intending to raise and excite discontent, disaffection, and sedition among the liege subjects of our lord the present King, and amongst the soldiers of our said lord the King, and to move and excite the liege subjects of our said lord the King to hatred and dislike of the Government of this realm, and to insinuate and cause it to be believed by the liege subjects of our said lord the King, that divers of the liege subjects of our said lord the King had been inhumanly cut down, maimed, and killed by certain troops of our said lord the King, heretofore, to wit, on the 22d day of August, in the 59th year of the reign of our Sovereign Lord George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, at Loughborough, in the county of Leicester, unlawfully and maliciously did compose, write, and publish, and cause to be composed, written, and published, a certain scandalous, malicious, and seditious libel of and concerning the Government of this realm, and of and concerning the said troops of our said lord the King, according to the tenor and effect following, (that is to say) "To the electors of Westminster—Gentlemen, on reading the newspapers this morning, having arrived late yesterday evening, I was filled with shame, grief, and indignation, at the account of the blood spilled at Manchester; this then is the answer of the boroughmongers to the petitioning people, this the practical proof of our standing in no need of reform, these the practical blessings of our glorious boroughmongers' domination, this the use of a standing army in time of peace. It seems our fathers were not such fools as some would make us believe, in opposing the establishment of a standing army, and sending King William's Dutch Guards out of the country. Yet would to Heaven they had been Dutchmen, or Switzers, or Hessians, or Hanoverians, or any thing rather than Englishmen, who did such deeds. What! kill men unarmed, unresisting! and, gracious God, women too, disfigured, maimed, cut down, and trampled on by dragoons! (meaning the said troops of our said lord the King, and meaning thereby that divers liege subjects of our said lord the King, had been inhumanly cut down, maimed, and killed by the said troops of our said lord the King). Is this England? This a Christian land? a land of freedom? Can such things be and pass by us like a summer-cloud unheeded? forbid it every drop of English blood in every vein that does not proclaim its owner bastard. Will the gentlemen of England support or wink at such proceedings? They have a great stake in their country. They hold great estates, and they are bound in duty and in honour to consider them as retaining fees on the part of their country, for upholding its rights and liberties; surely they will at length awake and find they have other duties to perform besides fattening bullocks and planting cabbages. They never can stand tamely by as lookers-on whilst bloody Neros rip open their mother's womb. They must join the general voice, loudly demanding justice and redress, and head public meetings throughout the United Kingdom, to put a stop in its commencement to a reign of terror and of blood, to afford consolation as far as it can be afforded, and legal redress to the widows and orphans and mutilated victims of this unparalleled and barbarous outrage. For this purpose I propose that a meeting should be called in Westminster, which the gentlemen of the committee will arrange, and whose summons I will hold myself in readiness to attend. Whether the penalty of our meeting will be death by military execution, I know not; but this I know, a man can die but once, and never better than in vindicating the laws and liberties of his country. Excuse this hasty address, I can scarcely tell what I have written. It may be a libel, or the Attorney-General may call it so just as he pleases. When the seven bishops were

county of Leicester. On **[116]** the part of the prosecution it was proved, by Mr. Brookes, that the libel in question was delivered to him **[117]** by Mr. Bickersteth, on the 24th August; he did not state where, but I think it fair to presume that it was delivered at the place of his abode in Middlesex. Mr. Brookes's memory did not enable him to state distinctly the manner in which the paper came to his possession. He said that the envelope which had covered it was destroyed. He could not say whether it had an address on it or not; but, to the best of his recollection, it was addressed to Mr. Bickersteth. Where Mr. Bickersteth lived did not appear, nor who he was, further than that **[118]** he was the professional friend of Sir Francis Burdett. There was not any seal or trace of a seal on the envelope, nor was there any post-mark either on the envelope or paper. The paper was dated Kirby Park, August 22d; and it appeared in evidence that Kirby Park was in Leicestershire, but at no great distance from the boundaries of the counties of Leicester and Rutland. It also appeared, from the evidence of a toll-gate keeper near Kirby Park, that Sir Francis Burdett was seen in Leicestershire on the 22d August, and again on the following day. There was no evidence of his having left the county of Leicester till after the publication of the paper, which took place on the 25th August. The paper, to be ready for publication on the 25th, must have been sent from the defendant's seat in Leicestershire (which is nearly 100 miles from London) on the evening of the 23d (on which day the defendant was seen riding near the toll-gate), or the morning of the 24th. The only words that, according to Mr. Brookes's memory, were within the envelope, or any other part of the papers, besides the libel, were "Forward this to Brookes." There was no express direction to him to publish it; and his only reason for thinking the defendant intended that it should be published was, that it was addressed to the electors of Westminster. It further appeared that Sir Francis Burdett, on Mr. Brookes being called upon by Lord Sidmouth to deliver up the author, wrote this letter: "Cottisbrook, August 28—My Lord, hearing your Lordship had applied to the gentleman through whose hands my address to the electors of Westminster was transmitted to the newspapers, to give up the author, and had, at the same time, intimated that a refusal would subject him, as well as the editors of the papers, to a **[119]** ministerial prosecution; I take the liberty, in order to save your Lordship further trouble, and also the gentleman above mentioned an unjust prosecution, to inform your Lordship, that I am the author of the address in question; and, moreover, to assure your Lordship, that although penned in a hurry, and under the influence of strongly excited feelings, I can discover nothing in it, on a re-perusal, unbecoming the character of an honest man and an Englishman." At the close of the evidence on the part of the prosecution it was contended, that there was no evidence that the libel in question had been published in Leicestershire. After hearing the argument, I thought that there was not only such evidence of a publication in Leicestershire as I was bound to leave to the jury, but it appeared to me then, and appears to me now, that, unless it received an answer, it was cogent evidence for the jury to find the verdict which they have found. I stated shortly to the learned counsel, that my opinion was, that there was evidence to be laid before the jury, by which I meant them to understand that, if they thought proper, they might offer evidence on the part of the defendant, to rebut the inference which the evidence on the part of the prosecution had raised of a publication in Leicestershire. No evidence was offered on the part of the defendant. The case was defended by the honourable baronet himself most ably—he said but little on the question of venue; but he contended

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tried for libel, the army of James the Second, then encamped on Hounslow Heath, for supporting military power, gave three cheers, on hearing of their acquittal. The King, startled at the noise, asked, 'What's that?' 'Nothing, sir,' was the answer, 'but the soldiers shouting at the acquittal of the seven bishops.' 'Do you call that nothing?' replied the misgiving tyrant, and shortly after abdicated the Government. 'Tis true, James could not inflict the torture on his soldiers—could not tear the living flesh from their bones with a cat o' nine tails—could not flay them alive. Be this as it may, our duty is to meet, and 'England expects every man to do his duty.'—I remain, gentlemen, most truly, and faithfully, your most obedient servant, F. Burdett, Kirby Park, August 22nd, 1819." In contempt of our said lord the King and his laws, to the evil example of all others, and against the peace of our said lord the King, his Crown and dignity.

that it was impossible to impute to him the intent charged in the information. I told the jury that there were two questions for their consideration. The first was, whether there was a publication of the libel in Leicestershire; and, secondly, if they should be of opinion that the paper was published in Leicestershire, whether the pa-**[120]**-per, under the circumstances in which it was published, was a libel. I stated to them the evidence that had been given. I pointed out to them the opportunity the defendant had of answering the evidence for the prosecution by evidence which I thought he might have been prepared to offer. With respect to whether this was a libel, I told the jury that the question, whether it was published with the intention alleged in the information, was peculiarly for their consideration; but I added, that the intention was to be collected from the paper itself, unless the import of the paper were explained by the mode of publication, or any other circumstances. I added, that if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to intend that which his act was likely to produce. I told them further, that if they should be of opinion that such was the intention of the defendant, then it was my duty to declare, that, in my opinion, such a paper, published with such an intent, was a libel; leaving it, however, to them (as I was aware at the time that I was bound to do under the Act of Parliament of the 32 Geo. 3, c. 60, s. 1) to find whether it was a libel or not. The jury found the defendant guilty. A motion has been since made for a new trial, and I am extremely glad that this case has been fully discussed, and that the defendant has had the advantage of the ablest counsel whom the Bar of this or any country could afford. All that talent, industry, and learning could bring forward, has been urged by the gentlemen on each side. I hope, therefore, that we are enabled, by the assistance of the Bar, to form an accurate judgment on this case.

Three objections were taken when the rule was moved. The first objection is, that there was no evidence that **[121]** the libel was published in the county of Leicester. I have to observe on that point, that if there was any evidence, it was my duty to leave it to the jury, who alone could judge of its weight. The rule that governs a Judge as to evidence, applies equally to the case offered on the part of the defendant, and that in support of the prosecution. It will hardly be contended, that if there was evidence offered on the part of the defendant, a Judge would have a right to take on himself to decide on the effect of the evidence, and to withdraw it from the jury. Were a Judge so to act, he might, with great justice, be charged with usurping the privileges of the jury, and making a criminal trial, not what it is by our law, a trial by jury, but a trial by the Judge. It must be borne in mind, that the question is not whether the evidence was such as ought to have satisfied a jury of the fact of publication in Leicestershire, but whether any facts were proved, which raised a presumption of publication in that county. If there were any such facts, I could not deal with them otherwise than I did. I am of opinion that there was evidence in this case, on the part of the prosecution, which raised a strong presumption, that the libel was published in Leicestershire; and no attempt having been made to rebut such presumption, it became, in my mind, conclusive proof of that fact. It has been said, that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did **[122]** happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided, that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilised countries. There is scarcely a criminal case, from the highest down to the lowest, in which Courts of Justice do not act upon this principle. Lord Mansfield, in *The Douglas case*, gives the reason for this. "As it seldom happens that absolute certainty can be obtained in human affairs, therefore reason and public utility require that Judges and all mankind, in forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on one side and on the other." In the highest

crime known to the law, treason, you act upon presumption. On proof of rebellion, or the endeavour to excite rebellion, you presume an intent to kill the King. In homicide, upon proof of the fact of killing, you presume the malice necessary to constitute murder, and put it on the prisoner, by extracting facts in cross examination, or by direct testimony, to lower his offence to manslaughter, or justifiable homicide. In burglary and highway robbery, if a person is found in possession of the goods recently after the crime, you presume the possessor guilty, unless he can account for the possession. In the case of a libel, which is charged to be written with a particular intent, **[123]** if the libel is calculated to produce the effect charged to be intended, you presume the intent. It therefore appears to me quite absurd, to state that we are not to act upon presumption. Until it pleases Providence to give us means beyond those our present faculties afford, of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is attempted to be raised, as to the corpus delicti, that it ought to be strong and cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption as would satisfy me in the most trifling cause that can be tried in Westminster Hall. I shall now state why I think there was a ground raised for presuming that this libel was published in Leicestershire. If this presumption had not led us to the truth, it is quite clear it would have received an answer. The defendant came prepared to dispute the publication in Leicestershire. I must suppose he came armed with the means of doing so; he had nothing to do but to call Mr. Bickersteth, to prove where the paper first saw the light. If it was first delivered from the hand of the defendant in London or Middlesex, Mr. Bickersteth could have had no difficulty in proving the fact. It has been said, that the prosecutor ought to have called him. Did he know that such a person existed? Could he know that he had even touched this paper? Such knowledge could only have been obtained from Mr. Brookes, and he was not disposed to communicate it to the prosecutor. The law does not impose impossibilities on parties; it expects, that a man who has the means of knowing who may be witnesses, shall call them. The presumption is, that the **[124]** paper was delivered open in Leicestershire. In Phillipps on Evidence, p. 152, 4th edit., it is said that the civilians' definition of presumption is "Præsumptio nihil aliud est quam argumentum verisimile communi sensu perceptum ex eo quod plerumque fit aut fieri intelligitur." Presumption means nothing more than, as stated by Lord Mansfield, the weighing of probabilities, and deciding, by the powers of common sense, on which side the truth is. Now let us see what are the facts of this case, that raise the presumption of the paper having been delivered open in Leicestershire. First, it is clear, that it was written in Leicestershire, for it was dated Kirby Park, Leicestershire; and it was held, in the case of *The King* v. *Dr. Hensey* (1 Burr. 644), that the date of a place in a letter, is evidence that it was written there. Then the next fact is, that on the 24th August the letter reached London. Now, Sir F. Burdett is proved, not only on the 22d but on the 23d August, to have been in Leicestershire, not travelling to London, but riding out in the neighbourhood of his own house. It is clear, therefore, that it did not pass from his hands, in Middlesex, to those of Brookes, but from the hands of Bickersteth. This evidence, leaving Sir F. Burdett in Leicestershire, and shewing a delivery by another person to Brookes, raises a presumption that it was sent by him, and not carried by him out of the county. If it was sent out of the county, in what state was it sent? I am to presume a thing always in the state in which it is found, unless I have evidence that, at some previous time, it was in a different state. It was presented to Brookes open; why then am I to presume it was ever inclosed? If the envelope had had a **[125]** broken seal, I should have thought that evidence that it had been closed, and that Bickersteth, to whom Brookes thinks it was addressed, had opened it. But there was no trace of any seal having ever been attached to it. If it came in that envelope it must have been open; and that it came in that envelope, is evident from the address to Bickersteth being on it. Brookes thought there was no post mark on it. Do not all these facts shew, that it was not sent by the post, but by some private hand (either that of Bickersteth, or some other person), and that the words on the outside of the envelope, and which Brookes thought was an address to Bickersteth, and the words in the inside, "Forward it to Brookes," were only memoranda, as to what was to be done with the paper when it arrived in London. It has, to my mind, nothing of the appearance of a paper sent by the post. If sent by the post, why was

