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EXAMINATION OF

TRIALS FOR SEDITION IN SCOTLAND.

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AN EXAMINATION

OF THE

TRIALS FOR SEDITION

WHICH HAVE HITHERTO OCCURRED

IN SCOTLAND

BY THE LATE

LORD COCKBURN

ONE OF THE JUDGES OF THE COURT OF SESSION

"When our ashes shall be scattered by the winds of heaven, the impartial voice of future times will rejudge your verdict."

MUIR'S *Speech to his Jury.*

VOLUME SECOND

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MDCCCLXXXVIII

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SEDITION TRIALS.

XI.—Case of MAURICE MARGAROT, Jan. 13, 1794.[1]

MARGAROT was an Englishman. The Crown counsel try to aggravate his guilt, in the course of the trial, by representing him as an attorney. (vol. xxiii. pp. 636-697.) But their own indictment describes him as a merchant, and I believe that this was the truth. He had come to Scotland as a delegate to the British Convention, and had the fatal honour of being elected one of its presidents. It was for accession to the proceedings of this association that he was tried. And therefore his case, though distinguished by a few occurrences of its own, does not differ in its substance except in one not very material matter, from that of *Skirving*.

In examining it, it will be convenient to discuss the main body of the trial first, apart from its incidental peculiarities.

The crime charged was *sedition;* and all the material circumstances resolved into these facts, viz., that the convention was criminal, and that the prisoner was responsible criminally for what it did. But in describing the legal guilt of the convention, facts and designs are imputed to it, which must compel a lawyer to entertain even stronger doubts

[1] *State Trials*, vol. xxiii. p. 603.

than in the case of *Skirving*, of the competency of having charged any offence short of high treason.

The indictment sets forth that the convention had held meetings, "which, though held under the *pretence* of procuring a reform in parliament, were evidently of a dangerous and destructive tendency, WITH A DELIBERATE AND DETERMINED INTENTION to disturb the peace of the community, AND TO SUBVERT THE PRESENT CONSTITUTION OF THE COUNTRY; WITH WHICH VIEW they imitated, BOTH IN THE FORM AND TENOR of their proceedings, that Convention of People, the avowed enemies of this country, who at present USURP the government of France." (vol. xxiii. p. 609.) Both the prosecutor and the court held that this fact implied treason, and would have *warranted* a charge of this offence; and indeed the lenity of the accuser, in having refrained from such a charge, attracts the admiration of the judges, and was gently professed to be scarcely reconcilable with his public duty by the Lord Advocate.

His Lordship explains his case thus:—"If by aping and imitating the example, the language, and the forms of a French convention—a country with which we are involved in war—they (the convention) demonstrate their intention of following its footsteps in *revolution and in blood;* if, as I shall prove to you must have been the case, their *intention* was *to overawe the legislature* in the free and independent exercise of its functions, by combining a majority of the people TO RISE IN ARMS AND IN REBELLION against any measures which the wisdom of parliament might direct for the public security and safety; if, in the event of that invasion from abroad with which the public enemy has menaced us, they, in place of resisting, were to JOIN THE

INVADERS, (for notwithstanding all the professions of the panel and his associates to the contrary this day in the course of the trial, such, on the sound construction of the evidence, and in common reason, I shall show IS THE ONLY CONCLUSION POSSIBLE to be drawn from the past and uniform tenor of their conduct and language,) then is the crime of *sedition* as clear and unequivocal as ever occurred in the criminal practice of this, or of any other civilised country." (vol. xxiii. p. 681.)

But what he meant by sedition was successful rebellion. Animadverting on the statement by the convention, that it represented a majority of the people—"If true (says he), what is the *unavoidable* inference?—that *insurrection and* TRIUMPHANT, IRRESISTIBLE, REBELLION was in their hands and under their control, and that, in no distant or improbable event, they were to exercise it." (vol. xxiii. p. 695.)

No wonder that, after this exposition, his Lordship should ask the jury "to check the evil in its bud, etc.; to mark your sense of the proceedings, and to stop them, while their guilt still remains with a *feature* of sedition marked upon it—verging upon treason,—*with such a trifling distinction that it is almost impossible for a lawyer to find the difference* [!!] It is so little, that when the indictment was preferred against Mr. Margarot, had it not been for the *promptitude* with which it was necessary to bring him before you, I should have laid the case before the King's Council in England, as to the appointment of a secret committee, *whether that per se was not sufficient to ground the charge of high treason.*"[1] (p. 701.) But *his own* opinion was,

[1] This speech was revised for the *State Trials* by his Lordship (p. 679, note).

that it was sufficient. Nothing prevented him from charging high treason, except that this crime could not be tried so *promptly* as sedition.

The very same view of the legal character of the guilt implied in the facts set forth was taken by the court. The prisoner had chattered a deal of nonsense about the relevancy; and in disposing of this, which was unworthy of notice, *Lord Henderland* gave it as his opinion that the libel was relevant, because, whether truly or falsely, it charged the prisoner with having taken "an active and distinguishing part in the deliberations of a society, met WITH A DETERMINED PURPOSE TO OVERTURN THE CONSTITUTION," etc. "The criminality does, to be sure, consist in this, that they met with a determined purpose to overturn the Constitution." This, he says, "*approaches* to high treason;" and in evidence of this he quotes an English indictment for treason,[1] where "the charges laid against the prisoners were very little different from those contained in the present indictment." (p. 623.) His Lordship was mistaken in his supposed analogy; because in the case referred to there was a direct charge of a design to depose the king; unless indeed he meant, as is probable, to say that a similar charge was virtually contained in the libel against Margarot.

Lord Eskgrove's opinion was to the same effect, and on the same grounds, but he takes occasion to say: "My Lord, *it is not the province of such men as these* to take upon themselves the amendment of the Government. The intention of their meeting, they say, was to obtain universal suffrage; or, in other words, to establish that every man living in

[1] Against Francis Townley. *State Trials*, vol. xviii. p. 333.

this country is to have a vote to choose a representative in parliament,—a thing that never did obtain, and does not now obtain, and that *never can* obtain, in this country." (p. 624.) It would not be worth while noticing this observation if it merely expressed the political opinion or speculation of this judge; but it is another of the many examples of their Lordships always considering universal suffrage or annual parliaments as at once so dangerous and so hopeless, that they were in themselves seditious objects.

Lord Swinton introduces another topic. Of all the French imitations, nothing excited such ludicrous horror on this supreme criminal bench as the word "*Tocsin*" (which Eskgrove invariably pronounced *Tock-Fin*). There was a discussion in this trial between the prisoner and the court, whether it was one French word, or two Chinese ones, referring to a motion made in the convention, of which the prisoner had said, "It is an excellent motion; the event it alludes to ought to be the Tocsin for the friends of liberty to assemble." "My Lords" (says Swinton), "*this is a very ill-chosen word.* What is this 'Tocsin'? It is an instrument made use of by the people of France to assemble. It is borrowed from a place from which I would wish to borrow very little." (p. 625.) But neither the nature, nor the uses, nor even the very existence of this implement were established by any attempt at evidence. If ever the notorious fact of the existence of a war, or of a threatened invasion, require to be proved when made matter of charge, or of substantive statement, surely the nature of a particular bell required to be so. But the existence and purposes of this terrible instrument, like the political character of a

tune called Ça Ira in *Muir's* case, were all taken for granted.

The libel was properly found relevant.

The evidence was, in substance, the very same with that against Skirving. Five witnesses, Mr. Davidson, Mr. Scott, Mr. Mack, James Lyon, and John Macdonald, proved the declarations, the seizure of papers, and the dispersion of the convention,—the last being effected by the mere "appearance" of force; for the sheriff states that he said at the time that "he supposed anything that had that *appearance* would be satisfactory." (p. 635.) Six other witnesses,—Thomas Cockburn, Alexander Aitcheson, George Ross, William Ross, John Wardlaw, and Samuel Paterson, prove certain proceedings in the convention, but not better than they were proved by the minutes. They disclose no new or concealed enormities. The prisoner examined five witnesses, with no effect, and apparently with no object, except to hurt himself by offensiveness.

The only visible differences between this case and *Skirving's* were in these two points: *first*, Margarot was not charged with the circulation of the Dundee address; *second*, there was an alleged proceeding in the convention charged against him, which was not charged, or at least was not set specially forth, against his brother reformer.

This proceeding, as described in the indictment, was, that on the 28th of November 1793 it was resolved, "that this convention, considering the calamitous consequences of any *act of the legislature* which may tend to deprive the whole or any part of the people of their undoubted right to meet, either by themselves or by delegation, to discuss any matter relative to their common interest, whether of a public or private nature; and holding the same to

be totally inconsistent with the first principles and safety of society, and also subversive of our known and acknowledged constitutional liberties—do hereby declare before God and the world that we shall follow the wholesome example of former times, *by paying no regard to any act* which shall militate against the Constitution of our country; and shall continue to assemble, and consider of the best means by which we can accomplish a real representation of the people, and annual election, *until compelled to desist by superior force.*" (p. 611.)

There can be no doubt of the criminality of any resolution by a number of persons to resist a statute; but I see no sufficient evidence that such a resolution was adopted.

The mere fact that it was not brought forward against Skirving makes its having been adopted extremely improbable; especially as the Lord Advocate says (p. 694) that he knew of the resolution before any of the prisoners were apprehended, and that it was his knowledge of it that made him direct the meeting to be dispersed. Accordingly the evidence, even as explained by his Lordship, is quite unsatisfactory. His case is, that the words are proved by the minutes and by the *Gazetteer;* that their substance was repeated by Margarot on the 5th of December; that the terms of the motion, as passed, and as originally set down in the minutes, were altered, but enough of their import retained to preserve the truth; which is confirmed by two witnesses, Ross and Cockburn. (vol. xxiii. p. 695.) But there seems to be an error in almost every part of this representation.