it not franked direct to Mr. Brookes? If it was thought right to submit it for the first time to Bickersteth, in London, for his opinion, the envelope would have contained something more of the form of a letter from one gentleman to another, than forward this to Brookes. If we act according to the rule laid down by Lord Mansfield and the civilians, to judge according to the weight of probabilities, we have then the highest degree of probability on the one side, without any thing to weigh against it on the other, that this paper was delivered either to Bickersteth, in Leicestershire, or to some other person in the confidence of the defendant; and that he thought it right to trust it to such person open, that he might carry it to Bickersteth. On these grounds, I am of opinion that it was not only proper for me (according to the principles on which justice is administered) to leave this case to the jury in **[126]** the way I did, but that the jury could find no other verdict than that which they have found.

But supposing it to have been sent by the post, my opinion is, that such a sending of it amounted to a publication. It is assumed that publication means a manifestation of the contents. I deny that such is the meaning of the word publication. In no part of the law do I find that it is used in that sense. A man publishes an award, but he does not read it. Again, he publishes a will, but he does not manifest its contents to those to whom he makes the publication; he merely desires the witnesses to take notice that the paper to which they affix their different attestations is his will. So in the case of a libel, publication is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands his control over it is gone; he has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the locus pœnitentiæ, his offence is complete, all that depends upon him is consummated, and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act. Suppose a man wraps up a newspaper and sends it into another county by a boy; who is the publisher? the boy who perhaps cannot read or is ignorant of its contents, or the man who has put it up in the envelope? The boy who carries it is merely an innocent instrument; there can be no other publisher but the person who sent it, and who publishes it when he delivers it to the boy. If the sending of a letter by the post be not a publication in the county from whence it is sent, how is a libeller to be punished who sends his libel by the post to some foreign country for circulation? The libeller will not go to the foreign country that he may be punished there. If the **[127]** sending it from England be not a publication, (as it is contended at the Bar,) can it be insisted, when the libel is completed by publication, that such a libeller can no where be punished? A British subject might libel with impunity, in a foreign land, his Sovereign, his Government, or any distinguished individual whose fame extended beyond the limits of his own country; and the foreign disseminator would have this strong appeal to the mercy of his own laws, that being sent to him from a person in England he believed the libel to be true. But there is authority for saying that this is a publication. In the case of *The King* v. *Watson* it was contended, that the post-mark was proof of the letter having been put into the post at Islington, and that such putting into the post amounted to a publication. Lord Ellenborough held the proof of the publication of the letter insufficient. Why? because there was no proof that there was the post-mark, and that what appeared to be the post-mark might have been a forgery. Now, he would not have said so, if he had thought that putting the letter into the post-office at Islington did not amount to a publication. If he had said the putting the letter into the post was not a publication, he would have been inconsistent with himself, a circumstance which the soundness of his judgment would have prevented. For the case of *The King* v. *Williams*, which was for sending a challenge in a letter, Lord Ellenborough said there was a publication in Middlesex by putting it into the post-office there, with intent that it should be delivered at Windsor. Lord Ellenborough does not say that this is a sufficient sending of a challenge, but a sufficient publication; nor can there be any difference beween that case and any other libel. Why are libels against indi-**[128]**-viduals prosecuted? because they have a tendency to provoke the party, to whom they are sent, to a breach of the peace. There can be no distinction between a libel sent with an express intent to provoke a breach of the peace, and any other libel on an individual. This case is directly in point to prove that the putting of a

letter into the post is a sufficient publication. Had not the civil law been quoted by the counsel for the defendant, I should not have referred to it, although I think it strongly confirmatory of my opinion. The description of a libeller in our indictments seems to me to have been borrowed from the civil law, and I agree that their word edo is represented by our word publish; but I deny that edere means to manifest the contents of a paper. Both in the Roman classics and law books it means the act of delivery, which precedes the manifestation of the contents; and the subsequent manifestation is expressed by some other term, as exponere or manifestare. Thus, in Cicero, De Legibus, lib. 3, art. 20, he says, "Apud eosdem qui magistratu abierint edant et exponant quid in magistratu gesserint." Here, the word "edant" means "they uttered," and the word "exponant," "they exposed to public view what was so uttered." So, in the civil law, in the Codex, lib. 9, tit. 36, we have this passage: "Si quis famosum libellum ignarus repererit, aut corrumpat priusquam alter inveniat aut nulli confiteatur inventum. Si vero non statim easdem chartulas corruperit vel igne consumpserit, sed earum vim manifestaverit sciat se ut auctorem hujusmodi delicti capitali sententiæ subjugandum." Here, the word ediderit is not used, but manifestaverit. Why? because it constituted no crime for a person who found a paper, and, being ignorant of its contents, delivered it to another. To punish him with death **[129]** would have been a species of cruelty of which the worst of the Romans were incapable; but if, instead of destroying it, he manifested it, then he was to be considered as the author. The reason I quote this passage is to shew that where "ediderit" is used it means a delivery only; but when they intend to express a disclosure of the contents of a paper, they use the word manifestaverit; and thus, both according to the civil and the English law, whether this paper were delivered open or wrapped up in a hundred envelopes, the delivery was a publication (*a*).

[130] I come now to another point, viz. the rejection of the evidence of that

(*a*) We would venture with great deference to the learned Judge, to suggest that possibly it may be found on examination that the word edo is not unfrequently used by the best writers to express a publication in the popular sense of the word. Quintilian, iii. 7, speaking of Cicero's publications, uses the phrase, Editi in competitores, in L. Pisonem, et Clodium, et Curionem libri vituperationem continet. And Cicero himself, in various passages, has employed the same expression in the same sense. As for instance: Scripsi etiam versibus tres libros de temporibus meis, quos jam pridem ad te misissem, si esse edendos putassem. Epist. ad Fam. Lib. i. 9. Nec se tenuit quin contra doctores librum etiam ederet. Acad. Quæst. iv. 12. Non occultavi (tabulas) non continui domi; sed describi ab omnibus statim librariis, dividi passim, et pervulgari et edi Populo Romano, imperavi. Pro. Syll. 15. Ut annales senex emendem atque edam. Ad Atticum, ii. 16. Leges autem a me edentur non perfectæ. De Legibus, ii. 18. There is another passage which shews this use of the word in a strong light. It is well known that Cn. Flavius first made public the "actiones" of the lawyers, which, till then, had been kept secret by them. And Cicero thus alludes to it, Augendæ potentiæ suæ causâ pervulgari artem suam noluerunt: deinde posteaquam est editum expositis a Cn. Flavio primum actionibus, &c. De Oratore, i. 41. In the books of the civil law, the definition of the word edere is Copiam describendi facere, in libello complecti et dare, vel dictare; which refers to the custom of the plaintiff inscribing in the book of the prætor, his cause of complaint against the defendant, and afterwards of serving his declaration upon the opposite party. Budæus inquit "edere" apud juris-consultos est, quod nunc, per scriptum dare, vel per declarationem, dicunt. These authorities shew, that amongst the Roman writers, the word edo, when applied to books, annals, and the like, meant "to make public." And amongst the civilians, even in its technical use, it implied a particular mode of making public, prescribed by the law, viz. by the inscription in the prætor's book. It undoubtedly also included the delivery of the declaration to the opposite party, which possibly may account for its being apparently used sometimes in the more restricted sense. In the passage from Cicero, quoted by the learned Judge, it should be observed, that the words "edant et exponant," are not applied to any book or written composition, and in that case the word may probably admit of a different interpretation to the one here suggested. See Stephani Thesaurus Linguæ Latinæ; and Vicat. Vocabularium Utriusque Juris.

which was done at Manchester, which it was contended ought to have been received for the purpose of explaining the libel. Now in the first place there was no ambiguity to explain. There was no part of the libel that was not intelligible without the aid of evidence. In the next place, it was clear that notwithstanding any thing which might have passed at Manchester, many parts of this letter were libellous. Nothing that passed there could explain the allusion to the commencement of a reign of blood and terror in this country, or have applied to what is said in the libel of the soldiers having the living flesh torn from their bones; or to what is perhaps the strongest part of it, the allusion to the abdication of King James. The paper would, therefore, at all events, have remained a highly aggravated libel. It is not like the case of *The King* v. *Horne*. There the defendant did not insist on the truth of the libel, but the indictment having charged him with libelling the King's troops, he endeavoured to shew that those whom he had libelled were not the King's troops; the evidence was admitted only to remove an ambiguity, but there is no obscurity like that in the present case. The defendant in that case offered the evidence, but it failed; and Lord Mansfield said, that from the evidence he produced, it appeared clearly that they were the King's troops; his words are, "In this case the defendant gave evidence, but demonstrated that the libel related to the troops acting under the King's authority."