No such motion, nor any motion of this tendency, is in the minutes. This is certain. But there happened to be a blank in the minutes, which was left

as the secretary, George Ross, swears (p. 661) in order that a resolution then passed might be afterwards entered; and the question is, What was this resolution? The prosecutor's case required him not merely to assert (which he did excellently) but to prove, that it was the resolution charged. His *argument* is that it *must* have been so, and that it was conscious guilt that made them leave the blank. But his *evidence*, when applied to the exact point, resolves into mere fancy. It consists entirely in his gratuitous assumption that the unengrossed resolution was identical, or inseparably connected, with the one about the committee of emergency, and the meetings which were to be held at places only to be disclosed by the opening of sealed letters. But this last resolution was not adopted on the 28th of November; and, besides, the two were essentially different in their objects. All this, however, is really immaterial. Because whatever the blank *ought* to have been filled up with, it was not filled up at all; and therefore whatever inference the omission may warrant, nothing at least can be made *of the minute itself.*

Then as to the *Gazetteer:* no doubt it was, in one sense, the paper of the convention; for it professed to promulgate the sentiments and proceedings of that body, of which George Ross, the principal clerk in the *Gazetteer* office, was a member, and occasionally acted as its assistant secretary. (p. 659.) This newspaper was therefore patronised by the convention. But the convention did not control or superintend the editing of the paper, and "never furnished anything towards the expense of the printing." (p. 667.) It was conducted at his own discretion, by Mr. Scott, the publisher, who sent two

persons (the Rosses) to the convention to take notes, which they did, with the usual accuracy of unpractised reporters. But though they wished to be correct, they will not swear that they succeeded; and their reports were never revised by any one for the convention. The newspaper "was carried on totally independent of the convention." (p. 667.)

I do not know what the *Gazetteer* stated to have been the motion, because its words are not given. But the credit, and indeed the admissibility, of the newspaper as evidence, depends entirely on the proof of its accuracy; and therefore all this resolves into the testimony of the witnesses. Now although the reporters meant their reports to be accurate, and believed them to have been so, they could not swear that they actually were so. And, in particular the prosecutor's statement about *resisting* the statute, receives no corroboration either from them or from any other witness. The two Rosses, Aitcheson,[1] and especially Cockburn, who is chiefly relied on by the Lord Advocate, all remember that, in the events specified in this part of the indictment, the convention was to meet, but they expressly

[1] It has very often been said, and generally by those who had good means of knowing, that this Aitcheson was secretly betraying his associates. The style of his evidence certainly looks very like that of a man who, under the appearance of boldly defending the prisoners, was in reality trying to make their case as offensive as he could. He calls Margarot "a *second Sidney*" (p. 653), and Gerrald "*a second Lycurgus*" (p. 923), and professes that he would "much sooner appear here as the panel at your Lordship's bar, than as a witness;" and in Gerrald's trial he treated them to impudent and foolish discourses in defence of the convention's terms of citizen,—"Liberty Stairs," etc., till Braxfield roared, "Put him out, then! put him out!" (Pp. 926-927.) Notwithstanding all this, two circumstances make me disbelieve in his perfidy, or at least not comprehend it. One is, that the prosecutor always treats him very contemptuously, and not at all in the way in which penitent or divulging accomplices are generally used; and it is absolutely certain, from their characters, that neither Dundas nor Blair, nor any of the advocates-depute, could assume this tone insincerely. The other is, that no suspicion of him ever escapes any of the prisoners. On the contrary, they plainly consider him a bold and true friend.

negative all intention, or understanding, of resistance. They were to meet *to assert their rights;* which George Ross swears was to be done *by drawing up a remonstrance to parliament.* And when Cockburn is asked whether the resolution said "anything about paying no attention to a Convention Bill if it should pass," all the length that even he can go, is merely, "I *think* there was *a mention* of *something similar* to that." (p. 648.)

Accordingly, the resistance is merely an inference by the prosecutor. "Combining all this evidence (says he), written and parole,—weighing and considering it fairly and impartially,—can you hesitate in believing that *rebellion against the legislature* of this country was the *avowed and real purpose* of this assembly, and of this panel at the bar in particular?" (vol. xxiii. p. 695.) It may be fair enough to deduce a particular *design* from such a complex mass of circumstances and considerations; but the *terms, or exact import of a specific resolution,* require very different evidence. The prosecutor's belief may be very well founded; for the boast, or threat, that they would disregard any statute which was intended to extinguish them was not out of character with these people, in the temper they were then in. But in reference to criminal evidence, the proof is at the best very questionable.

The Lord Advocate addressed the jury. Speeches, upon temporary subjects by ordinary men, can scarcely be appreciated by those who only read them after the casual interest and allusions are weakened by time. But it surely evinces some want of perception, or singular fidelity in reporting, that in revising this address, his Lordship did not

omit a number of passages which the partiality of friendship cannot now avoid being distressed by.

Such, for example, as his aggravation of sedition, which is a greater crime, it seems, when committed by an *attorney* than by anybody else. "It tends to aggravate the crime of this man, that if he was an attorney, which I do not know that he was, *he has made an ill use of his profession*; his criminality is without excuse; his guilt is, indeed, of a more atrocious nature." (p. 697.)

It may sometimes be excusable to refer, on such occasions, to the general circumstances of the times, without any other evidence of them than that which it is supposed that no one can live without possessing. But *special*, and particularly *local*, facts can never be introduced safely, unless they be regularly established, and be thus subjected to scrutiny both as to their relevancy and their truth. It would therefore have been going far enough if his Lordship had only alluded to two tumultuous assemblages which he asserted had recently alarmed Edinburgh, but as to neither of which had there been a single particle of evidence. But not content with alluding to these occurrences, he uses them as established facts, tending to support his primary charge. "Compare you that, gentlemen, with what has passed within these few days past in this city; with the attempts to excite tumult and disorder which, *on the trial of Skirving*, disturbed, at a late hour of night, this supreme court of criminal justice in which we now sit; compare it with the mob assembled *this morning* to conduct this man to his place of trial with triumph, and with shouts, and clamour, and noise, and violence, clearly directed to intimidate court and jury and prosecutor in the dis-

charge of their duties ;—that clamour, indeed, nobly and honourably met, resisted, and put down by the spirit of the loyal and well-disposed inhabitants, turning out in support of their insulted magistrates and courts of justice ; *and then doubt, if you can, as to the seditious, not to say treasonable, purposes of this person with whose guilt or innocence you are now charged.*" (vol. xxiii. p. 696.) It is certainly possible that the fact of there having been one popular procession at the close of Skirving's trial, and another at the beginning of Margarot's, may have been quite satisfactory to that jury as evidence that the person they were trying for sedition had, in truth, been guilty of treason. But, 1*st*, ought not facts so detached from the other matter of the case, and so conclusive, to have been put into the indictment ; and, 2*d*, should they not have been proved ?

Margarot, though said to have been rather a clever man, made a long and injudicious harangue in his own defence. No enemy, anxious to deprive him both of hope of acquittal, and of sympathy in conviction, could have made a worse. He does not appear to have had the remotest conception where the strength, and still less where the weakness, of his case lay ; nor did he state or reason it, even according to his own view, with any force, sense, or plausibility ; and throughout he was defying without formidableness, and insolent without effect.

But there was certainly nothing to justify the rude and cruel criticism of the Justice, who, the very instant that Margarot was done, and immediately before he himself began his summing up, interposed this observation : "You have gone on for four hours, and I would not allow you to be interrupted. If you had not been a stranger I would not have

heard one-third of what you have said in four hours ; *which was all sedition from beginning to end.*" (vol. xxiii. p. 763.) Even if this statement had been true, which it was not, and even although it had not implied an admission of his Lordship's own incorrectness, in quietly listening to the commission of a crime in his own court, it was a coarse advantage for a Judge to take of any prisoner in making what he thought his defence. But it was a hint to the jury.

His Lordship then proceeded to charge; that is, he proceeded to do what, when properly done, amounts to this,—that the judge instructs the jury on the law, lays down the points of fact necessary to be ascertained in reference to the accusation and to the defence, and directs their attention to the evidence bearing on these facts on both sides, and states his own impression of the result, if he thinks this proper,—the most delicate and important task this that a judge has to perform, even on ordinary occasions, but one which raises him into a position requiring the calmest reflection and the most sacred candour, where it is a case with the Crown on the one side, and a subject, accused of a political offence, and on trial before a jury of known prepossessions against him, on the other.

His Lordship professed to give only "*the general idea of the case.*" This plan of a charge easily enabled him to make his summation a mere exhibition of his own political opinions, and an intimation to the jury that they might safely act upon theirs.

Neither the indictment, nor the verdict, nor the sentence against Skirving were made evidence on this trial, or were known judicially to the jury. Yet, such was their Lordships' habit of introducing all the popular occurrences of the day, that he tells

them "a very material circumstance, which you will have under your observation in forming your judgment, and it is this,—that that society (the convention) stands upon the records of this court, not above six or seven days old, to be a seditious society; when a person, a secretary to that society, was found guilty of the crime of sedition, and has been, by a judgment of this court, condemned to transportation for fourteen years. *That is a pretty strong circumstance to show that this was not an innocent meeting.* If it was a lawful meeting, I am afraid that that poor man Skirving has suffered very unjustly. In the *first* place, there was an *unanimous* verdict, of a *most respectable* jury, against him; and, in the *second* place, the *court pronounced judgment* upon that verdict." (vol. xxiii. p. 764.) Now, *no particle of this had been proved.* It could not have been so. Skirving's verdict was dated on the 7th of January 1794, and Margarot was tried on the 13th of that month, and, consequently, had got his indictment before the record against Skirving could have been specified as one of the articles of intended evidence.[1] And though this obstacle had not been in the way, it is clear that the whole of these facts were irrelevant and inadmissible. What was Skirving's case to Margarot? He was not on his trial upon Skirving's evidence, or before Skirving's jury. If Skirving had been *acquitted*, would the court have allowed Margarot to produce the verdict as evidence either of his innocence or of the convention's? The mere *illegality* of this refer-

[1] By the law of Scotland a prisoner, besides a list of witnesses, is entitled to notice, in the body of the indictment, of every article of documentary evidence that is to be produced by the prosecutor against him, and he must receive a copy of the indictment at least fifteen days before the day of trial.

ence to the opinion, and possibly to the error, of a different jury, or a different case, was by no means its worst feature. It tended to instruct this jury, that they need not trouble themselves by taking the nature or objects of the convention into their consideration, because this vital point was already fixed, and that as Margarot's connection with the society was not disputed, the trial before them was a mere form.

His Lordship then gives them his doctrine of the legal nature of sedition. He first instructs them that a design "to overturn the king and parliament by *mobs* and *violence*," is not necessary, which is certainly correct; and then proceeds to the more delicate task of explaining the case in which the crime consists in the mere expression or promulgation of opinion. This subject, which borders on the most important constitutional privileges, and the exercise of the most useful rights, he exhausts at once by the following tremendous principle:— "I apprehend, in some sense, the crime of sedition consists in *poisoning* the minds of the lieges—which *may naturally*, IN THE END, HAVE A TENDENCY to promote violence against the State, and in *endeavouring* to create a DISSATISFACTION in the country, which NOBODY CAN TELL WHERE IT WILL END. It will very naturally end in overt rebellion; and *if it has that tendency*, THOUGH NOT IN THE VIEW OF THE PARTIES AT THE TIME, yet *if they have been guilty of poisoning the minds of the lieges*, I apprehend that that will constitute the crime of sedition to all intents and purposes." (vol. xxiii. p. 766.)

This doctrine, viz., that the guilt of sedition may be incurred by the mere *remote tendency* of the acts composing it, to create a *dissatisfaction* which *may end* in rebellion, *though this was not in the view of*

the accused at the time, is one of the most monstrous that has been uttered from any modern British bench. It makes, or may make, the questioning of any supposed defect, the challenge of any fancied abuse, perhaps all discussion of constitutional principle, criminal. It may truly be said of every such discussion that "*nobody can tell where it will end.*" And this combined uncertainty and remoteness of the result, instead of excluding the idea of sedition, which in law requires the specific wickedness of *intending* the production of a certain degree of public and nearly *immediate* mischief, by measures *plainly calculated for this end*, is, it seems, all that is wanted to constitute the offence. Everything, according to this, has been sedition that has ever produced hostility, however gradual, to government, though only by the natural progress of thought. All that is now law was once innovation, says Bacon; and all that was ever innovation was once sedition, adds Braxfield.

The qualification that the distant and unmeant rebellion must be brought about by mental *poison* is no extenuation of the doctrine, partly because, except where the delinquency consists in mere negligence, there can never be guilt in any result which is produced so unintentionally and so remotely that it was never contemplated; and partly because scarcely two people ever agree as to whether what is administered be poison or medicine. Hume's toryism is poison to the palate of a whig; Brodie's detection of Hume to that of a tory. The dissenter holds the mind of the people to be poisoned by a harangue in favour of establishments; the churchman by a harangue against them.

The sound law is well laid down by Erskine in

his speech to the jury for Hardy,—a speech which, though only the pleading of a counsel, is a model to all judges of the highest excellencies of a judicial charge:—"The doing an act, or the pursuit of a system of conduct which *leads, in probable consequences*, to the death of the king, *may legally affect the consideration of the traitorous purpose* charged in the record; and I am not afraid of trusting you with the evidence. How far any given act, or any course of acting, *independently of intention*, may lead, probably or *inevitably*, to *any natural or political consequence, is what we have no concern with.* These may be curious questions of casuistry or politics; but *it is wickedness and folly to declare that consequences, unconnected even with intention or consciousness, shall be synonymous in law with the traitorous mind;* although the traitorous mind alone is arraigned as constituting the crime." (*State Trials*, vol. xxiv. p. 880.) Every word of this is applicable to Braxfield's unintentional sedition.

His Lordship then reduces his principle to practice; and very correctly. Since the production of *dissatisfaction*, which *may* end in rebellion, though nothing rebellious was in the contemplation of the author of the dissatisfaction, constitutes sedition, this offence is necessarily committed by any effort to obtain any reform, at least by any appeal to the people in seasons of agitation; because reform implies defect, and the disclosure of defect creates dissatisfaction; and nobody can tell where dissatisfaction will end. The Justice therefore told the jury, and, in consistency with his principle, was compelled to tell them, that the mere fact of the prisoner's having in these times been a reformer of the Constitution, was, if not absolutely conclusive, yet

strongly against him: "I submit to you whether a man that *wishes well to his country* would come forward and insist upon a reform, *parliamentary or not parliamentary*, at such a crisis, which *would create discontent* in the minds of the people, when every good subject would promote unanimity among the lieges to meet the common enemy. I say, in place of that, to bring forward a great reform in parliament *is a thing totally inconsistent with the Constitution of this country.* I say bringing it forward at that period IS A STRONG PROOF that they were not well-wishers to the Constitution of this country, *but enemies* to it. I say that no good member of society would have taken these measures. I appeal to you all, that you are living under a happy Government, in peace and plenty, in perfect security of your lives and property, the happiest nation upon the face of the earth. And when that is the situation of this country, I appeal to you whether I have not given a fair and just description of it—for a set of men in that situation to raise a faction in the minds of the lower order of people—*to create dissatisfaction to the Government, and consequently make a division in that country.* I say that *these things appear to be, from the very conjuncture at which they are brought forward, sedition of a high nature.*" (p. 766.)

This was exactly the doctrine on which the Attorney-General claimed a conviction of the seven Bishops. "There is not any one thing that the law is more jealous of, or does more carefully provide for the prosecution and punishment of, than *all accusations and arraignments of the Government.* No man may say of the great men of the nation, much less of the great officers of the kingdom, that they act *unreasonably* or *unjustly;* least of all may

any man say any such thing of the king. For these matters *tend to possess the people that the government is ill administered; and the consequence of that is to set them upon desiring a reformation; and what that tends to, and will end in, we have all had a sad, and too dear bought experience,*" (*State Trials*, vol. xii. p. 281)—a principle, as Mackintosh justly observes (*James II.*, p. 277), "subversive of all political discussion." Accordingly, the part of Lord Clarendon's intolerant "*Five Mile Act*," which has always been condemned as the worst, is that in which non-conforming clergymen are compelled to swear "that they will not, at any time, *endeavour any alteration of government in church or state.*" If this was tyrannical, it was a tyranny of which the principle is approved of by every one of the judges in these Scotch trials. (See Campbell's *Chancellors*, vol. iii. p. 220.) And in this even Thurlow deserts them. When, at this period, Government wanted severer laws against sedition, he objected (being out of office), and asks, "Was it fitting that a man should be subject to such penalties for saying it was an abuse that twenty acres of land below Old Sarum Hill, without any inhabitants, should send two representatives to parliament? All were to be punished who attempted to create a dislike to the established Constitution of which this renowned rotten burgh is a part."

The Justice made two or three other immaterial observations; but what I have quoted forms the real import of all the summing up.

The rest of the charge consists in telling the jury that the convention "IS ALREADY DETERMINED to be a meeting of an illegal nature," and that the prisoner is proved to have taken a lead in

it; after which he closes by repeating the certainly conclusive principle that, in these times, reform was sedition. "He took up four hours in a defence which was sedition from beginning to end; *finding fault with the Constitution;* and I think a speech of a very seditious tendency." (vol. xxiii. p. 767.)

Thus directed, the jury unanimously found the prisoner "guilty of the *crimes* libelled."

The prisoner then renewed some objections which he had taken at an earlier stage, and which, having been repelled or disregarded then, were of course dealt with in the same way now. But he also stated another objection, which is disposed of by the court as a new one. It was, that one James Carlisle had got access to the witnesses, and conversed with them, while they ought to have been all locked up by themselves. If this had been stated in due time, it might have been an awkward occurrence, according to our notions about witnesses which prevailed at that time. But being only brought forward after conviction, the objection was properly repelled. But not contented with deciding the point that had actually arisen, the Lord Justice-Clerk decides a much more important point that had not arisen. "I am entirely of the same opinion. And I will tell the panel that if the court were to sustain the objection, *it would not avail him as an absolutory from the crime* with which he is charged, even if it would make null and void all the proceedings; because *he would be liable to be tried over again.*" (*State Trials*, vol. xxiii. p. 771.) No doubt, anything that made all the proceedings *null and void*, must leave any prisoner liable not to be tried *again*, because what is null and void is no trial, but to be still tried. But it is a different case

entirely, where, after conviction, but before sentence, an objection occurs which arrests judgment. The proceedings here would not have been all made null and void; but a part of the evidence—viz., that which consisted of the testimony of the witnesses who had been talked to—would have been found contaminated. Suppose it is discovered, before sentence, that a witness had been bribed. Probably, with us, this would be no ground for an arrest of judgment. But if it was a ground, would this imply that because the verdict was inoperative, the prisoner could be re-tried?

After what had passed at the immediately preceding trials, the sentence could not be expected to be anything except transportation for fourteen years; which accordingly was pronounced.

There was no discussion either as to its legality or propriety. But *Lord Henderland* declared—"I know no other way which I could discharge my duty to God, to my country, or to my own conscience, but by proposing that this man should be *banished* forth of this kingdom *by transportation*, or in common language, should be transported, for fourteen years."

Lord Eskgrove approves. "The court can do no less than make use of the power which the law gives them, to send him to *a place where he can do no harm.*" (vol. xxiii. p. 774.)[1]

Lord Swinton thought that sedition "is worse, in one respect, than most other crimes. Many other crimes are committed from the sudden impulse of passion or heat. But this crime is committed with a premeditated, felonious intention, by deliberating on the means of *overturning our Constitution.* They begin with seditious and inflammatory discourses,

[1] The other world would have been a better place, on this principle.

endeavouring to draw simple, and perhaps well-meaning, people after them, *by pointing out imperfections*, which will be in every Government whatever, and *placing them in a strong light;* and, in the next place, by seditious writings." (p. 774.) But the real guilt certainly consisted in the horrid practice of placing imperfections in a strong light—thereby causing dissatisfaction—and "no one can tell where it will end."

Lord Abercromby agreed with all his brethren in considering "the circumstance of this panel being a *stranger* to this country as an *aggravation* of his crime;" and thought the punishment "the *mildest* which, under all the circumstances, ought to be proposed." (p. 776.)

The poor Justice was in a very distressing situation. He was a lover of mild punishments. "I have always *more pleasure* in inflicting a mild punishment than a more severe one." Both gave him pleasure, but the severe one least. An ordinary judge would have yielded at once to this weakness, and selfishly enjoyed his favourite gratification. But Braxfield was moved by a higher principle—a calm sense of duty; and sedition "is OF ALL CRIMES KNOWN AMONGST MANKIND, of the MOST heinous nature." Therefore it "well merits the HIGHEST arbitrary punishment that this court can POSSIBLY inflict." Hence "the moment I heard the verdict, *I revolved in my own mind* the circumstances attending this case," and the result was, that "the only doubt that occurred to me was *whether we ought not to go* FURTHER" than had been done on the two preceding occasions. (p. 776.) But, on the whole, the allurements of humanity prevailed, and his Lordship solaced himself with only fourteen years.

Margarot was the only one of these early sedition prisoners whom I saw. I was sitting one day—a Monday, I think—in Swanston's writing-school, which was on the third or fourth floor of a house on the south side of the High Street, opposite the Cross, when I observed a crowd coming out of the Parliament Close, following a little, black, middle-aged man, who was put into a coach, from which the people instantly proceeded to take off the horses. Several of us boys ran down the stair, and heard that it was Margarot, whose name was familiar to us, though we understood nothing of his story, except that he was one of the Friends of the People—a title terrible in our ears—and was to be sent to Botany Bay. This, I think, was on the Monday before his trial actually took place. But as he had gone into the Parliament House (on the morning of Skirving's trial, I suppose), and was seen coming out again from a place from which no seditious prisoner was supposed to have any chance of escaping, the cry had arisen that he had been let off; and some of the populace drew him in triumph to his lodgings in the Black Bull, at the head of Leith Walk. I ran alongside the carriage, and, when I could get near enough, thought it excellent entertainment to give an occasional haul; for which I afterwards got as severe and serious a rebuke from the Lord Advocate as if I had committed some base immorality, although my horror of the Friends of the People, like that of all boys, sons of the gentry, was fully equal to his own.