[131] Another point on which the motion for a new trial was made was, that I took upon myself to lay down the law to the jury as to the libel, and that since the statute 32 Geo. 3, c. 60, I was not warranted in so doing. I told the jury that they were to consider whether the paper was published with the intent charged in the information; and that if they thought it was published with that intent, I was of opinion that it was a libel. I, however, added, that they were to decide whether they would adopt my opinion. In forming their opinion on the question of libel, I told the jury that they were to consider whether the paper contained a sober address to the reason of mankind, or whether it was an appeal to their passions, calculated to incite them to acts of violence and outrage. If it was of the former description, it was not a libel; if of the latter description, it was. It must not be supposed that the Statute of George the Third made the question of libel a question of fact. If it had, instead of removing an anomaly, it would have created one. Libel is a question of law, and the Judge is the judge of the law in libel as in all other cases, the jury having the power of acting agreeably to his statement of the law or not. All that the statute does is to prevent the question from being left to the jury in the narrow way in which it was left before that time. The jury were then only to find the fact of the publication, and the truth of the innuendoes; for the Judges used to tell them that the intent was an inference of law, to be drawn from the paper, with which the jury had nothing to do. The Legislature has said that that is not so, but that the whole case is to be left to the jury. But Judges are in express terms directed to lay down the law as in other cases. In all cases the jury may find a general verdict; they do so in cases of murder and treason, but there the **[132]** Judge tells them what is the law, though they may find against him, unless they are satisfied with his opinion. And this is plain from the words of the statute, which, after reciting that doubts had arisen whether on the trial of a libel the jury may give their verdict on the whole matter in issue, directs that "they shall not be required or directed by the Judge to find the defendant guilty merely on the proof of the publication, and the sense ascribed to it by the indictment." But the statute proceeds expressly to say, that "on every such trial the Judge shall, according to his discretion, give his opinion to the jury on the matter, in like manner as in other criminal cases." That was all that was done on this occasion, and, therefore, I am of opinion that this objection also fails. As to the libel itself, considering it as the production of a man of large fortune, high rank, and extensive influence, where is the person that can make an observation in favour of any part of it? My opinion of the liberty of the press is, that every man ought to be permitted to instruct his fellow subjects; that every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and Government of the country; that he may point out errors in the measures of public men, but he must not impute criminal conduct to them. The liberty of the press cannot be carried to this extent without violating another equally sacred right; namely, the right of character. This right can only be attacked in a Court of Justice, where the party attacked has a fair opportunity of defending himself. Where vituperation begins, the liberty of the press ends. This maxim was acted upon by the greatest States of antiquity. In

our country, the liberty of the press allows us to persuade men to use their constitutional influence over their re-**[133]**-presentatives to obtain in the regular Parliamentary manner a redress of real or supposed grievances. But this must be done with temper and moderation, otherwise instead of setting the Government in motion for the people, the people may be set in motion against the Government. In such a case as this it is fit that the public should know the grounds on which I have acted. Whether I shall persuade others that I have acted right I know not. It is enough for me as an Englishman, to be myself satisfied that I have done so. We have been desired to consider what posterity will think of our judgment. I am not insensible to this consideration, but I value only the good opinion of those who love their country and wish to preserve it in peace. Of their censure I am not afraid. I have acted upon this occasion with the firmness which the times in which we live particularly require, but I trust I have not lost sight of that which ought in all times to guide a Judge in this country, where every magistrate is reminded by the oath of his Sovereign, that it is his first duty to administer justice in mercy.

Holroyd J. This is a motion for a new trial which has been made and supported in argument on various grounds with the greatest ability; but after hearing and most attentively considering every thing that has been suggested by the learning and ingenuity which on this occasion we have heard displayed, and the authorities that have been relied upon or discussed, I am of opinion, that the rule for a new trial ought not to be made absolute. The case appears to me to have been sufficiently proved at the trial to warrant the verdict given against the defendant. The proofs are direct and positive, not only that the paper writing charged to be a **[134]** libel was published, but also that Sir Francis Burdett was the author of it; that the same was in fact not only composed and written, but that it was also published, by him. I am not at present speaking of any proof either positive or presumptive, of an act of publication by him in Leicestershire. I am now speaking of the proof merely of an act of publication by him somewhere. That he was not only the composer and writer, but also that he published it, is directly proved by evidence of his hand-writing to the libel and its envelope, and by the contents of that envelope directing Mr. Bickersteth to pass it to Mr. Brookes, and further by his letter to Lord Sidmouth, in which he not only expressly acknowledges himself to be the author of the paper writing charged to be a libel, but the fact also of his having sometime before sent it up to town. So that it is established by direct proof, not only that the paper writing in question was composed and written by him, but also that the locus pœnitentiæ of the writer was passed by his having parted with the possession of it. His own act of sending away the letter, his publishing it to Mr. Bickersteth, and the publication of it to Mr. Brookes by his own direct authority and order, are decisive on this point. But, if necessary, we have, in addition to the positive proofs of a complete corpus delicti having been committed by the defendant somewhere, by his writing and publishing the letter in question, pregnant proofs, afforded by the very contents of the letter itself, that it was originally composed not with a view of keeping it for any time to himself, for any further consideration whether it should be published or suppressed, but with the intent that it should speedily be published and acted upon. For from its being addressed to the electors of Westminster, and from the **[135]** haste in which it appears to have been written, evidently for the purpose of dispatch, it is clear that the defendant intended that it should be acted upon by others in the speedy call of public meetings on the subject. So that the proofs are not only of a writing and publishing by the defendant, but also that the letter was originally written by him with the intent, and for the purpose of its being published, and that that was the sole cause and object of its being written. That it was written at Kirby Park in Leicestershire, is proved, and indeed is admitted to have been proved by its date. And upon this part of the case *The King* v. *Hensey*, which was cited, is an authority in point. These circumstances, all of which were proved or admitted at the trial, being taken into consideration, it appears to me, that the jury of the county of Leicester had a jurisdiction by law over the offence with which the defendant was charged.

Writing a libel with the intent and for the purpose of its being published (under circumstances not sufficient in law to justify or excuse the writer for so doing), followed by a publication by the act, or under the authority of the writer, is in my opinion, by the law of England, a misdemeanor, and triable in the county where such writing took place, though the publication be in some other county. I do not say whether all those

qualities are or are not necessary to be attached to or connected with the act of writing, in order to make it a misdemeanor. It is not necessary at present to consider or give any opinion upon any such case, and still less upon a case where the writing remains confined by the author to his own closet or privacy, or has been obtained from thence, and published without his privity or consent. **[136]** How far the case of *The King* v. *Beare*, may be borne out or supported in law to that extent, I have not in the present case considered, nor do I mean now to give my opinion upon it. The present case, I think, does not require it, being quite distinguishable; and every thing said by me in this case, will, as I conceive, leave my judgment, as well as that of others, quite unfettered in any such cases as I have last supposed, if unfortunately any such should arise. Where a misdemeanor has been committed by a defendant by writing and publishing a libel, the writing of such a libel so published, is in my opinion criminal, and liable to be punished by the law of England as a misdemeanor, as well as the publishing of it. The crime in such a case is not confined to the publishing of it alone. The constant form in which the charge is alleged in indictments and informations, shews this. Where the facts of the case are expected to support it, the indictment or information does not confine the offence charged to publishing the libel merely, but alleges the composing or the writing of it as part of the crime; and where the party prosecuted has been acquitted of publishing it, and found guilty of writing it, judgment has passed against the defendants, not merely in *The King* v. *Beare*, but in the subsequent cases of *The King* v. *Knell*, and *The King* v. *Carter*, for the preceding parts which the several defendants had taken with respect to the libel, whether it were in printing, composing, or writing them. The charge against this defendant is an aggregate offence; a misdemeanor consisting of different parts, viz. the composing, writing, and publishing; and if so much of that charge be proved to have been committed in the county of Leicester, as is in law a misdemeanor, it is perfectly **[137]** clear that he might be found guilty of that part alone, and that judgment thereupon must pass against him pro tanto. The composing and writing, with the intent and for the purpose above stated, of a libel proved to have been published by the defendant, is in my opinion, of itself a misdemeanor, in whatever county the publishing of it took place, and is, I think, triable in the county where the libel was composed and written. The jury of that county, I take it to be clear, may inquire into any fact, though in another county, so far at least as tends to prove that to be an offence which has been done in their own county. So far, therefore, at least as the defendant's publishing the libel elsewhere, tends to prove his composing and writing of it to be criminal, the jury of the county where it was composed and written, clearly, I think, may inquire of, and take cognizance of it. This is constantly done in the case of overt acts of high treason, and of acts of conspiracy, committed out of the county, in order to establish or confirm the charge of treason or conspiracy within the county.

But it is urged, that if the defendant were found guilty of the composing and writing, and not of the publishing, this information does not contain a sufficient charge of composing and writing, so as to make composing and writing in that case criminal, inasmuch as it does not allege that the defendant wrote it with intent to publish it. Now, without considering how far an information in such a case would or would not be sufficient to convict the writer upon it, unless such an allegation, either directly or to that effect, were contained in it, the information does in this case, I think, contain an allegation, not only to that extent and effect, but even **[138]** further: for it alleges that the defendant, intending to excite discontent and sedition amongst the King's subjects, and particularly amongst the soldiers, &c. &c. composed, wrote, and published the libel. This allegation of the intent is applicable to each of the acts charged upon the defendant: to the composing and writing, as well as the publishing. And, therefore, as such discontent and sedition could not be excited amongst the soldiers of the King without publishing the libel, the information in effect alleges that the defendant composed and wrote it for the purpose of its being published, in order to effect those further purposes of mischief which could not be accomplished by it, unless by its publication.

But further, I think the jury may inquire into, and take cognizance of those facts which are done out of their county, for the purpose of finding a defendant guilty, not only of so much of the crime as was committed within the county, but also of the remainder of the aggregate charge, in those cases, where so much of the misdemeanor charged as is proved to have been done within their county, is of itself a misdemeanor.

If that be so, it would warrant this verdict in its full extent, whether the publication of this libel is deemed to have been in the county of Leicester or not. And this is established to be the law, in the cases of conspiracies and nuisances, in both of which the juries do not confine their verdicts of guilty to such criminal acts or consequences as occur in the county where the conspiracy or erection of the nuisance is laid and proved, but extend them to such further acts and consequences of conspiracy and nuisance, as may occur or arise in another county; and judgment and punishment are in **[139]** such cases given and awarded to the full extent of the aggregate offence. The cases of felony have been urged as bearing on the present case, particularly those provided for by the Statute of Philip and Mary, but those are, I think, distinguished from, and do not apply to the present question.

It has, however, been further urged, that there ought to be a new trial, because the verdict was found upon the learned Judge's telling the jury that there was evidence before them to shew that the libel was published by the defendant in Leicestershire; that it might be presumed to have been delivered by the defendant to Mr. Bickersteth there, and even in the state in which it was afterwards delivered to Mr. Brookes, namely, open. From what I have stated above, it appears that my opinion must be, that by law the learned Judge need not have gone so far in favour of the defendant as to put it to the jury to consider whether, from the evidence given, they would presume and find that the defendant had published the libel in Leicestershire, which would have given him the benefit of an acquittal, in case they had thought the evidence not sufficient for them to make that presumption; because, for the reasons I have above stated, I think the verdict ought to have been the same, whether the defendant had published the libel in that or any other county. It is certainly true, and I most ardently hope that it will ever continue to be the case, that by the law of England, as it was urged and admitted in the case of *The Seven Bishops*, no man is to be convicted of any crime upon mere naked presumption. A light or rash presumption, not arising either necessarily, probably, or reasonably, from the facts proved, cannot avail in law. That is the presumption spoken **[140]** of in *The Seven Bishops' case*, which is no more than mere loose conjecture, without sufficient premises really to warrant the conclusion. But crimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly and conclusively proved, upon presumptive evidence only of the guilt of the party accused; and the well-being and security of society much depend upon the receiving and giving due effect to such proofs. The presumptions arising from these proofs should, no doubt, and most especially in crimes of great magnitude, be duly and carefully weighed. They stand only as proofs of the facts presumed till the contrary be proved, and those presumptions are either weaker or stronger according as the party has, or is reasonably to be supposed to have it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true; and according as he does or does not produce such contrary evidence. It is established as a general rule of evidence, that in every case the onus probandi lies on the person who wishes to support his case by a particuiar fact, which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true. Bearing these con-**[141]**-siderations in remembrance, there was, I think, evidence sufficient to be left to the jury from which they might reasonably presume a publication by the defendant in Leicestershire. In the case of Sir Manasseh Lopez, for bribing a voter of a borough in Cornwall; evidence was given that when he was at his seat in Devonshire he said, "such a one," (the person whom he was charged to have bribed, and whom he was proved to have bribed, though it did not appear whether the bribery was committed in the county of Devon,) "has been with me." It was objected at the trial, that there was not evidence sufficient to shew that the offence was committed in Devonshire. Upon that occasion I left it to the jury to consider whether his being there at the time, and that being the county in which the voter was to vote, were not sufficient; and upon that evidence the jury

presumed the offence to have been committed in Devonshire; it being in the defendant's power, by means of the voter, who was, however, not called by him, to have shewn that the crime was committed out of Devonshire, if the fact had been so. I mentioned this circumstance to the Court afterwards, in order that it might be ascertained whether he was rightly convicted or not, and the Court thought it was prima facie evidence, and he received judgment.