In about a week Margarot came from the Black Bull to be tried, attended by a procession of the populace and his convention friends, with banners and what was called a tree of liberty. This tree

was in the shape of the letter M, about twenty feet high and ten wide. The honour of bearing it up by carrying the two upright poles was assigned to two eminent conventionalists, and the little culprit walked beneath the circular placard in the centre, which proclaimed liberty and equality, etc. I was looking out of a window in the old Post-office, which was then the northmost house on the west side of the North Bridge. I think I see the scene yet. The whole North Bridge, from the Tron Church to the Register Office, was quite empty at first; not a single creature venturing on that bit of sand, over which the waves were so soon to break from both ends. The Post-office and the adjoining houses had been secretly filled with constables, and sailors from a frigate in the roads (I think the "Hind," Captain Cochrane), all armed with sticks and batons. No soldier appeared, it being determined that this civic insurrection should be put down by the civil force, unaided at least by scarlet.

As soon as the tree, which led the van, emerged from Leith Street, and appeared at the north end of the bridge, Provost Elder and the magistrates issued from some place they had retired to (I believe the Tron Church), and appeared, all robed, at the south end. The day was good. There was still not one person—I doubt if there was even a dog—on any part of the space, being the whole length of the bridge, between the two parties. But the rear of each was crammed with people, who filled up every inch as those in front of them moved on. The magistrates were in a line across the street, with the provost in the centre, the city officers behind this line, and probably a hundred loyal gentlemen in the rear of the officers. The two parties advanced

steadily towards each other, and in perfect silence, till they met just about the Post-office. The provost stepped forward about a pace, so that he almost touched the front line of the rebels, when, advancing his cane, he commanded them to retire. This order probably would not have been obeyed; but at any rate it could not have been obeyed speedily, from the crowd behind. However, all this was immaterial; for, without waiting one instant to see whether they meant to retire or not, the houses vomited forth their bludgeoned contents; and in almost two minutes the tree was demolished and thrown over the bridge, the street covered with the knocked down, the accused dragged to the bar, and the insurrection was over. The execution was entirely by the civil and naval arm; but the rebels, however formidable they looked as they came on, fled the instant they were attacked.

The popular idol in this scene was a little, dark creature, dressed in black, with silk stockings and white metal buttons, something like one's idea of a puny Frenchman, a most impudent and provoking body. Burnett, quoting Thurlow's words against Horne (*State Trials*, vol. xx. p. 779), describes his conduct as "a paradeful triumph over justice"—not a good expression as applied to Margarot; for in court there was little parade and no triumph. It was mere baffled impertinence. Abercromby's observation was much truer, that "from the moment he appeared at the bar, till the instant he was carried out, his whole conduct was of the most indecent kind." (vol. xxiii. p. 775.) Some allowance, however, must be made for the provocation he received, and for a pragmatical Englishman's con-

tempt of all courts, and all forms, and all phrases, except his own.[1]

He flew out before ever the diet had been called, and first objected to the jurisdiction of the court because the Lord Justice-General was absent; and then insisted that the court should grant him a caption to compel the attendance of the Duke of Richmond, Mr. Dundas, and Mr. Pitt, who were in England, as witnesses, and that the trial should be delayed till they should appear. It is needless to say that both of these proposals were justly disregarded.

But he made other objections which the court ought not to have been provoked by his offensiveness to treat with contempt.

According to our undoubted law, courts of justice ought to be open to the public, especially on criminal trials, in which the public generally are, and ought to be, much interested. Hence it is only in virtue of a statute that our court is entitled to proceed with closed doors, in one description of

[1] For the finest examples of panels' impudence we must go to the trials of Horne Tooke. When at the bar as a supposed traitor in 1794, he was generally quiet, because he was in the hands of Erskine. But when he was his own counsel on two trials for libel in 1777 (*State Trials*, vol. xx.), his genius in this line was very conspicuous. His respectful insolence to Mansfield, Chief-Justice; his teasing contempt of Thurlow, Attorney-General; his sneers at the law; and the provoking self-possession and cheerfulness with which he frets and defies everybody else, are excessively entertaining. Hone's audacity, which, it is said, killed Ellenborough, was powerful, but coarse. He struck with a rusty cleaver. Tooke cut with a bright lance. The strength of both, as of every person who is disrespectful with effect to a court, arose from their being to a certain extent right. Tooke was struggling against the unjust and nonsensical rule which then virtually deprived a person, tried in England for libel, of the benefit of trial by jury; and he had Thurlow, a bully, for his opponent. Hone was rising above the usual lowness of his character and public habits by the manliness with which, unassisted, he bore up against, and thrice baffled, the cruelty of compelling him to go to trial, for separate offences, on three successive days, although he sought some delay, however short, from the fact, visible to every one, that he was exhausted both in body and mind.

cases. It is notorious, however, that where there is any unusual demand for places, the door-keepers take advantage of this, and demand admission money. But still the court is filled; and this very exaction enables a respectable class of spectators to be comfortable, who would otherwise be crushed or excluded; and no complaints are made. But where complaints are made, it is a very dangerous thing for the court to avow that it leaves the lieges to the mercy of its officers. Margarot stated that money was exacted at the door, and said, "I demand that the doors of this place may be opened, in order that the people may partake of what passes." To which the answer, by the Lord Justice-Clerk, was, "It would be a very pretty opening, I think." Margarot said: "The doors are shut, and I understand it is the custom of the door-keepers to take money, which is contrary to the law of the land!" To which the reply by the Justice is, "That *you have no business with!*" (vol. xxiii. p. 630.) But has an accused man no business with the legal publicity of his own trial? —no interest in the presence of friends who may think him innocent, or whose appearance may cheer and console him though guilty? Is he obliged to submit, without even asking the protection of the court, not only to have all his own friends excluded, but to have the court crowded at the discretion of mercenary officers, by the friends of the prosecution? Lady Russell, according to this, might have been debarred from the trial of her husband, and this would have been no business of Lord Russell's!

When asked, according to the old mockery, whether he had any challenge for cause to any of the first five jurymen selected by the presiding judge, he said, "I have no personal objection, but I

must beg to know by what law you have the picking of them?" (p. 632.) This most reasonable question was answered, with solemn folly, by Abercromby. "His Lordship is *not picking, but naming* the jury, according to the established law, and the established *constitution of the country;* and the *gentleman at the bar has no right to put such a question.*" (p. 632.) Did his Lordship really suppose that it was the word, and not the thing, that the prisoner was startled with? And surely it was no unnatural question for an Englishman to put, who had never seen, and probably never fancied the jury, in a political case, being selected by the presiding judge.[1]

After the prisoner had entered upon his evidence in defence, and had examined the sheriff and the provost, he introduced a matter which made a great impression at the time, and gave rise to the following scene:—

"*Mr. Margarot.*—Now, my Lord, comes a very delicate matter indeed. I mean to call upon my Lord Justice-Clerk, and I hope that the questions and the answers will be given in the most solemn manner. I have received a piece of information which I shall lay before the court in the course of my questions. First, my Lord, are you upon oath?

"*Lord Justice-Clerk.*—State your questions, and I will tell you whether I will answer them or not. If they are proper questions, I will answer them.

"Did you dine at Mr. Rochead's at Inverleith in the course of last week?

"*Lord Justice-Clerk.*—And what have you to do with that, sir?

[1] Margarot had the impertinence to tell the jury that if not *packed*, they were at least *picked*. He would have been more correct if he had said that the first had a tendency to be implied in the last.

"Did any conversation take place with regard to my trial?

"*Lord Justice-Clerk.*—Go on, sir.

"Did you use these words: What should you think of giving him a hundred lashes, together with Botany Bay; or words to that effect?

"*Lord Justice-Clerk.*—Go on. Put your questions if you have any more.

"Did any person—did a lady—say to you that the mob would not allow you to whip him? And, my Lord, did you not say that the mob would be the better for losing a little blood? These are the questions, my Lord, that I wish to put to you at present in the presence of the court. Deny them, or acknowledge them.

"*Lord Justice-Clerk.*—Do you think I should answer questions of that sort, my Lord Henderland?" (vol. xxiii. p. 672.)

There can be no doubt of the relevancy of the fact here virtually announced by the prisoner. If the Justice had spoken as was imputed to him, it was plainly improper in him to try a case he had so prejudged. There can be as little doubt, that the prisoner, if he could establish the fact, threw it away by his manner of using it. It ought to have been stated at the outset, as a disqualification of the judge; and the other persons, said to have been of the dinner party, should have been called as witnesses to prove it. Instead of this, he allowed the Justice to preside, so far, without objection; and then introduced the objection to him as a part of the defence. And besides the dangers of relying on the answers he might get from a person supposed to be capable of such misconduct, he could scarcely expect a judge to submit to such interrogation upon the bench.

The incorrectness of the court's treatment of the matter is equally clear. They quashed the whole inquiry on grounds so plainly untenable, that their resorting to them creates a strong suspicion that they were afraid of the truth.

Lord Henderland answered the Justice's request that he would tell him whether he should answer questions of that sort, by saying, "No, my Lord; *they do not relate to this trial.* Questions as to facts *material to the charges contained in this indictment*, my Lord Justice-Clerk is obliged to answer, but not otherwise." (vol. xxiii. p. 672.) *Lord Eskgrove* says: "What may have been said *in a private company* cannot in any way affect this case as to the panel at the bar; it certainly cannot throw any light on the subject. I am of opinion, therefore, that you ought not to answer questions of that sort, which cannot involve the fate of the trial. I think, therefore, that it is not consistent *with the dignity of this court*, and cannot be beneficial to the panel." (p. 672.) *Dunsinnan* and *Swinton* rest their opinions on this, that "the answer to none of these questions *can tend to exculpate him*, or alleviate the offence of which he is accused. Not one of them are proper, not one of them are competent; and ought not to be allowed to be put. And were he not a stranger to this country, I should look upon it as an insult offered to this court." (p. 673.)