The presumptions, in the present case, are stronger, and arise, as well from the contents of the libel, and the extrinsic facts proved, as from the want of contrary evidence within the knowledge and power of the defendant, as to facts peculiarly within his own knowledge, and of which he must be supposed to be cognizant, in order to rebut or weaken those presumptions against him. The contents of the libel shew, that it was written in haste, **[142]** and in Leicestershire, for the purpose of being speedily acted upon by public meetings elsewhere; from which it is reasonably to be presumed to have been, as soon as effectually it might be, sent off for its destination, as it must have been delivered by Mr. Bickersteth to Mr. Brookes, in Middlesex, on the 24th August, or otherwise it could not have been published in the British Press on the 25th. The writer was living in Leicestershire, and was proved to be there on the 22d and the day following, within which period of time it was, probably, sent away; and it is but a reasonable presumption, that it was sent away by him from the place where he was then living; at least it is so, in default of proof, on his part, of his being out of the county, or of any other evidence to rebut that presumption. The evidence for the Crown established both the time and person to whom the prosecutor had traced the libel. How it came to Mr. Brookes unsealed, and whether it was originally sealed or not, were matters peculiarly in the knowledge of the defendant, and not of the prosecutor. He knew how and in what state, whether open or sealed, and when he had sent or delivered it to Mr. Bickersteth, and might have proved it, or at least he might have shewn, by Mr. Bickersteth, in what state it was when he received it. Of these facts the prosecutor could not be supposed to be cognizant; nor can it be supposed, if the letter had not been parted with by the defendant in Leicestershire, and even in an unsealed state, (for it does not appear, that is, there is no proof, that it went by the post; and if it did, it would no doubt go sealed,) that Mr. Bickersteth would not have been called by the defendant to prove the state in which it was received by him. In default of all proof, under such circumstances, to weaken **[143]** or rebut these presumptions, I think the jury were warranted in concluding and finding that it was parted with by the defendant in Leicestershire, and that it was then in the same state in which it was delivered to Mr. Brookes, there being no proof, either direct or presumptive, of its ever having been in any other state. Indeed, my belief, from the evidence, would be, that it was not sent by the post to Mr. Bickersteth, and that he was not in London when he received it, but that probably, it was delivered to him by the defendant in Leicestershire; for I cannot suggest to myself any reason for his sending the libel, either by the post or otherwise, to Mr. Bickersteth, merely to give him the trouble of passing it to Mr. Brookes in the Strand, instead of sending it at once to Mr. Brookes himself.

But whether it was sent away or parted with by the defendant in Leicestershire, open or sealed, makes, in my opinion, no difference with respect to the question, whether it was, in point of law, published by him in that county or not, so far as to give the jury of that county jurisdiction over that fact. In 5 Co. Rep. 126 a., it is laid down, that a scandalous libel may be published traditione, when the libel, or any copy of it, is delivered over to scandalize the party. So that the mere delivering over or parting with the libel with that intent, is deemed a publishing. It is an uttering of the libel, and that I take to be the sense in which the word publishing is used in law. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual only is, indisputably, in law, a publishing. Lord C. J. de Grey, in *Baldwin* v. *Elphinston*, 2 Black. Rep. 1037, states, that a written libel may be published in a letter **[144]** to a third person, and states two instances from Rastal's Entries (*a*) of charges of constructive publications, by delivering letters to A. and B., and by fixing them on the door of St. Paul's Church. The mere delivery or fixing them, with the intent to scandalize, is itself considered to be a

(*a*) Action on Case, 13 a.

publishing; and in prosecutions for libels, it is never made a matter of enquiry, whether either the witness, who purchased the libel at a defendant's shop, or any other person, read it in the county where it was bought, or even at all, in order to prove the publication of it complete in that county. In such cases the fact of delivering it to the purchaser is alone relied upon as proof of the publication in the county, without any proof of its being read there or elsewhere. In the prosecutions for libels in London, when proof was given of their being purchased at Carlile's shop, in Fleet-Street, no enquiry, I believe, ever followed, whether the purchaser had read them within the City of London or not; though there is all probability he took them out of the City of London and delivered them unread to the Solicitor of the Treasury, or some one else in Lincoln's Inn. The mere parting with a libel with such an intent, by which a defendant loses his power of control over it, is an uttering; and when the contents of it have thereby become known, if not before, it has become, I think, so far a criminal act, in the county where it is parted with, as to give the jury there a jurisdiction to try the crime of publishing it. As far as depends on the defendant, his crime is there complete; and the act of another person, in reading the composition elsewhere, does not alter his criminality, or the nature of his act, in the county where he parted with it with the criminal intent. In the cases of **[145]** wills and awards, they are constantly made and published, without the contents being made known, even to the witnesses in whose presence they are published. So that the making known the contents is not, in some cases at least, ex vi termini essential to the constitution of an act of publishing.

With respect to the objection of the learned Judge's refusing to receive evidence of the truth of the facts alleged, or rather assumed in the libel, there is, I think, not the least doubt upon the point. Although the objection was made, it was not even attempted to be supported by argument at the trial. Whatever might be the result of a due enquiry into those facts elsewhere, it is clear that that was not the proper place or occasion for enquiring into them, nor would the writing be otherwise than, in law, a libel. It assumes, as true, a statement most highly calumnious on individuals, and on the Government, merely from a statement in a public newspaper, and without the knowledge, whether it were true or not, to any or to what extent, and indulges in the highest strain of invective, for the purpose of inflaming the public, and raising in their minds the greatest discontent, disaffection, and alarm. That is, in itself, a seditious libel, and the question for the jury was, whether what the defendant had written and published, with the intent stated in the information, was a libel or not, and not to what extent it was so; even supposing that the result of that enquiry would have been any palliation of the libel. With respect to the objections taken to the learned Judge's having given his opinion and directions to the jury, upon the question, whether the writing was a libel or not, it seems to me that he left it to them to consider, whether they would adopt his opinion in that **[146]** respect, or not; and he is expressly directed, by the Statute of the 32d of the late King, according to his discretion, to give his opinion and directions to the jury on the matter in issue, in like manner as in other criminal cases. And with respect to the objections to his summing up, I do not, upon an attentive consideration of it, find any reason to disagree with his observations in that respect. For these reasons, I think the rule for a new trial ought to be discharged.

Bayley J. In several of the points discussed in the course of the argument, I agree with the rest of the Court. I have not the least doubt that the evidence relative to the truth of the transactions, stated in the libel to have taken place at Manchester, was properly rejected. I take it to be clear law, that if a libel contain matters imputing to another a crime capable of being tried, you are not at liberty at the time of the trial of the libel, to give evidence of the truth of those imputations. And this is founded on a wise, wholesome, and merciful rule of law; for if a party has committed such an offence he ought to be brought to trial fairly, and without any prejudice previously raised in the minds of the public and the jury. The proper course, therefore, is to institute direct proceedings against him, and not to try the truth of his quilt or innocence behind his back, in a collateral issue to which he is no party. The present libel contains imputations of very high crimes, capable of being tried. It contains a statement that certain persons at Manchester had been guilty of murder, and the truth, therefore, of the libel could not be tried without inquiring whether at Manchester certain persons had or had not committed murder. It appears, therefore,

to me, that evidence upon this point [147] was not admissible; and that the case of *Rex* v. *Horne* is distinguishable, on the ground that there was not in that case an imputation of any crime capable of being tried. In some cases, indeed, it is possible that the falsehood may be of the very essence of the libel. As for instance; suppose a paper were to state that A. was on a given day tried at a given place and convicted of perjury: if that be true, it may be no libel, but if false, it is from beginning to end calumnious, and may, no doubt, be the subject of a criminal prosecution. Possibly, therefore, in such a case, evidence of the truth of such a statement by the production of the record, might afford an answer to a prosecution for libel. I also entirely agree that the learned Judge did right in intimating to the jury his opinion on the question, whether this was or was not a libel, and in telling them that they were to take the law from him, unless they were satisfied he was wrong. The old rule of law is, ad quæstionem juris respondent judices, ad quæstionem facti respondent juratores; and I take it to be the bounden duty of the Judge to lay down the law as it strikes him, and that of the jury to accede to it, unless they have superior knowledge on the subject: and the direction in this case did not take away from the jury the power of acting on their own judgment. Besides, if the Judge be mistaken in his view of the law, his mistake may be set right by a motion for a new trial; but if the jury are wrong in their view of it, it is not so easy to rectify their mistake. Upon all these several points I agree with the rest of the Court.

But the difficulty which has pressed on my mind, and which, from the beginning of this argument to the conclusion, I have not been able to overcome, arises from [148] the direction of the learned Judge to the jury, as to the publication in the county of Leicester. This is, undoubtedly, a technical objection, and does not interfere with the merits of the case. But whether technical or not, it seems to me to be a valid objection; and I should desert my duty if I did not, by avowing my opinion, give to the defendant the full benefit which may arise from it, whatever that opinion may be. The facts proved at the trial were in substance these: the libel was written at Kirby Park, in Leicestershire; as appeared from the date, which is Kirby Park, the 22d August, and from the circumstance of the defendant being seen on that and the subsequent day, riding near his residence in that county. By a subsequent letter to Lord Sidmouth, the defendant avowed himself the author, and that he had transmitted the paper to London. It appeared also, that on the 24th of August Mr. Brookes received it in London from Mr. Bickersteth, and that he received at the same time an envelope, in which the libel was contained, and in which was a direction from the defendant to Mr. Bickersteth, to pass the enclosure to Mr. Brookes. It did not appear whether the envelope had been sealed, and there was no evidence of the manner in which it had reached Mr. Bickersteth, whether by a personal delivery or otherwise; he himself was not called as a witness, nor was there any evidence to shew that he was resident or had been in Leicestershire about that time. An objection was taken at the trial, that there was no evidence of any publication in Leicestershire, which, after argument, the learned Judge overruled, and when he summed up to the jury, he intimated to them, that they might presume that the enclosed paper was delivered open to Mr. Bickersteth, in the county of Leicester. Now, my objection to [149] that direction is this, that the Judge left it to the jury without sufficient premises to warrant them in presuming an open delivery to Mr. Bickersteth; and that it proposed to their consideration no other species of delivery by the defendant. As far as I can judge, the evidence given furnished to them no ground for such a presumption. No one can doubt that presumptions may be made in criminal as well as in civil cases. It is constantly the practice to act upon them, and I apprehend that more than one half of the persons convicted of crimes, are convicted on presumptive evidence. If a theft has been committed, and shortly afterwards, the property is found in the possession of a person who can give no account of it, it is presumed that he is the thief, and so, in other criminal cases; but the question always is, whether there are sufficient premises to warrant the presumption, and those premises seem to me, in this case, to be wanting. In order to warrant a presumption a prima facie case must, at least, be made out. Now was such a prima facie case made out here? The proposition to be established consists of two parts: first, that a paper, written in Leicestershire and afterwards found in London, in the hands of Mr. Bickersteth, was delivered personally to him in Leicestershire; and, secondly,

that it was delivered to him open. It is incumbent on the prosecutor to make out a prima facie case upon the affirmative of each of those points. Now, does he advance any evidence as to either? Does it follow, that because Mr. Bickersteth has it in London, that he received it personally in Leicestershire? Does it follow, because he has it open in London, that it was not sent to him in a parcel or in a sealed letter? Suppose this to be the only proposition to be established, and that **[150]** the prosecutor had gone with this evidence before a grand jury, could the grand jury have found the bill? I apprehend they would have expected some additional facts to be produced, and that unless Mr. Bickersteth had been called as a witness on the part of the Crown, they would not have found a bill on the publication in Leicestershire; they might have said, "Here is clearly a publication in Middlesex, for which a bill will no doubt be found by the grand jury of that county; but it is altogether doubtful whether any publication took place in Leicestershire or not." Now, if a grand jury could not find a bill upon such evidence, can the petit jury be asked to convict upon it? Again, suppose a feigned issue upon these two questions; could the plaintiff ask for a verdict upon such evidence as this? Upon whom does the onus probandi lie? Is the plaintiff to say to the jury, "If the defendant does not give you any evidence you are to presume that this paper was delivered to Mr. Bickersteth and open?" I apprehend, that if he did say so, it would be impossible for the jury to come to such a conclusion. I try this case by these tests, because, although this is a criminal information filed by the Attorney-General, yet he will not file an information in any particular county, unless he is convinced that there is such evidence as ought to satisfy a grand jury; and he never would, I apprehend, have filed this information, unless he had thought that there was a prima facie case of publication in Leicestershire. I agree, that where a matter is peculiarly within the knowledge of one party, the onus probandi may be shifted, and his neglect to give the evidence may furnish ground for a presumption against him. But here the matter does not lie **[151]** peculiarly within the knowledge of the defendant. Mr. Bickersteth knew as well as the defendant the circumstances of the case, and the case on the part of the prosecution shews it. Then the question is, whether it was sufficient to leave the case without calling him as a witness. Is the prosecutor to say "Here is a person who can tell you to an absolute certainty the fact as to the delivery, but I will not call him, and yet I will desire you to presume a personal and open delivery to him. I ask you to act upon presumption which may mislead, when the power of supplying you with certainty is within my reach." If, indeed, there was any evidence to go to the jury, they had a right to come to a conclusion. But my opinion is, that there was no evidence, and that it ought not to have been submitted to their consideration at all. My learned brother told the jury most properly, that if he were wrong in his view of the case, the defendant would have the benefit of having his mistake corrected. And it does seem to me upon a careful review of the case, that there was a mistake in considering that in the absence of Mr. Bickersteth, there was any evidence to go to the jury. If, in the course of the cause, it had appeared that Mr. Bickersteth had been in Leicestershire, or that the defendant or any of his agents had been instrumental in concealing from the prosecution the mode in which the paper had come to the hands of Mr. Brookes, it might, perhaps, have varied the case, and given some ground for such a presumption. But there is no such proof, nor even that any application to that effect was ever made to Mr. Brookes; it is not even shewn that Mr. Bickersteth was not present in Court at the time of the trial, and capable of being examined as a witness. In the absence of all this proof, it seems to me that there was no ground on which the jury could **[152]** put the presumption either the one way or the other. If this case had gone before a grand jury, Mr. Brookes might have been compelled to say from whom he received the paper, and the link of the chain which seems at present wanting, might have been easily filled up. But it seems to me that as the case at present stands, the jury were desired to make a presumption without having sufficient premises, and that if they did draw that presumption they acted not upon justifiable inference, but upon unwarrantable conjecture. Upon these grounds the difficulty which I have entertained in this case is principally founded.

But it is said, that even if the verdict cannot be supported on this ground, yet there is evidence from which a jury might have presumed, and must have presumed, that this libel was delivered for the purpose of publication, either to a servant, or at the post office, in the county of Leicester. If the jury must have presumed that, I

should pause before I said there ought to be a new trial. If it stands only that they might have done so, then it is for them to draw the conclusion. If the case has been put to them on a ground which cannot be supported, we must use great caution in proceeding upon the idea that there was another ground on which they might have acted. The jury ought never to invade the province of the Judge as to questions of law, but it is for them alone to come to a conclusion on questions of fact. If the Court draw the conclusion, they invade the province of the jury. Upon this evidence, I cannot tell where Sir Francis Burdett parted with the letter, what distance his residence is from the post office, into what post office it was put, and whether he carried it himself, or sent it by a servant. These are points on which I have no means of forming a judgment. It therefore **[153]** seems to me that there is no foundation on which without infringing on the rights and privileges of the jury, we could come to the conclusion, that although the paper was delivered to Mr. Brookes in London, it must have been parted with by Sir Francis Burdett in Leicestershire. That question has not been put to the jury, and till that has taken place, it is not for me to put such a construction upon the facts. But suppose that it was delivered by Sir Francis Burdett in Leicestershire; then the question arises, in what state was it delivered? Was it open or sealed? If sealed, does a close delivery amount in law to a publication? That turns on the meaning of the word publication; I do not mean to give an opinion whether a close delivery is or is not a publication, but I think, that if a Judge tells a jury that a close delivery, a mere traditio, in a sealed state (without an opportunity of seeing the contents) is a publication, a defendant should have the right to claim a special verdict on that point, in order that he may have the opinion of a Court of Error on the subject. The word "published," is equivocal, and may admit of different meanings according to the subject-matter to which it is applied. In the case of libel, which is criminal only in respect of its contents, it may mean only a communication to others, or an affording an opportunity to others of seeing the contents. There does not appear to me to be any authority so direct on this point as to take from the defendant the right to have a writ of error in order to canvass this question. Of the authority of Lord Ellenborough, nobody thinks higher than I do. He was a man of a most powerful and vigorous mind; but I may say, that even his opinions at Nisi Prius were not always right; and I will add of him, that I never met with a man who was more ready in the best **[154]** part of his life to recede from his own opinion so delivered, and to yield to that of others. The case of *The King* v. *Watson* did not give him such an opportunity. The evidence was of the post mark at Islington, to shew a publication in Middlesex; the case subsequently failed, and the point was not afterwards considered. The case of *The King* v. *Williams* was for sending a challenge, and though the word publication was used, yet the act charged was an act of sending, and no doubt the putting a letter into the post was proof of that fact. There was another case of *Metcalf* v. *Markham*, cited in argument, which, however, seems to me to be no authority on this point, because there the sending the letter from Hull, was clearly part of the cause of action, and material evidence in the case. Another case to which I adverted in the course of the argument, is that of *The King* v. *Collicott;* there the prisoner was indicted for uttering forged stamps in Middlesex, a crime which has been considered as analogous to the present case. He lived in Middlesex, and sent the forged stamps by his servant in a parcel to London, that they might be forwarded from thence by a carrier to Bath; the Judges considered the question, and seven were of opinion that he was guilty of uttering in Middlesex, but five others, whose names were entitled to great respect, very considerable lawyers, were of a contrary opinion. The result was, as might be expected, that no proceedings were taken on the verdict; but he was afterwards prosecuted for another offence in London. These authorities seem to warrant me in this observation, that the case of delivering a letter sealed, is not so clear a case of publication as to exclude a defendant from the right to have the fact found specially; and it seems to me, that **[155]** by the course taken, the defendant has been deprived of this opportunity, for the question of a delivery sealed, never was presented for the consideration of the jury.

But it has further been argued, that whether there was a publication in Leicestershire or not, still this verdict ought to stand, for that the composing, writing, and publishing, constitute one entire offence, and that if part thereof be in one county and part in another, an indictment may be supported in either; and I was for a considerable time of that opinion, and had at one period consented, upon that ground, to

refuse the rule. Upon the discussion, however, which has since taken place, and upon further consideration, I am by no means satisfied that this is so clear a point as to warrant us in concluding the defendant from having it put upon the record. I consider the evidence as establishing clearly that the defendant composed and wrote in the county of Leicester, and published in the county of Middlesex; and I think it impossible to deny but that he composed, wrote, and published with the intent charged in the information. And even now, if the Attorney-General would consent to enter the verdict specially in that way, I should be against the rule for a new trial. Upon the best consideration, however, which I can give to the authorities, I am of opinion that the whole offence, the whole corpus delicti, must be in one and the same county; that there is no distinction in this respect between felonies and misdemeanors; and that, though the jury may enquire into collateral facts, or facts of inducement prior to the crime, or facts resulting from the crime, in another county, they are wholly confined to the county for what constitutes the offence itself. Hale's Summary, p. 203, says, "Regularly the grand jury can **[156]** enquire of nothing but what arises within the body of the county for which they are returned;" but he states as an exception, "For a nuisance in one county to another, a jury of the county where the nuisance is committed may indict it." Now this mode of putting the case of nuisance clearly implies that the rule extended to misdemeanors as well as felonies, and that such special case of misdemeanor was an exception to it. And why is it an exception? Because the whole body of the offence is in the county where the nuisance is committed; the jury there find in their own county a wrongful act, calculated to do mischief; and all they enquire out of their own county is into the consequences of such wrongful act. Lord Hale says (*a*) "The grand jury are sworn ad inquirendum pro corpore comitatus; and, therefore, regularly they cannot enquire of a fact done out of their county, for which they are sworn, unless specially enabled by Act of Parliament, but only in some special cases;" and in p. 164, he says, "If A. by reason of the tenure of lands in the county of B., be bound to repair a bridge in the county of C., he may be indicted in the county of C." Now this, again, is a special exception in case of misdemeanor. The whole corpus delicti there is the neglect to repair, which is in C., and the ground of his obligation is only evidence to prove his guilt in C. Lord Hale cites 5 H. 7, 3, and 3 Ed. 3, Assise 440, in support of this position. In 2 Hawk. c. 25, s. 34, it is stated thus: "It seems to be generally agreed at this day, that by the common law no grand jurors can indict any offence whatsoever, which does not arise within the limits of the precinct for which they are returned." And in s. 37, "And **[157]** it seems, by the common law, if a fact done in one county prove a nuisance to another, it may be indicted in either county," still putting this (though a case of misdemeanor) as a case of special exception; for which he cites Summ. 203, Assize, 446, and 19 Assize, 6. Sir W. Blackstone, vol. 4, p. 302, lays it down thus: "The grand jury are sworn to enquire only for the body of the county, pro corpore comitatus; and, therefore, they cannot regularly enquire of a fact done out of the county for which they are sworn, unless particularly enabled by Act of Parliament." And in page 305, after an enumeration of certain exceptions, he says, "But in general, all offences must be indicted, as well as tried, in the county where the fact is committed." These authorities are all general, without distinction between felonies and misdemeanors, and seem to shew, that though the evidence need not be confined to the county, the offence must. We have an instance of this in the case of bigamy, where the first marriage, which must be proved, may be proved to have taken place either in or out of the county where the offence is tried. But what is the whole offence? It is the second marriage, and the second marriage only which is the corpus delicti, and that must be proved within the county, (unless the indictment is in the county where the prisoner was apprehended, which is specially provided for) and then the jury have jurisdiction to enquire into the other facts of the case. *Danby's case*, 2 R. 3, pl. 10, which has been cited, seems to me to fall within the same rule. There it appeared that the original writ was erased in London by Mundres, but the other erasures which completed the offence, were done in Middlesex, by Danby and three others. And the prisoners, in consequence of this, were not tried for the felony, but were afterwards separately convicted in London and **[158]** Middlesex of the misdemeanor. But there each alteration was a complete common law misdemeanor; each offender was

(*a*) 2 Hale P. C. 163.

indicted in the county in which the whole of his misdemeanor was committed, and this case, therefore, is not an authority to shew that a misdemeanor commenced in London and consummated in Middlesex, could be tried in either.

Upon these grounds, I think, this, at least, so far a questionable point, that if the publication in Leicestershire cannot be supported, the ground which I have last considered is not sufficient to support the verdict in its present shape, and that there ought to be a new trial, unless the Attorney-General consents to a special verdict. The only remaining question is, whether, if the verdict be narrowed to the composing and writing, and the publishing and causing to be published be negatived, composing and writing constitute an offence. But the case seems hardly ripe for discussing that question. If the verdict be so narrowed, I shall readily give my opinion upon the question; but, till then, it is unnecessary. Upon the whole, therefore, I am of opinion that the verdict, as at present found, ought not to stand; and that, if it is not confined to composing and writing in Leicestershire, and publishing in Middlesex, there ought to be a new trial.