It is not easy to give their Lordships credit for being unconscious of the fallacy of the principle on which they thus threw their shield over their chief. They might have held that the challenge came too late; or that the Justice was not bound to submit to interrogation; or that he was not obliged to criminate himself; or they might have invited the

prisoner (he being a stranger who required direction) to establish his charge otherwise. These might, no doubt, have proved awkward suggestions; because the prisoner might have called other witnesses; or might have put the Justice to the necessity of declining to answer; or subsequent prisoners might have been warned not to let the proper time for stating the objection pass; all very awkward. But still these were the only courses legally open to the court; and almost anything would have been better than appearing to shelter one of themselves. But the irrelevancy of the fact *as a defence for the prisoner*, which was the ground they went upon, clearly implied no irrelevancy in it *as a charge against the judge*. What if the prisoner had offered to prove that his Lordship *had taken a bribe* for trying to obtain a conviction? Could the court's saying that this "can neither tend to exculpate the prisoner, nor to alleviate the offence of which he is accused," be considered as anything except a determination to exclude inquiry? The conclusion which the prisoner drew from this ground of decision was perfectly correct. The Justice asked him, "Have you any other witnesses?" He answered, "It is needless, my Lord, when I am told that the answers to such questions could neither exculpate me, nor alleviate the charges against me. But it would have gone to show the jury that I *was prejudged before my trial came on*." (vol. xxiii. p. 673.)

This mode of getting rid of the subject was by no means satisfactory to the public, even at the time. It was generally understood that the Justice really had uttered the sentiments imputed to him, which certainly were not at all out of character, and that a lady had incautiously repeated them. Mr.

Rochead, at whose table the words were said to have been spoken, kept a luxurious bachelor's table at Inverleith, his property. According to the prevailing custom at the time, he had a dinner-party almost every Sunday, and very much with the same people. My father, Sir Robert Dundas, soon afterwards my brother-in-law, the Lord Advocate, and the Justice-Clerk, were established guests. Rochead's mother lived with him, and this introduced a few ladies. I heard the matter often talked of at my father's house, by the persons who had composed this party, though never in the Justice's presence. These friends never talked of it in such a way as to show that even they doubted that his Lordship had been rash. They rather enjoyed it as not a bad sentiment for the times, and laughed at Margarot's impudence and defeat. Accordingly it is remarkable that there was never any authoritative denial by those who had been present; and even Braxfield made no protestation of innocence, even in the form of expressing his belief that he could not be expected to stoop to the refutation of such a calumny. And when the objection was renewed, at the proper time, on the subsequent trial of Gerrald, and offered to be established by evidence independent of the judge, his brethren still refused to allow it to be gone into —a proceeding which it is difficult to reconcile with any hypothesis except one.

Margarot's sentence was carried into effect. Both during his voyage to New South Wales, and while there, it has always been said, and I believe truly, that he behaved very ill, particularly towards his companions in misfortune. He was the only one of them who ever saw Britain again. He returned about 1810; and was examined before a committee

of the House of Commons on Transportation in 1812. His account of the state of the colony at that period, and the fact that to bring himself, a wife, and a servant, home, cost about £450, give us some idea of the nature of the punishment inflicted on these men. He revisited Edinburgh, when he was surprised to find his friend Braxfield, and all his other judges, dead; and all his jurors either dead or not to be found, except one, to whom he gave a supper. But by this time the juryman had become a whig, and the convict a tory. He died in 1815.

XII.—Case of CHARLES SINCLAIR, February and March 1794.

I DO not know whether Sinclair was Scotch or English by birth, but he had certainly been resident in England, and was another of the persons who came here to distinguish himself in the convention.

With the exception of a speech which he himself is charged with having delivered there, his indictment is founded on the same facts, and in all material parts is in the same words with those against Skirving and Margarot.

Henry Erskine and Archibald Fletcher appeared as his counsel. Both are too well known to require anything to be said of them here.

They made three objections to the relevancy of the indictment. 1. Burnett (p. 249) states the first (or one) of them to have been that sedition was not a crime at common law. It may possibly have been so, but nothing of the kind appears from the report. The first, as there described, was that the libel did not specify the exact law, *whether common or statutory*, on which the prisoner was accused. 2. That the indictment was *uncertain*, in so far as it did not set forth whether it was *real or verbal* sedition that was meant to be charged. 3. That it concluded for the pains of law generally, without specifying what these were.

These were all justly repelled. It was clearly an indictment for sedition at common law; this

covered every species of the offence; and no indictment specifies the punishment that is to follow a conviction.

The whole objections, indeed, were apparently taken merely as a mode of raising the discussion about the power of transporting. How such a point was permitted to be raised at such a stage I cannot comprehend; for nothing surely can be more premature than to discuss the punishment before there be a conviction; and all the objections to the relevancy might have been stated, even though it had been conceded that transportation was illegal. However, it was raised and decided. The court, which had already committed itself, both by its opinions and its sentences, could scarcely be expected to see its error now, though the matter was for the first time seriously argued by distinguished counsel. I shall not examine the argument here, because a better opportunity will arise in the next case, that of *Gerrald*. But some things connected with it deserve to be noticed.

Some curious specimens were exhibited of the vagueness of even lawyers' notions of the legal nature of sedition.

Assuming the facts to be as set forth in the libel, Fletcher maintained that as there had been no *commotion*, it was only *verbal* sedition; and that this being the same with *leasing-making*, it could only be punished under the Act of 1703 by fine, imprisonment, or banishment, which last did not mean transportation. The shortest answer to this, I should have thought, would have been that there was no distinction *in law* between verbal sedition and real; and that though these might be convenient terms for denoting aggravated or mitigated cases,

the law knew only the single offence of sedition. But the Lord Advocate's chief answer was that the indictment made it plain, "and must certiorate the panel that the crime founded on is *real* sedition." (p. 790.) Between these two stood Blair, who agreed with neither of them, but declared that "the facts charged amount to BOTH *verbal and real* sedition." (p. 786.)

After thus differing from his chief on the meaning of their own charge, it is not wonderful that Blair should think that "to give a definition of sedition would be difficult, *perhaps impossible;* but *I have no hesitation* in giving this definition of it, viz." He then gives his definition; and his success may warn all sensible men to abstain from attempting to define that (and without hesitation), of which the definition is difficult, or perhaps impossible; for the definition thus confidently given is, "that the act charged must be unauthorised by law, and must be done with an intention to disturb the peace of the community." (p. 786.) According to this, many treasons are seditious, and so is every mob, and every riot, and every breach of the peace.

The power of transporting was often defended in those days on the ground that sedition was equivalent to leasing-making—that by the Act 1703 leasing-making warranted banishment, and that this word justified transportation. But in this case of *Sinclair* it is remarkable that the application of the Act 1703 to sedition is pointedly disclaimed. *Lord Eskgrove* (who, by the way, says that "sedition is clearly a common law offence, *mentioned even in the scriptures*,"—p. 796) declares that "as the offence here is not leasing-making, *the Act* 1703 *is entirely out of the question.*" (p. 797.) "The Act 1703 (says *Aber-*

cromby) does in no shape apply to the case before us." (p. 799.) And the *Lord Justice-Clerk* says, "I am clear that the Act 1703 has nothing to do with this case." (p. 800.)

The only statute supposed to be applicable being thus excluded, the principles on which their Lordships proceeded were that the case was to be regulated by common law; that as under this law the Court of Justiciary has an inherent authority to declare new crimes, so it can introduce and apply what it conceives to be appropriate punishments; and that the only doubt that can be reasonably entertained of the appropriateness of transporting was whether it was not too mild. This reasoning assumes the legal existence of this extraordinary authority.

Abercromby's exposition of it is as follows:— "We all know that the manners of a people cannot be stationary. New manners necessarily give birth to new crimes. In some countries doubts may arise in what way, and by what law, such new crimes are to be punished; whether they require a special enactment, or may be punished by the common law of the country. In Scotland no such doubt can arise; because *the supreme criminal court here has always been understood to be possessed of an inherent and radical jurisdiction to punish every offence that can be denominated* a crime *upon the principles of sound reason and morality.*" (p. 798.) He means that can be so denominated—by *us, the Court of Justiciary.* What *our* principles of morality and sound reason lead us to denominate a crime, that we can legally so denominate; and having thus added it to the catalogue of public delinquencies, we can punish it as we think proper. To the same purpose, the *Lord*

Justice-Clerk says: "I have always held it [the court]—*and every lawyer must be of the same mind* —to possess a common law jurisdiction to the effect of inflicting ANY punishment, according to the quality of the offence, *less than death*, for every crime the punishment of which is not specifically defined by statute." (p. 800.)

It may be conceded that this power of inventing punishments is a necessary consequence of the power of creating new crimes, because, without the one, the other is useless. And hence, I see no reason, except that carrying the principle to its full extent would show its extravagance, why they stop short of death, where death happens to be what they think appropriate. But these judges apply their principle of suiting the penalty to the delinquency, even to old crimes. Their doctrine is, that wherever their discretion is not *excluded* by a statute, the punishment, even of offences long practised and punished, is entirely in their hands; —a monstrous principle, which leaves the court unfettered even by its own precedents, and prevents the people from knowing the exact consequences of criminal acts. But it is a principle necessary for the justification of what the court did with sedition; for seditious acts were no new offence, but were never punished by transportation before.

The truth is, however, that the possession of such authority is a mere justiciary delusion. Hume does not merely assert the existence, but praises the expediency, of such a power, which he terms "*the native vigour*" of the court. But it would be mere idleness to enter upon any serious discussion of such a subject. The very pretension must be inconceivable to those who are aware of the tendency of

every court to extend its own jurisdiction, and of the facility with which the habit of saying a thing comes to be taken as evidence that the thing is true. It is a pretension which supersedes the legislature; and this on the subject the most important for the public policy and the safety of the people; and erects six judges into an absolute and practically irresponsible tribunal, for pronouncing any action to be criminal, and any punishment less than death to be adequate. This is a claim so dangerous, and so unconstitutional, that it would scarcely be sustained by the open and unquestioned usage of a hundred years. But at present it rests upon nothing except the assertions of the usurping judges, followed by no *exact* precedent except the single and recent case of combination—the most unfortunate in its history of any case that could have occurred for justifying the exercise of this judicial legislation. For parliament differed from the court upon the "sound reason and morality" of the question, and upheld, as just and necessary, what a majority of their Lordships had condemned as criminal and injurious. Accordingly, though this pretension has not been quashed by any judicial determination, or yet put down by any statute, the judges now talk seldom and timidly about it; no public prosecutor appeals to it, and the public unanimously scout it.[1]

The indictment was found relevant on the 17th

[1] It is now many years since the preceding pages were written. I grieve to be enabled to say that a case (*Greenhuff*, 19th December 1838) has since occurred, where a public prosecutor did appeal to the "native vigour," and the court re-asserted its existence, praised it, and acted upon it. Being then on the bench, I raised my solitary voice against this. It was a case which, unfortunately, made no noise, and in which there could, in Scotland, be no sympathy with the accused. If such another proceeding shall occur, I do not think it will be possible for me to resist bringing the principle before the public, for discussion and condemnation.

of February 1794. But instead of proceeding with the trial, the case was continued till the 24th. On the 24th it was again continued till the 10th of March; and on the 10th to the 14th, the day of Gerrald's trial, when the prosecutor got the diet deserted *pro loco et tempore*, and the proceedings were never renewed.