Abbott C.J. I am of opinion, that the rule for a new trial in this cause ought to be discharged. The case has been argued at very great length on the part of the defendant, and many topics have been addressed to the Court, some of a general nature, and others more particularly applicable to the case itself. It has been contended, that the whole crime of libel consists in the publication alone, and that the author, or writer, is in [159] no degree criminal if his composition be not published. I intimated more than once, in the progress of the argument, that the decision of this point was, in my opinion, immaterial to the present case, because this is the case of a libel actually published by the authority and procurement of its author. I shall, therefore, abstain from giving any decided opinion upon this point, but I cannot forbear observing, that many of the passages quoted in support of the proposition, from the text of the civil law being expressed in the disjunctive, appear to me to be authorities rather against than in favour of the point for which they were adduced. The composition of a treasonable paper intended for publication has, on more than one occasion, been held an overt act of high treason, although the actual publication had been intercepted or prevented, and I have heard nothing upon the present occasion to convince my mind that one who composes or writes a libel with intent to defame, may not, under any circumstances, be punished, if the libel be not published. In any case in which this question may arise, the particular circumstances of the case will become fit matter for consideration at the trial.

The case of *The King* v. *Beare* came before the Court after verdict. There is no very clear and satisfactory report of it, and I will only say of it, at present, that I have no doubt that Lord Holt considered the criminal intention charged in the indictment as not negatived by the verdict, and understood the word only to be confined to the acts done. It is true, that in cases of libel a publication has been generally proved, and the trial has been had in the county where publication took place. The place of publication is rarely a matter of doubt, the place of the writing or composition is often unknown, and as most of the cases of libel have been cases of pub-[160]-lication, Judges and other persons, speaking of the crime of libel, generally, and without any thing requiring a distinction between the writing and publishing, may not unreasonably use expressions applicable to published slander.

It was further contended, that the word publication denotes an actual communication of the contents of the writing by the publisher to some other person, and we were referred to dictionaries for the sense of the word publication. But in the law, as indeed in other sciences and arts, some words are used in a peculiar sense, differing in a certain degree from their popular meaning. Thus, in the language of the law, we speak of the publication of a will, and the publication of an award, without meaning to denote by that word any communication of the contents of those instruments, and meaning only a declaration by the testator or arbitrator, in the presence of witnesses, that the instrument is his testament or award. In like manner the publication of a libel does not, in my opinion, mean an actual communication of the contents of the paper. Lord Coke says, a libel may be published traditione, by delivery; and this is adopted by Lord Chief Baron Comyns in his Digest, and is conformable to the civil law, wherein we find the word edidit used as applicable to this subject. Actual communication of the contents, as by singing or reading, is indeed one mode of publication; but it is not the only mode, nor the usual mode;

the usual mode is by delivery of the paper, either by way of sale or otherwise; and upon proof of the purchase of a newspaper or pamphlet in Fleet-Street, no one ever thought of asking whether the purchaser or other person read the paper or pamphlet in London or elsewhere.

[161] I shall now proceed to advert to the topics more particularly applicable to the present case. In the first place it was contended, that there was not, in this case, as it was said there ought to have been, any evidence of publication in the county of Leicester; and the manner in which this point was put to the jury, by my learned brother, at the trial, was made the ground of much objection. It was said, that the jury were directed to presume a publication in Leicestershire, without any sufficient ground; but, upon an attentive consideration, I am of opinion, that all that was done upon this subject, was well warranted by the evidence adduced at the trial. A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained, by inference in a Court of Law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime, is or can be given; the man who is charged with theft, is rarely seen to break the house or take the goods; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against **[162]** him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men, conversant with the affairs and business of life, and who know, that, where reasonable doubt is entertained, it is their duty to acquit; and not of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtilty and refinement. I have thought it right to premise these general observations, before I consider the particulars of the evidence in the present case, and I must also first take notice of a topic that was urged on this head, by one or more of the learned gentlemen who have argued for the defendant. It was said, and truly said, that guilt and crime are never to be presumed; and the cases of supposed murder, mentioned by Lord Hale, and which have since operated as a caution to all Judges, were quoted on this occasion. But the cases are wholly different. In those cases, there was no actual proof of the death of the person supposed to have been slain, and, consequently, no proof that the crime of murder had been committed. The corpus delicti was **[163]** not established. In this case, the crime, so far as it consists in the composing and publishing the paper, was proved beyond all contradiction; the paper was written by the defendant, and came to the hands of Mr. Brookes by the defendant's authority and procurement, not as a private and confidential communication, but for insertion in the public newspapers; and the question is not whether there was any publication, but in what county the publication shall be deemed to have taken place; a question arising entirely out of the locality of the jurisprudence of this country. If the prosecutor has mistaken the county in which the offence is charged, the defendant is entitled to avail himself of that mistake; and I have as little inclination as authority to deprive him of his privilege; and this brings me to the particulars of the evidence.

The information is laid in Leicestershire, and it charges that the defendant, in Leicestershire, composed, wrote, and published, and caused and procured to be composed, written, and published, a libellous paper. In support of this allegation, a paper was produced at the trial, in the hand-writing of the defendant, dated the 22d of

August, at Kirby Park; a letter was also produced, written by the defendant to Lord Sidmouth, in which the defendant acknowledged that he was the author of this paper, and had transmitted it to town for insertion in the newspapers. Kirby Park is a mansion-house and residence of the defendant, a gentleman of fortune, in Leicestershire; the defendant was seen riding on horseback, in Leicestershire, on the 22d of August, and also on the following day. From the contents of the paper, it appears to have been composed in some haste, in consequence of something which the defendant had just read in a newspaper. There is, therefore, **[164]** abundant proof, that the matter was composed and written by the defendant, in Leicestershire; nor is that fact denied; and if so, the paper must have been in his hands or power in Leicestershire, when the writing was finished. It was further proved, that on the 23d or 24th of August this paper was delivered to Mr. Brookes, in Middlesex. Mr. Brookes, a friend of the defendant, was the witness who proved this; and the further account that he gave of the matter was, that the paper was brought to him by a Mr. Bickersteth, in an envelope, which he had mislaid, and which had no seal; he did not know how it was directed, but he believed that it might be directed to Mr. Bickersteth; and he said that it had the words "Pass this to Mr. Brookes," or something to that import. It is to be observed, that this witness would not take upon himself to say that the envelope was directed: he only said he believed it might be; nor did he say whether the words were written within or without the envelope. Mr. Bickersteth was not called by the prosecutor or by the defendant; but it appeared, from the testimony of Mr. Brookes, that the prosecutor did not, before the trial, know that the paper had ever been in the hands of Mr. Bickersteth, for Mr. Brookes declined, at the trial, to name the person from whom he had received the paper, until he was told that he must do so.

The defendant, on the contrary, knew how and in what manner he had parted with the paper; he knew that his trial was to take place in Leicestershire, and he came to the trial ready to object to the county. Upon these facts the question arises, whether the jury might reasonably infer and conclude, in order to satisfy the locality of jurisdiction, that the paper had passed from **[165]** the defendant in the unsealed envelope to Mr. Bickersteth, in Leicestershire, as the Judge informed them they might, in his opinion, do. The learned counsel for the defendant had argued with much ability at the trial, in the hearing of the jury, that the evidence furnished nothing upon which any inference could be drawn of a publication of any kind in the county of Leicester; the jury had witnessed the examination of Mr. Brookes, who was the agent for the defendant, for transmitting the manuscript to the editors of the public newspapers; this agency is acknowledged by the defendant in his letter to Lord Sidmouth. I have considered this question again and again, and with much anxiety, from respect to the different opinion entertained on this point by my brother Bayley, and I must say, that in my opinion the premises warranted a conclusion that the paper had been delivered by the defendant in Leicestershire to Mr. Bickersteth, in the state in which the latter gentleman delivered it to Mr. Brookes. The learned counsel have contended, that for any thing that appeared, the paper might have been sealed by the defendant before it quitted Leicestershire; that the defendant might himself have carried it out of Leicestershire, and delivered it in some other county to Mr. Bickersteth, or to some other person, or might himself have put it into some post office out of Leicestershire. Now Mr. Bickersteth might have proved for the defendant in what state and at what place, and in what manner he had received the paper, but he was not called; and as I have before observed, this was a question which the defendant came prepared to try, so that there was no surprise. The defendant was a member of Parliament; he might have sent this paper free of postage, directly to Mr. Brookes, and there **[166]** was no apparent reason for his sending it by the post, or otherwise to Mr. Bickersteth, in London, to give him, (a professional gentleman, as he is described to be, but whose place of residence does not appear,) the trouble of taking it in person to Mr. Brookes. The paper professes to have been written in haste, and it appears to have been intended for an immediate publication in the newspapers. It is dated on the 22d, and appeared in at least one morning paper on the 25th. Mr. Brookes said he did not recollect on what day, nor indeed at what time in August he had received the paper; he said he copied and sent it to the newspapers; this must have occupied some little time. It cannot have been delivered to Mr. Brookes later than the 24th; at what time it was finished on the 22d does not appear;

the distance of Kirby Park from the Strand is, I suppose, not less than a hundred miles, but that matter would be better known to the jury than to me. The defendant was proved to have been in Leicestershire on the 22d and 23d. To have presumed that he had himself gone out of the county to deliver this paper, for no reason apparent or suggested; or that a paper delivered by a private hand unsealed, and not appearing to have been sent by any conveyance requiring a seal, was in fact sealed before it was dispatched or was sent by any other hand or conveyance, than the hand that delivered it, would, indeed, in my opinion, be to draw a conclusion without any premises to warrant it. It certainly would be to introduce by way of presumption, some new and affirmative matter of fact not found in the evidence, but of which, if really existing, the evidence was in the knowledge and power of the defendant. Then why, in the absence of all the explanation and proof that the [167] nature of the case afforded of a delivery out of the county or in a sealed cover, or to another person, if the fact was really such, might not the jury reasonably decline to presume any of those facts, and conclude, from the proof before them, that the defendant had delivered the paper to Mr. Bickersteth, in that county in which alone the defendant was proved to have been, and in that state in which alone the paper ever appeared to have been? I can discover no reason why that conclusion might not be drawn; on the contrary, I think it might reasonably be drawn as a legitimate conclusion from the proof given, in the absence of all contradiction.

It is not necessary, to sustain the verdict on this point, that this should be the only conclusion that could be drawn from the premises. Matters of fact are for the determination of the jury; if they draw a conclusion not warranted by the premises before them, it is our duty to correct their error, and to send the case to another trial; but if the conclusion is a reasonable inference from the premises, we ought not to disturb their verdict. I think this conclusion the most reasonable inference from the premises, and that the Judge was perfectly justified in presenting the matter to the jury for their consideration, in this light, with a strong expression of his own opinion in favour of this conclusion.

I have given my opinion thus largely on this point, on account of the great importance that has been attached to it in the course of this cause, and this being my opinion, I might forbear to advert to another topic that has been addressed to us, but I think it right to advert to, and give my judgment on that matter, not [168] only on account of its general importance, but because the particular point on which so much has been said, and to which I have already adverted, would, but for an observation made by my learned brother to the jury at the trial, be in my own opinion of little importance on the question properly brought before us, which is, whether there ought to be a new trial. By presenting the matter to the jury, in the mode adopted by my learned brother at the trial, the cause was put as to the point of publication, on an issue much more favourable to the defendant, and giving him a much greater chance of acquittal pro tanto at least, than the law required. For I am most clearly of opinion, that upon the facts proved, and the inference necessarily arising out of them, and also that upon the facts taken simply by themselves, and without deducing any other fact by way of inference from them, and leaving, therefore, as to this part of the case, nothing to be found by the jury that is not already established, the defendant might lawfully be tried, and ought to have been found guilty of the whole charge contained in this information in the county of Leicester. And I cannot persuade myself to think that the Court would be justified in granting a new trial for the purpose of having certain facts specially found, and put upon the record, if the Court be convinced, as I in my judgment and conscience am convinced, that upon the facts so found, the Court would be bound to pronounce the defendant guilty, especially in a case wherein that was not asked at the trial. What are the facts? The defendant wrote the libel at his own mansion house in Leicestershire on the 22d of August; he was seen in Leicestershire riding on horseback on that day, and also on the following day; the [169] paper was delivered to Mr. Brookes, in London, by a third person on the 23d, or at the latest on the 24th August, and this by the authority and procurement of the defendant, for insertion in some London newspapers. Upon these facts, can any man hesitate to infer that the defendant, in some way delivered the paper out of his custody in Leicestershire that it might pass to London? And if he did there deliver it for that purpose, such a delivery was at the least a commencement in Leicestershire, of the traditio or act of publication. Now the fact of such a delivery

in Leicestershire, can scarcely be called an inference, for it is nothing more than saying, that the defendant did the act in the county in which he is proved to have been on the day on which he did it, he not appearing to have been out of the county on that day, and the act being such, as regard being had to his rank and situation in life, would in the ordinary course of things take place at his own house.

But it is said to be possible, that he may have carried the paper out of the county in his pocket, and have parted with it in some other county; and much has been said in the argument about the vicinity of Kirby Park to the borders of some other county. I presume the distance is not very great, and some of the jury would probably be acquainted with it. I admit the possibility of the fact suggested, its probability I utterly deny. But if I should even go further, and having first converted the possible into the probable, should then take another step in this process of presumption, and assume the supposed probable to be the real fact, and thus at length conclude, that the defendant did carry the paper out of Leicestershire in his pocket, and deliver it from his hands in some other county, to be forwarded to [170] Mr. Brookes, I should still be bound to say, that the defendant might lawfully be tried, and ought to have been convicted of the whole of this charge in the county of Leicester. The commencement of the traditio or delivery, would still be in Leicestershire by the act of the defendant himself carrying the paper from his house into that county, in its progress to Mr. Brookes. To write and publish a libel is a misdemeanor compounded of distinct parts, each of which parts (for I am speaking of a published libel) being an act done in prosecution of one and the same criminal intention, is a misdemeanor. And where a misdemeanor consists of such distinct parts, I say, without doubt or hesitation, that the whole may be tried in that county wherein any part can be proved to have been done. All that I have heard from the learned gentlemen who have argued the case on the part of the defendant, and have presented this matter to the Court in every various view that ingenuity could devise, has not for one instant raised a particle of doubt in my mind; and having no doubt, I should abandon the duty of my office, if I did not declare my own conviction, and act judicially upon it.

If the law should be otherwise, I know not very well what consequence is to follow. At one time it was argued, that the trial could be in that county alone wherein the paper was received and read, which was called the place of the publication. If this be true, one of two consequences must follow, either the party must be convicted of the whole offence in the latter county, and then the jury of that county will inquire into, and find criminal matter committed in another, which would be contrary to other parts of the argument addressed to us, or the party must be acquitted of the writing; and if [171] the latter alternative be correct, then an author can never be punished as such if he happen to write at one side of Temple Bar and publish at the other. At another time it was contended, that in the case supposed, the party could not be tried in either county, or in other words, that he could not be tried at all; and if it be true that a misdemeanor can be tried in that county alone wherein every part of it has been committed, the impossibility of any trial in the supposed case, would be a conclusion fairly deducible from the premises. But the conclusion would be an absurdity in the law, and the absurdity of the conclusion proves the falsehood of the premises.

Felony stands on a very different ground from misdemeanor; and the assertion that a misdemeanor can be tried in that county alone wherein every part of it was committed, appears to me to have been built upon a mistake of the true ground and reason of the doctrine in felony. This mistake, however, is not new, and therefore in no degree surprising, for we find in many of our books, and even in the preamble of the statute of the Second and Third Edward 6, c. 24, expressions importing that a jury of one county cannot inquire into, or take cognizance of any fact that happened in another. It was admitted on the present argument, that the generality of these expressions must be so far restrained as to confine their import to criminal matter, or rather to a part of the crime, because daily experience shews, that the proof of introductory or explanatory matter occurring in either county, is received without objection, even in cases of felony. There was a time, however, when it was supposed that a jury could not even in a civil action [172] inquire into a matter that did not take place in their own county. In the time of Henry the Seventh, an action of debt was brought upon a bond. The condition of the bond, according to the report in one part of the Year-Book, was, that if a certain ship should sail to Lynn, and from thence

go to Norway, and return from Norway to London, then the bond should be void; otherwise, that it should stand good. Now, upon this it was said, that as Norway was a place ultra mare, no jury in England could try or know whether the ship had been in Norway; that the fact upon which the condition depended was, therefore, a matter not triable; and a condition containing matter not triable was the same as a void condition, and that where the condition of a bond was void, it was the same thing as if the bond was made without any condition, and so the bond must stand good and be available as a single bond; and there is much learned and subtle reasoning upon those points, on one side, and on the other, and the case was adjourned. So easy is it for men to perplex themselves, and even to deduce absurd conclusions, if once a false proposition be admitted as true. The case occurs afterwards in another part of the book in the following year, and there the condition is differently stated, but still, in such a way to make the return from Norway material. It appears not to have been decided at that time, and I have not traced the final result. (10 H. 7, fo. 22. 11 H. 7, fo. 16.)

The true ground of the doctrine in felony is this; if a felony be compounded of two distinct acts, one of which takes place in one county, and the other in another county, the concurrence of both being necessary to constitute the felony, the party may not be triable in **[173]** either, because, ex hypothesi, there is no felony committed in either. The case of a stroke in one county and death in another, was considered by some as of this kind. The stroke was not a felonious act at the time; and the death, though consequential to the act of the striker, seems not to have been considered by them as properly his act, and to remedy this inconvenience, the statute 2 and 3 Edw. 6, c. 24, was passed. It seems somewhat extraordinary that the preamble of this part of the statute should be expressed in the terms in which we find it, because (1 P. C. 426) Lord Hale mentions this point as being doubtful at the Common Law, and says the more common opinion was that the party might be indicted where the stroke was given, and in the same page there is a reference to *Coles's case*, Plowden, 401, to shew that a general pardon whereby all misdemeanors are pardoned, intervening between the mortal stroke and the death of the party stricken, doth pardon the felony consequentially, because the act that is the offence, is pardoned, though it be not a felony until the party die.

Observations of the same kind may be made upon the case of accessaries in one county, whether before or after the fact, to a felony committed in another county. The act done, whether of prior advice or procurement, or of subsequent receipt and harbouring, is not a felonious act, if taken singly and by itself; but requires the concurrence of some other act, to give the felonious character. Both descriptions are provided for by the same statute, though the preamble speaks only of accessaries after the fact; and the case of accessaries before the fact does not seem to have been very clearly settled at the common law, for according to a case in Keilwey, p. 67, **[174]** it appears that accessaries before the fact, in one county, to a murder committed in another, might be arraigned and tried in the county where the murder was committed. In the Year-Book, 9 Edward 4, pl. 48, there is a case of a person indicted in Middlesex, for there procuring one I. S. to commit a murder, who committed it in Berks; and because the accessary could not be arraigned until the principal was attainted or acquitted, the Court wrote to the justices and coroners of Berks to certify whether I. S. was indicted for the murder, and upon a return that he was not, the accessary was discharged. Now, it was wholly unnecessary to obtain such a certificate, and the party ought to have been discharged immediately, if the indictment against him in Middlesex could not be sustained, in case the principal had been convicted in Berkshire. In the case of the appeal of robbery reported in Dyer, fol. 38, it appears to have been the opinion of one, if not both the Judges present, that the procurer of a felony might be indicted in the county where his procurement was. But in that case an appeal of robbery brought in Wiltshire, where the robbery was committed, against the procurers thereof in London, was quashed; for, says Lord Coke, in *Bulwer's case*, 7 Coke, 2 b. who there cites this case of the appeal from Dyer, "In case of felony, which concerns the life of a man, every act shall be tried in the proper county where the act was in truth done." This case of life, though, perhaps, not a good logical reason for a distinction, is, undoubtedly, a ground for the utmost caution, and is well known to have operated strongly upon the minds of Judges in all times. It has, indeed, led in some cases to such subtilty and refinement of construction, and to the

giving way to such nice and formal objections, as were in the opinion [175] of Lord Hale a reproach to the law. But as the reasons which may be assigned in cases of felony do not apply to other cases, so neither has any instance been found wherein a misdemeanor, composed of acts in different counties, each act being in itself a misdemeanor, has not been held wholly triable in that county wherein any criminal part was committed. The case of *The Seven Bishops*, which was referred to in the motion, does not establish any thing of this kind; for in that case, which was an indictment in Middlesex, there was not at any period of the trial, any proof of the writing in Middlesex, nor, for a very long period, any proof of a publication in Middlesex. And the difficulty as to the locality of trial, was in the end so far removed as to become a question for the jury, under circumstances to which I need not now advert, by the testimony of the Lord President of the Council. And even after his testimony, the identity of the paper was to be collected by inference, which was not objected to. The doctrine of Lord Coke in 3 Institute, page 80, in his commentary on the statute 4 James 1, cap. 8, was applied to the case of felony. I will now refer to *Bulwer's case*, and the authorities there cited, premising only that I am not aware of any authority pointing to a distinction between local actions and indictments for misdemeanors. The power of the jury appears, upon principle, to be not less limited in the one case than in the other. *Bulwer's case* was an action brought in the county of Norfolk, for maliciously causing the plaintiff to be outlawed in London, upon process sued out of a Court at Westminster, and causing him to be imprisoned in Norfolk upon a capias utlagatum directed to the sheriff of that county, but issued at Westminster. It was [176] objected that the action was not maintainable in the county of Norfolk, but the contrary was decided, because where matter in one county is depending upon matter in another county, the plaintiff may choose in which county he will bring his action, unless the defendant should be prejudiced in his trial. And of this proposition numerous instances are there cited relating to actions, some of which were then considered as local, though, perhaps, they might not be so now, and others which would still be so considered. Among the instances, are conspiracy in one county to indict a man falsely, followed up by an indictment preferred by the same parties in another county; neglect to repair a wall in Essex, whereby the plaintiff's land in Middlesex is overflown; and the forgery of a deed in one county, and publication of it in another. This last instance exactly resembles the writing of a libel in one county, and publication of it in another, and is less strong than the writing in one county and sending or carrying from thence into another, in order that it may be received and read. For the sending or carrying in the latter case, is the commencement of the publication; the receipt and reading are its consummation; the sending is the act of the party, and so also is the carrying of it, if it be carried by the writer; and the melior notitia that has been alluded to, seems to be, as it regards such a party, in the county in which his own acts are done.

A very early instance of misdemeanor, wherein the whole matter was enquired into in one county, is *Danby's case* in 2 Richard 3, fo. 10, cited in 1st Pleas of the Crown, fo. 652. The proceedings, to an outlawry, consisting of an original writ, three writs of capias, and a writ of exigent, had been altered, by the erasure of [177] the Christian name of the defendant, who was therein called John, and the substitution of William in its place. This alteration in the original writ was made by one person, in London, and in the several other writs, by three other persons, in Middlesex. The whole matter, taken together, was considered as a felony, under the statute of 8 Henry 6, c. 12. It seems that the several writs were considered as constituting but one record; and this offence, thus committed in parts, was held not to be triable as a felony; but it was held, that the one offender might be tried in London and the others in Middlesex for the misprision, which was accordingly done, and they were punished; and though it may be true, as was said by one of the learned counsel, that the whole act of the person tried in London, was committed there; yet it seems to have been thought necessary to prove all that had occurred in Middlesex. A part, viz. the issuing of the writ, was certainly necessary, but this was no criminal part; and the case is not so material in itself, as for the observations made upon it by Lord Hale. "And yet observe," saith he, "the felony was one entire felony, committed in two counties, and so neither enquirable nor determinable in one county; for the jury of that county cannot take notice of part of the fact committed in another; and yet the misprision of that felony was enquirable and punishable in either county, where but

part of the felony was committed; and yet the jury, in that case, must take notice of the entire felony, part whereof was committed in another county." The expression misprision of felony, does not seem to be very correctly used in this case; for misprision of felony is the concealment of a fe-**[178]**-lony, knowing it to have been committed by another. This was the case of acts done by the parties themselves.