Burnett explains this result by saying that "the trial proceeded no further against Sinclair, *he not being deemed a leading offender.*" But, in the *first* place, *judging from the indictment*, he was fully as bad as any of the others. The minutes attest his activity in the convention, and the indictment does not merely charge him with all the general sins of that body, but with a violent speech and resolution of his own. In the *second* place, if his not being a leading offender was a good reason for not trying him, it was a much better one for not indicting him.

The *truth* is, that he had become a Government spy,—as Mr. Fletcher, whose openness and enthusiasm exposed him to the artifices of any villainy which made its advances in the form of zeal for liberty, or of suffering in its cause, had the best possible means of knowing, and always attested.

XIII.—Case of JOSEPH GERRALD, 3d, 10th, 13th, and 14th of March 1794.

NONE of these cases made such an impression at the time, or has sunk so deeply into the heart of posterity, as Gerrald's—not however so much from his superior innocence, as from his character and heroism.

He was an Englishman, a gentleman, and a scholar; a man of talent, eloquence, and fidelity to his principles and associates; the rashness of whose enthusiasm in the promotion of what appeared to him to be the cause of liberty, though not untinctured by ambition or vanity, was the natural result of the political fire which at that time kindled far less inflammable breasts. The purity of his intentions was above all suspicion.

He was at large upon bail when he heard of the resolution to bring him to trial. Dr. Parr and other friends advised him not to go to Scotland. But having, by his example, encouraged others to join the convention, he held himself bound in honour to prevent the impression which his keeping away might produce, and heroically put himself into the hands of those whom he knew would destroy him. Nothing can be nobler than the high-minded courage with which he met his fate; or more affecting than the agitation of his excellent friends, who knew what awaited him, but could not shake his constancy.

Dr. Parr gives the following account[1] of one

[1] In a letter to Mr. Laing, and lately, if not still, in the possession of Thomas Thomson, Esq., Depute Register.

interview in which he told Gerrald that his bail would be paid, and urged him to withdraw. "He heard my proposal attentively, but with no emotion of joy. At first he paused; and then, after calmly discussing with me the propriety of the proposal, he peremptorily refused to accede to it; and finally, after hearing my earnest entreaties, closed our conversation in words to the following effect: 'In any ordinary case,' said he, 'I should, without the smallest hesitation, and with the warmest gratitude, avail myself of your offer. I readily admit that my associates will not suffer more that I suffer less. I am inclined to believe with you that the sense of their own sufferings will be alleviated by their knowledge of my escape. But my honour is pledged, and no opportunity for flight, however favourable, no expectation of danger, however alarming, no excuse for consulting my own safety, however plausible, shall induce me to violate that pledge. I gave it to men whom I esteem, and respect, and pity; to men who, by avowing similar principles, have been brought into similar peril, by the influence of my own arguments, my own persuasions, and my own example. Under these circumstances, they became partakers of my own responsibility to the law; and therefore, under no circumstances will I shrink from participating with them in the rigours of any punishment which that law, as likely to be administered in Scotland, may ordain for us.' He uttered the foregoing words emphatically, but not turbulently; and finding him fixedly determined upon returning that night to Scotland, I did not harass his mind by any further remonstrance. He was very calm before we parted; and I left him under the strongest impressions of compassion for

his sufferings, admiration of his courage, and moral approbation of his delicacy, and his fidelity."

His behaviour in Edinburgh was equally magnanimous. On the evening before his trial, Mr. Laing and Mr. Fletcher went almost on their knees, imploring him to withdraw. But he was inflexible in following what he considered as the honourable course. The last free hour he ever had was passed at Fletcher's, where he breakfasted before going to be tried. Mrs. Fletcher [1] tells me that he was again urged to withdraw, which even then could have been managed—but in vain; and that he took leave of them with the calm and affectionate demeanour of a good and firm man going to meet his death. His conduct throughout his trial was distinguished by the same noble superiority to his fate. The manner and tone of no prisoner ever contrasted more strikingly with that of his judges. The feebleness of his health, which obviously left him no chance of surviving the anticipated sentence, gave his case the only additional interest of which it admitted.

He appeared at the bar with unpowdered hair, hanging loosely down behind—his neck nearly bare, and his shirt with a large collar, doubled over; so that on the whole he was not unlike one of Vandyck's portraits. This was the French costume of the day. His adopting it on this occasion gave great offence to the judicious, even of his own party, and has not

[1] Brougham says of this lady, that "His (Fletcher's) zeal for the maintenance of these principles, and his anxiety for the renovation of British liberty, were, if possible, still further excited by the matrimonial union which he entered into with a lady of whig family in Yorkshire; one of the most accomplished of her sex, who, with the utmost purity of life that can dignify and enhance female charms, combined the inflexible principles and deep political feeling of a Hutchison or a Roland." (*Speeches*, vol. iii. p. 346, Introduction to speech on Burgh Reform.) This is quite true, so far as it goes. But besides these public virtues, she is one of the most amiable of women in every domestic relation.

been forgotten yet. It was foolish certainly; for no one in his position should do anything which may be supposed to savour of affectation. But it must be recollected that he had lived much abroad, and that this dress was one of the symbols of his party. And, no doubt, he appeared in it, partly from a desire to show his opponents that he did not shrink from displaying the outward badge of his principles, even in that extremity. A Quaker is honoured for his hat now, and did not suffer in the estimation of the reflecting even when his sect first put it on. Powdering, or not powdering, the hair was, at this time, one of the established tests of opinion. The heads of the loyal were polluted with white dust; he who meant to proclaim his admiration of France did so by natural ringlets; or, if he was very intense, by a short crop.

The proceedings began (3d March 1794) by his stating to the court that "as I am totally ignorant of the laws of this country, being a native of England, I applied to several gentlemen of the profession to advocate my cause, (but) *they unanimously refused.*" (vol. xxiii. p. 803.) Malcolm Laing indeed authorised the fact of his refusal to be intimated. (p. 807). Erskine explains (Letter to Howel, vol. xxiii. p. 806), that the only ground on which he ever declined, was, when he was not allowed to conduct the case in his own way. But some counsel declined even when this most reasonable condition was acceded to, as it was by Gerrald. Erskine was not applied to by him; but Laing never disguised that his reason, and that of his brethren who acted as he had done, was, their aversion to hurt clients by helping to produce the semblance of fair trial, where the reality was absent.

However, as Gerrald said that he wished for counsel, the court agreed to appoint any he chose, and advised him to name four, that he might be sure of obtaining at least two. He named Erskine, Laing, Gillies, and Fletcher. But the court said that it could not interfere with Erskine's numerous and important engagements. The trial was put off till the 10th, when the prisoner returned with Clerk, Fletcher, Gillies, and Laing. The two last, however, took the whole ostensible charge of the defence.

Gillies had only been about seven years at the bar; but, even then, had given earnest of the formidable powers that afterwards raised him into very extensive practice. He was promoted to the bench in 1811. A plain, or rather coarse manner, strong sense, and direct, manly, unadorned speaking, joined to the reputation of a friendly, generous nature, made him a very powerful counsel. Laing was better fitted, both by his faculties and his tastes, for study than for practice, and this was almost his solitary important case. Of great force of intellect and the sternest probity, he carried these qualities into all his pursuits; and is now known as the most original and honest of the historians of Scotland.

The first thing done was, to renew the personal objection, which had been repelled in Margarot's case, to the Lord Justice-Clerk's judging in this trial. But Gerrald stated it in a way which removed the obstacles against its success when it had been formerly brought forward. In the *first* place, it was stated at the very commencement of the proceedings, and before the Justice had done anything except showing, by taking the chair, that he meant to preside. In the *second* place, instead of having

no evidence except the testimony of the challenged Judge, he offered to prove the fact on which his objection rested, by other named witnesses.[1] In the *third* place, instead of stating it verbally, he set it forth in a minute, which was made part of the record.

This minute was as follows:—"Joseph Gerrald stated that before proceeding to trial, he must take the liberty of declining the Lord Justice-Clerk, as having disqualified himself from judging in the present question, by having prejudged it. In order to show that this objection was not made at random, Joseph Gerrald offered to prove that the Lord Justice-Clerk had prejudged the cause of every person who had been a member of that assembly calling itself the British Convention; inasmuch as he had asserted, in the house of James Rochead of Inverleith, that 'the members of the British Convention deserved transportation for fourteen years, and even public whipping;' and that when it was objected to by a person in company, that the people would not patiently endure the inflicting of that punishment upon the members of the British Convention, the said Lord Justice-Clerk replied, 'that the mob would be the better for the spilling of a little blood.' I pray that this may be made a minute of court." (vol. xxiii. p. 808.)

Upon this being read, the Justice left the chair, which Henderland took.

The prisoner "desired to have the matters alleged substantiated by evidence." This, however, was not allowed, because it was held that the allegations were *irrelevant*.

[1] See vol. xxiii. p. 825 for the names. Except the Justice and Miss Ainslie, I knew them all well afterwards. All were regular fixtures at the Inverleith dinners. It was a lady (but I don't say Miss Ainslie) who was supposed to have peached.

In considering their relevancy, their truth must be assumed.

Now, although being a member of the convention was an important circumstance, there was no necessary guilt in this mere fact. It was always admitted by the prosecutor, and assented to by the court, that it was possible for a person to have joined this association innocently. To make it criminal, the addition of a *criminal intent* was necessary; and accordingly such an intent was always charged. And as the existence and degree of this intent could only be inferred from the whole circumstances, the case of each prisoner differed, or might differ, from that of all the rest; so that no fair opinion could be formed of any one case, without a due consideration of all its peculiar facts.

But the charge against his Lordship was, that without waiting to be informed judicially of the circumstances of the case now before him, he, *in the immediate contemplation of these trials*, had announced it as his opinion that the mere fact of having belonged to the convention deserved transportation, if not whipping. Now the indictment in his hand set forth accession to the acts of the convention as one of the facts charged against Gerrald; and there was no reason, from the experience of the past trials, to suppose that he would deny this to be a fact. His Lordship therefore had prejudged the identical case; that is, he had made up his mind, or professed to have made it up, that the prisoner, *whatever his intent, or his peculiar circumstances, might turn out in evidence to have been*, deserved transportation, at the least, on account of this single undisputed fact. He had prejudged the case, both on the guilt, and on the punishment.