In the case of *The King* v. *Williams*, in 2 Campbell, 505, which is reported to have been an indictment in Middlesex, for sending, but was, in fact (as appears by the record), an indictment for composing and writing, and causing to be composed and written, and sending and delivering, and causing to be sent and delivered, a libellous letter, with intent to provoke a challenge; the letter being sealed up, was put into the post-office, by the defendant, in Westminster, addressed to the prosecutor, in London, who received it there. Objection being taken, that there was not any evidence of an offence committed in Middlesex, Lord Ellenborough said there was a sufficient publication in Middlesex, by putting the letter into the post-office there, with intent that it should be delivered to the prosecutor elsewhere. In the case of *The King* v. *Watson*, 1 Campbell, 215, the prosecutor failed in proving that the first letter was put into the post-office in Middlesex, and it was received in another county. Mr. Justice Grose, in delivering the judgment of the Court, in *The King* v. *Brisac and Another*, 4 East, 171, says, "There seems no reason why the crime of conspiracy, amounting only to a misdemeanor, may not be tried, wherever one distinct overt act of conspiracy is, in fact, committed, as well as the crime of treason. In *The King* v. *Bowes and Others*, the trial proceeded upon this principle; where no proof of actual conspiracy, embracing all the several conspirators, was attempted to be given, in Middlesex, where the trial took place, and where the individual actings of some of the conspirators were wholly confined to other **[179]** counties than Middlesex; but still the conspiracy, as against all, having been proved, from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it in different places and counties; the locality required for the purpose of trial, was holden to be satisfied by overt acts done by some of them, in prosecution of the conspiracy in the county where the trial was had." Another instance of this kind, is the decision of the Judges, in the case of *The King* v. *Buttery;* he was indicted on the statute of 30 Geo. 2, c. 24, s. 1, for obtaining money by false pretences. The language of the statute makes the offence to consist in obtaining the money, and not in using any false pretence, whereby money shall be obtained. The indictment was in Herefordshire, the false pretence was in Herefordshire; but the money was received in Monmouthshire; the Judges thought the indictment was laid in the wrong county; they did not think the party not indictable at all, which they ought to have done, if the proposition addressed to us be true, because the pretence which was necessary to constitute the crime was in one county and the receipt in another; and so there was no entire crime in either. The instances of treason which were alluded to by Mr. Justice Grose, are well known; see 1 East's Pleas of the Crown, 130, and they go this length, viz.; that one witness to an overt act in the county wherein the indictment is preferred, is sufficient, if another overt act in another county be proved by another witness; and so, as there can be no conviction, but by the testimony of two witnesses, the jury must take cognizance of criminal matter committed out of their county, as the foundation of a conviction; and treason and misdemeanor are alike distinguishable from **[180]** felony, on the ground that I have already mentioned, viz., that each act is an offence of the same species with every other and with the whole; whereas an act requiring the concurrence of some other act or matter, to constitute a felony, may not be in itself a felony, and may either be an offence of a different nature, punishable as such, or lose its character by merger in the other act or matter, so as to become dispunishable, for want of the locality necessary to a trial.

In cases of felony, the Legislature has, on more than one occasion, intervened to prevent the failure of justice, occasioned by the rule to which I have adverted. I am not aware that the Legislature has interposed in any case of misdemeanor; and I cannot help thinking that the absence of any such enactment furnishes an argument to shew that nothing of this kind has been thought necessary, and that it has been generally understood that a conviction for a misdemeanor might take place in the county wherein any such part thereof as I have mentioned should have been committed, for otherwise there would, in many cases, be a great failure of justice. I

cannot, therefore, do otherwise than say I am clearly of opinion in the way I have expressed myself, and for the reasons I have given, that if any such part of an entire misdemeanor be proved to have been done in the county in which the indictment is preferred, there is enough to satisfy the locality of trial, and here there is not only the fact of composing the paper in the county of Leicester but some act must have been done by Sir F. Burdett by delivering the paper, or carrying it himself out of that county. Some act must have been done in that county as the commencement of sending it for publication.

[181] The next ground taken in support of the motion for a new trial was, that the learned Judge had rejected evidence offered at the trial to prove that some of the King's subjects had been killed and wounded by the dragoons on the 16th August, or, in other words, that evidence of the truth of the fact, alleged in the libel as the foundation and cause of the remarks therein contained, was tendered and refused. I am of opinion, that this evidence was properly refused. The whole history of the law of libel shews that such evidence has been almost invariably refused on all occasions of criminal prosecution for slanderous observations and remarks upon the administration of the Government, or upon the conduct of public or private men. The reason of this part of the law has been so often explained, that it is altogether unnecessary to enter into it at present. I will only quote the opinion of one of the most eloquent writers of antiquity, who united the characters of philosopher and statesman. Cicero having cited the law of the Twelve Tables, made for the punishment of any one, "Qui carmen eondidisset quod infamiam afferret flagitiamve alteri," immediately subjoins "Præclare judiciis enim ac magistratuum disceptationibus legitimis propositam viam non poetarum ingeniis habere debemus, nec probrum audire nisi ea lege ut respondere liceat et judicio defendere." The case of *The Seven Bishops* has been mentioned as an instance of evidence received on the part of a defendant; but in that case the evidence was not offered to prove any matter of fact mentioned in the supposed libel, which was a petition to the King, but to shew that the King had not the power of dispensing with an Act of Parliament, which was matter of law; and the evidence consisted of **[182]** the records of proceedings in Parliament, and was addressed to the Court rather than to the jury. The case of Mr. Horne, tried before my Lord Mansfield, was also quoted, as an instance of receiving evidence of facts. Upon looking into that case, it appears that Mr. Horne, who conducted his own defence, did not open his evidence to the jury, as usual, but sat down without proposing to call any witnesses; and when he afterwards proposed to call some, and the Attorney-General objected, Lord Mansfield said, "You had better not object; you had better hear his witnesses." And they were accordingly examined. Such an instance can, in my opinion, be of no avail against the current of prior and subsequent practice; it certainly can be of no avail against the opinion of the Judges, delivered in the House of Lords, in answer to a question on this particular point, propounded to them by the House on the occasion of the passing of the statute 32 G. 3, c. 60, commonly called the Libel Bill; and the still more important fact that the Legislature having its attention directed to this subject at that time, left the law in this respect in the situation wherein the Judges reported it to stand. Another case, that occurred before me, was also referred to; in that case, however, the truth was not offered in evidence by way of defence, but the evidence of the falsehood was adduced by the prosecutor, as necessary to support the charge. No objection was made on the part of the defendant; and although I was not free from doubts in my own mind, yet, adverting to the particular nature of the supposed libel, which contained little more than a narrative of certain facts, supposed to have taken place in one of the West India Islands, I did not think myself warranted in interposing **[183]** under the very peculiar circumstances of that case; and, having received evidence of the falsehood, I should, most undoubtedly, have received evidence of the truth, if any such had been offered, on the part of the defendant.

Another ground of the motion was, that the learned Judge gave his own opinion to the jury upon the character of the publication in question, expressing himself at the same time somewhat to this effect: you are to say whether you will adopt this opinion or not; and unless you are satisfied that I am wrong, you will take the law from me. This was supposed to be contrary to, or at least beyond, the duty of the Judge, as prescribed by the statute to which I have just alluded; it was, however, in my opinion, not only not contrary to or beyond the duty of the Judge as prescribed by that statute, but in strict conformity to it. The clauses of the statute have been

referred to. If the Judge is to give his opinion to the jury, as in other criminal cases, it must be not only competent but proper for him to tell the jury, if the case will so warrant, that in his opinion the publication before them is of the character and tendency attributed to it by the indictment; and that, if it be so in their opinion, the publication is an offence against the law. This has been repeatedly done by different Judges within my experience, and I am not aware of any instance in which it has been omitted. The contrary has sometimes occurred, in cases where the Judge has thought that the matter of the publication was innocent; but those cases also are instances of an opinion given, and not of silence on the part of the Judge, as to the law of the case. The statute was not intended to confine the matter in issue exclusively to the jury **[184]** without hearing the opinion of the Judge, but to declare that they should be at liberty to exercise their own judgment upon the whole matter in issue, after receiving thereupon the opinion and directions of the Judge. For these reasons I am of opinion that the rule ought to be discharged.

Best J. I entirely agree with my Lord Chief Justice and my brother Holroyd, in the opinion, that if a libel be written in one county and published in another, the libeller may be prosecuted in either.

Rule discharged.

CAMELO *against* BRITTEN. A licence for the exportation of gunpowder was granted on the petition of A. B. on behalf of himself and others, on condition that the merchant exporter should give a certain security therein mentioned. A. B., the manufacturer of the gunpowder, sold it to C. D., and contracted to deliver it free on board a ship: Held, that the condition of this licence was not complied with by A. B.'s giving the required security, he not being the merchant exporter within the meaning of the licence.

Action on a policy of insurance, dated the 30th January 1817, effected in the name of the plaintiff at and from London to Pernambuco, to wait orders to enter there or proceed for Maranham, by the policy the insurance was expressed to be on wine, shot, lead, gunpowder, and goods in bales and cases, valued at 2500l., at a premium of 50s. per cent. The first count of the declaration alleged that the defendant subscribed the policy for 200l.; that the plaintiff was interested; that the ship sailed with the goods insured on board, and that afterwards, to wit, on the 15th April, the said ship or vessel with the said goods and merchandizes on board thereof, arrived off Pernambuco aforesaid; and that afterwards, and before the said ship or vessel could enter Pernambuco aforesaid, and during the continu-**[185]**-ance of the said voyage; to wit, on the day and year last aforesaid, the said ship or vessel with the said goods and merchandizes on board thereof as aforesaid, was with force and arms arrested, seized, and detained by certain officers and subjects of the King of Portugal, and carried to a certain other port; to wit, the Port of Bahia. And that afterwards, to wit, on the 22d May in the year aforesaid, at Bahia aforesaid, the said goods and merchandizes were condemned and confiscated; and thereby the said goods and merchandizes became and were wholly lost to the plaintiff. The second count alleged the loss generally by seizure and detention. Plea, general issue. The cause was tried before Abbott C.J. at the sittings at Guildhall before Easter term 1819, when the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case.

The defendant subscribed the policy for 200l., and the plaintiff was interested in the goods insured. The plaintiff is by birth a Portuguese subject, but has been domiciled in London, and has carried on trade there as a merchant since the year 1809. Pernambuco and Maranham are parcel of the dominions of the Crown of Portugal. The "Venus," the ship mentioned in the policy, was chartered by Messrs. Josling, Allen, and Freneira, Portuguese merchants in London, in January 1817, to carry out a cargo of sundry merchandize to Pernambuco and Maranham, and to bring back a return cargo. The goods insured consisted of 9 hogsheads of Madeira wine, 6 pipes of red wine, 30 barrels of small, or bird shot, 4 rolls of sheet lead, 10 cases and 14 bales of manufactured goods, and 100 barrels of gunpowder. For a number of years past, gun-**[186]**-powder has been usually shipped from this country to Pernambuco and Maranham, and imported there, but if the Portuguese Government did not choose to purchase such gunpowder, the shipper was obliged to re-export it,