The words having been uttered in the confidence of private society, only makes their sincerity the more probable. The levity of loose conversation was not suggested, either by his Lordship or his apologists, as his explanation. And it could not have been so, because there was no levity in these times, on such subjects. And, at any rate, a judge has no right to harden his mind against the reception of judicial views, or to depress prisoners, by talking lightly of the results of their trials.

If the Lord Justice-Clerk, or his brethren, therefore, had been wise, he would have avoided, or been made to avoid, all discussion on this subject, on the best pretence, and with the best grace, that he could, unless he had a good case on the truth of the objection; in which event he ought to have insisted on the prisoner being indulged with the freest proof. But since the facts were offered to be proved, and the challenge was insisted on, and was disposed of judicially, it humbly appears to me that its relevancy ought to have been sustained. And no lawyer can fail to be confirmed in this opinion, by seeing the grounds on which it was rejected.

Lord Henderland being in the chair, laid the matter before the court in the following terms:— "Your Lordships have heard the minute of the court concerning the respectable judge who has the honour to preside as vice-president in this court in the absence of the Lord Justice-General.[1] My Lords, it is a thing perfectly new in the annals of this court; nor is there one instance to be found in our records upon the books of adjournal. My Lords,

[1] The Lord Justice-General was then the head of the court *nominally*, but never acted. He was not a lawyer.

you have heard the nature of the complaint, which is as extraordinary as it is unprecedented; and it will become you, my Lords, well to weigh what is the import, and what ought to be the legal effect, of such an objection, offered in such extraordinary circumstances, *and at so early a period* as this. You had it in a different form indeed in the case of *Margarot.* But you will consider it in this new form, in this new guise, which it has assumed. You will consider how far it is important in its nature, or how far it is the same that was offered in the case of *Margarot.* You are not prohibited from forming a different judgment upon it now from what you might have done then; but I thought it necessary to bring these matters under your Lordships' view before you proceed to give your opinion upon this so unprecedented and extraordinary a minute. It is now submitted to your consideration." (vol. xxiii. p. 809.)

Eskgrove's opinion proceeds entirely on a misrepresentation of the ground of the declinature. "I do not observe," says he, "that this gentleman says *his name was ever mentioned* in that conversation, or that anything was said of him *individually.*" (p. 809.) This was true; but surely a man, or his case, may be mentioned by description. "He says it was an expression in common conversation, importing that honourable judge's opinion that the members of the British Convention should be transported for fourteen years, and even publicly whipped. *I do not conceive what interest this gentleman has in it; he has not yet acknowledged himself a member of that convention.*" But was he not charged with being so? and had he not denied it by pleading not guilty? "My Lord, *one man's conduct may be*

different from another's in that assembly. As to the expression, it *could* only import, *hypothetically*, that IF that convention *was guilty of the crimes stated against them*—of that attempt to overthrow the Constitution of the country—to create rebellion and insurrection in the country—*then* the punishment adapted to such an offence was, in his opinion, transportation and public whipping. What is there in that more than in the opinions given in this court already in causes of this kind," etc. "I think it was nothing more than a *general* opinion, given upon the nature of the offence *as charged*, that it was a convention of persons meeting to overturn the happy Constitution of this country, and giving it as his opinion that such an offence merited that punishment. I am sure that can be no disqualification from sitting in this court, where the same opinion has been given by all your Lordships." (p. 810.)

Now, taking it even in this last view, the impropriety of the Justice's alleged observation is clearer than ever; for it amounted to a prejudication of the *very case under trial*, the case "*as charged.*" But it cannot be taken in this view; for Eskgrove is plainly not addressing himself to the fact offered by the prisoner to be proved. The Justice was *not* declined for saying that all men who attempt to overturn the Constitution should be transported, but for committing himself prematurely to the opinion that this was the object of all the members of the convention. He was not in the situation of a judge who should say that a murderer deserved death, but of a judge who, on the eve of trying certain soldiers for firing on the people, should say that every man in that regiment should

be hanged. The *hypothesis* is a mere friendly invention by Eskgrove. Braxfield seldom dealt in anything so fine as hypothesis. What Gerrald wanted to prove was the expression of a positive and absolute opinion, directly applicable to his particular trial.

Eskgrove had set out by saying that the objection "is a novelty in many respects; and I do not think this panel at this bar is well advised in making it. What could be his motive for it I cannot perceive. He has the HAPPINESS of being tried before one of the ablest judges that ever sat in this court. But he is to do as he thinks fit. *I am sure he is to obtain no benefit if he gains the end he has in view.* And therefore I cannot perceive his motive, unless it be an *inclination, as far as he can, to throw an indignity upon this court.*" (p. 809.) It was something for the prisoner to get rid of Braxfield; and it is natural for every prisoner to like to disparage the court that is to condemn him, especially when the ground of disparagement is one which, by showing prejudice in the presiding judge, may render the guilt of the accused less unquestionable. But if a party, either criminal or civil, has an objection that is well founded, it is not usual either to withhold the law from him, or to sneer at him for stating it.

This insinuation against the prisoner's motives passed unnoticed by him. But he interfered when it was repeated more offensively. After disposing of the observation that the people would not submit to the infliction of corporal punishment on the members of the convention, *Eskgrove* said: "I can ascribe it (the prisoner's statement of it) to nothing but *malevolence and desperation.*" This produced the following exhibition:—

"*Mr. Gerrald.*—My Lord, I come here not to be the object of personal abuse, but to meet the justice of my country. Had I been actuated by such motives, I am sure I should never have returned to this country.

"*Lord Henderland.*—I desire you will behave as becomes a man before this high court; I will not suffer this court to be *insulted.* [!]

"*Mr. Gerrald.*—My Lord, far be it from me to insult this court—

"*Lord Henderland.*—Be silent, sir!

"*Mr. Gerrald.*—My Lord—

"*Lord Henderland.*—I desire you will be silent, sir!

"*Mr. Gerrald.*—My Lord, I am sure that my coming to this country shows that I was actuated by the purest principles of justice.

"*Lord Eskgrove.* — If I have said anything wrong, I will very readily retract what I have said. But *I was making* AN APOLOGY [!!!] *for this objection,* that I cannot ascribe it to a solid objection of counsel, none of whom have stood up to support it. I meant nothing more by what I was saying. I am very sorry for the expression I made use of, and I ask the gentleman's pardon." (p. 811.)

It does not elevate a tribunal in one's imagination that one judge makes an apology for what another tells the prisoner that he insults the court by seeking. Why none of the counsel maintained the declinature after the use that was thus made of their silence, I have not been able to learn.

Lord Swinton's opinion was that there were no legal grounds of declinature of a judge except those mentioned in the Statute, and that these were only two—*interest or capital enmity,* neither of which

existed here. Interest was out of the question. And as to enmity, it is "absurd." "I never heard of this man's name in my life before he came into this country, and I dare say his Lordship never did. And what interest he can have, except that of compassion for a man in that unfortunate situation, I cannot tell, and I appeal to the feelings of every man. I say it is *impossible.*" (p. 812.) This opinion exhausted the question, and there was no need for having said anything more. But his Lordship had permitted himself to begin with these words: "My Lord, an objection of this kind, coming from any other man, I should consider as a very *high insult upon the dignity of this court.* But coming from him, standing in the peculiar situation in which he now stands at the bar, charged with a crime little less than treason, the *insolence* of his objection IS SWALLOWED UP IN THE ATROCITY OF HIS CRIME." (p. 811.) Not swallowed up in the atrocity of the prosecutor's charge, but of the *prisoner's guilt.* Yet the trial had not begun! And what a symptom is it of a court, when the judges treat a declinature of one of their number, on a ground of supposed legal or of supposed personal impropriety, as an insult!

Abercromby admitted that wherever "a judge is guilty of a breach of the sacred trust reposed in him, he is amenable to the laws of his country, and may be *impeached* for that offence." But when addressed to the *court*, he gives it as his opinion that "THERE IS NO SUCH THING AS A COMMON LAW DISQUALIFICATION OF A JUDGE," in reference of course to any individual case. "But, my Lord, that [impeachment] is not the shape in which this objection comes before you. It comes in the shape of a

disqualification. Now, my Lords, I KNOW OF NO CIRCUMSTANCES WHATEVER WHICH CAN DISQUALIFY A JUDGE FROM SITTING TO DISCHARGE HIS DUTY, EXCEPT THOSE IN THE ACT OF PARLIAMENT." So that if Braxfield had drawn the indictment, or taken a bribe, or given a written pledge to Government that he would do all he could to obtain a conviction, or had committed any other crime for which he might have been degraded by parliament ultimately, this would not have entitled the prisoner to object to him in the meantime, unless the partiality which had produced these improprieties had sprung from what an old Scotch Statute calls *interest* or *capital enmity*—that is, pecuniary interest in the trial, or deadly hatred of the prisoner personally. The specific case of judicial partiality arising from political disapprobation is excluded.

He agrees with Eskgrove that the objection stated, if well founded, reaches them all as well as the Lord Justice-Clerk. "Upon every occasion when I have had an opportunity of giving my opinion on the subject, I have never hesitated to say, that I considered the British Convention as a conspiracy of a most dangerous and of a most criminal nature.' (p. 812.) No doubt. But his Lordship forgets that the declinature of the Justice was not founded on his having condemned *the convention*, but on his having condemned *every individual* member of that body, the prisoner, of course, included, merely on the solitary fact that he had belonged to it. And by condemning *the convention*, Lord Eskgrove could only mean that he *strongly disapproved* of it, and to the extent of deeming it criminal. But what Braxfield was accused of was, not merely his condemning *individuals*, but his

condemning them *as on their approaching trials.* There could be no *whipping* except under an *anticipated sentence.*

His Lordship concluded by an observation which has too much the appearance of a desire to intimidate the prisoner in his defence. After acknowledging that he "is presumed to be innocent of the charges laid against him till he is found guilty by a verdict of his country," he proceeds, in the very next sentence, to anticipate the verdict, and to cheer the panel by its consequences. "But I have no hesitation in saying now, in the presence of that man, in the presence of his counsel, and in the presence of this audience and of your Lordships, that IF he should be convicted of the crime charged against him in this indictment, I *shall* say that even fourteen years' transportation is *too slight* a punishment for an offence of such magnitude. My Lord, in the case of *Margarot* I had a doubt. But that doubt was whether fourteen years' transportation was not too slight a punishment for the offence, aggravated as it was by a variety of circumstances, and, in particular, by *the very improper and indecent conduct of that man to the court in the course of his trial, which, for his own sake, I hope the panel at the bar will not do,*" (p. 813)—a pretty significant hint to a prisoner who had only declined one of the judges, though in perfectly respectful terms, and whose single interruption of the bench was so just, that the interrupted judge made a personal apology for having provoked it. Judges should be very cautious in making the misbehaviour of a prisoner at the bar a ground for increasing the severity of his punishment. This misbehaviour is not the offence for which he is tried; and when it

consists of disrespect to the court, the equanimity even of judges is not unapt to be so ruffled, as to make the aggravation be appreciated rather by their temper than their reason. Where a *new crime* is committed at the bar, it had better, in general, be punished separately; and perhaps the only misconduct that may be correctly visited in the sentence pronounced in the principal case, is where it evinces *bad character*. But even this is doubtful.

Lord Henderland puts the point at first correctly enough. He states it to be, whether the language ascribed to the Justice implies prejudication?—and he thought that it did not. "It appears to have been a transient conversation *with respect to the crime of sedition*, and the punishment due to *it*; but is that a ground for declining a judge? I appeal to the feelings of any man who has conversed on this subject. *I appeal to the feelings of every juryman who has tried these cases; I appeal to the feelings of every juryman who will try these cases;* would he think himself bound, in the smallest degree, by such a conversation? Would he think the case prejudiced one iota?" "My Lords, taking it in this point of view, the words said to be expressed—in the manner in which they were expressed, and the occasion on which they were expressed—must all go together; and IT IS ADMITTED THAT THEY ARE, SO FAR, FAIRLY TOLD YOU. It is not said that was a judicial opinion given by this learned judge; and *therefore* was not anything like a prejudication of what he might do in this court; and we are to judge whether, by fair inference, it ought to be held so,—whether, by consulting the common sense of mankind, for that is the test of all criminality." (p. 813.)

This is true. The common-sense of mankind is

the test of all criminality. But it is not equally true that courts are always correct exponents of this common sense. Very few men, off the bench, will agree with this judge, either in his representation of the ground of declinature, or in his reason for rejecting it. The very essence of the prisoner's objection was, that it was *not* a *conversation* about *sedition* and *its* punishment, but the expression of a positive opinion by the Lord Justice-Clerk, on the particular case of Joseph Gerrald, as one of a class, who were all included in that opinion. And if it be sound that because the opinion was not given *judicially*, it "was not anything like a prejudication of what he might do in this court," then there can never be any extra-judicial prejudication.

His Lordship then proceeds to try his declined brother by the test of the common sense of mankind. And his manner of doing so is a fair example enough of the degree of accuracy with which this matter was reasoned. Immediately after mentioning "the test of all criminality," he proceeds thus: "And here, my Lord, a respectable judge — an honour to his profession and abilities, whom I know to be a man of the highest honour and the strictest integrity—is to be tried before us. For we are his jury. And we are called upon by our great oaths, as judges, and laying our hands upon our hearts, to say that this respectable judge, by what is here alleged, is to be *rendered incapable of sitting in this chair,—to be degraded from his office, and held unfit to judge in the most important trials in this country*, where his abilities, steadiness, and knowledge in the law are most required. I cannot go to such a length." (p. 814.) Who had asked him to do so? He was not moved to go one-tenth part

that length. The plea of the prisoner only went to exclude the justice from acting in *this particular trial;* and a judge may disqualify himself, by accidental rashness, from interfering in a single case, or in a single class of cases, without incurring any general disability. At any rate, if the plea was well founded in reference to the individual trial, its tendency, even though it had led to the official extinction of the judge declined, ought to have been utterly disregarded.

Treated as the challenge was, *Dunsinnan's* opinion was perhaps the wisest of them all. The whole of it was in these words: "My Lords, this objection is new, and not a little extraordinary. It very much surprised me. I shall enter into no observations upon his conduct; and I think your Lordships *ought to pay no attention to it, either in one shape or in another.*" (vol. xxiii. p. 812.)

The declinature being thus repelled, the Justice resumed his seat—with what feelings those who best knew him can best tell.

The indictment was then read. In its structure and substance, it was nearly identical with those of Skirving and Margarot. The only new matter introduced consists of three speeches said to have been made by the prisoner; two in the convention, and one when it was dispersed. The last, however, was rather an exclamation than a speech, and merely amounted to an expression of indignation, or of resistance, against the dispersion. One of the addresses in the convention was in favour of universal suffrage; the other, on the statute passed shortly before for suppressing such societies in Ireland. They are both, of course, more declamatory than wise. But they are both so clear of sedi-

tion, that if it were not for certain remarks made upon them from the bench, I should have held that this vice was not imputed to them even in the indictment. Because all that it says of these harangues is, that they were delivered, "*wickedly and feloniously*," in the convention, an "*illegal and seditious meeting.*" It is not said that these speeches are, *in themselves*, seditious. Accordingly I read the indictment as mentioning these addresses only as acts showing that the prisoner was an active member of the society—a character in which it might have been wicked and felonious to make even a speech not seditious. But this is not the construction put upon the libel by the judges; for they almost all select different passages of these speeches as seditious. They are too long to be quoted at length; but I may perhaps notice hereafter some of the passages objected to, which we may be sure are the worst. Meanwhile, this indictment is, in other respects, the same with the two preceding ones, and therefore requires no new observations.

Gillies addressed the court in a full speech, both on the relevancy and on the legality of transporting. He was ably answered by Mr. Montgomery, eldest son of the Lord Chief Baron—a remarkably sensible, gentlemanlike, well-conditioned person, who would certainly have risen high in his profession, if this had been necessary for his comfort. But a baronetcy, a large estate, a secure seat in parliament, and an agricultural taste, impair a wise man's relish for the *Dictionary of Decisions.* He therefore brought his legal career to a respectable close by rarely seeing the Parliament House after he ceased to be Lord Advocate, which he had been for about a year, when the whigs came into office in 1805. He

represented his own county of Peebles long after this; and good sense, good conduct, and good manners, secured him respect in every situation. Blair followed on the same side, and Laing replied for the prisoner.

This seems to have been an excellent discussion. The counsel for the prisoner strike me as having shone the brightest; but this may be a prejudice from my admiration of the spirit with which they maintained offensive doctrines—a merit which their side alone admitted of, and from that side being the one towards which I rather lean. But the whole discussion was good. It forms one of the very few scenes in these trials, where the air of a court of justice is felt.

I cannot understand, however, how the legality of any particular punishment was allowed to be argued at this stage. It could only be so hypothetically; for an acquittal would have rendered the whole discussion useless. The only explanation that Gillies can give me is, that it was arranged with the court that this would be the most convenient time for the argument. But, except upon the ground that a conviction might be very safely anticipated, it is difficult to comprehend how such an arrangement could be acceded to in any quarter. I shall not follow the example; but shall reserve anything I may have to say on the sentence till the verdict be pronounced.

Both Laing and Gillies allude, plainly enough, to the existence of the depressing feeling that their efforts must be hopeless. *Gillies* mentions the difficulty "of directly and strongly maintaining that other views ought to have guided your Lordship's judgment formerly, and that other views ought to guide

it now. Added to this is that *firmly rooted and widespread notion of the guilt of all those who stand at this bar accused of sedition.* The temper of men's minds, from many obvious causes, is such, that they consider a person at this bar, *under this accusation,* as already condemned ; that it is almost unnecessary to plead for him, except as going through the forms ; while he whose fortune it is to undertake such a cause *is considered as, in effect, a sharer of the crimes imputed to him whom he defends,* and by doing his duty may incur all the consequences that ought only to follow his not doing it. As to the panels thus brought before you, the public considers them as the personal enemies of us all. Our properties, our lives, our all, are represented as the objects of their violence ; and against danger so near, and danger so dreadful, *we should not be scrupulous about our means of defence.*" (vol. xxiii. p. 827.) *Laing* says that he had at first declined the case, "*not only from personal considerations, which I forbear to mention,* but because my recent avocations have been very different from the pursuits of this bar." (vol. xxiii. p. 869.)

As to the relevancy, strictly considered, the argument, when stripped of its husk, comes to this kernel.

It was maintained for the prisoner, that there was nothing criminal in any number of persons meeting in a society called a convention ; that though the attainment of any given reform of parliament, particularly of annual parliaments and universal suffrage, was the object of the convention, this object did not render the convention criminal ; that all the acts of the British Convention, and all the speeches delivered in it, in so far as these were

challenged in this indictment, were innocent; that therefore there was no sedition set forth at all; but that if there was, then, as it was not said to have produced any popular rising or commotion, it was verbal sedition, and not real, and therefore the relevancy could only be sustained to this extent; or that, if the statements in the libel were meant to describe real sedition, its reality consisted in there having been a scheme for the overthrow of the Government, and that this being high treason, it could not be tried as sedition.

The answer to this was that the general charge of sedition in the major proposition entitled the prosecutor to bring out any form of the offence in his minor; that the case exhibited in this minor, though bordering upon treason, did not actually amount to this crime, as introduced into Scotland at the Union; that the mischief described as intended, plainly amounted to what the prisoner chose to call real sedition; but that real and verbal, though convenient as terms to indicate the import of the circumstances of two classes of cases, were not known to the law as denoting generically different offences; that the convention was a seditious association, and sedition was the character and the object of the acts it did, and of the speeches it heard; and that even though the court should, on the first impression, concur with the prisoner's counsel in their construction of all these, still the prosecutor was entitled to have an opportunity of supporting his own view of them by evidence and argument before a jury.

The court repelled the objections, and found the libel relevant. And, except in one particular, this was right. I am strongly impressed with the idea

that, *ex facie* of the indictment, and still more as the indictment was explained, the matter presented itself as a case of treason. But, holding this view to be excluded, there was plainly no such palpable irrelevancy as could have warranted the court in refusing to send the case to a jury. The truth is that the leading objection, as is very common in cases of sedition, was not so much to the relevancy of the libel, as to the groundlessness of the charge. It resolved into this, that the convention, in its constitution, objects, acts, and words, was innocent. But how could the prosecutor be held concluded as to all these without being allowed to adduce his evidence? I should therefore have held the indictment relevant, even though I had acquiesced in all the criticisms of the prisoner's counsel.

But it is for this very reason, namely, because the objections to relevancy involved the consideration of the merits, that a cautious judge, in delivering his opinion on relevancy, will never say more than what may be absolutely necessary to enable him to dispose of the precise matter then before him. It may require some skill and more forbearance to hit the right line, but the *principle* is to leave the whole matter, if relevant, to the jury, *entirely and truly*, subject always to judicial direction and observation at last, but free from all confident opinions, hypothetical anticipation, and positive constructions, from the court at first.

This is a principle, however, which it must be presumed that our judges of 1794 did not acknowledge, because they certainly did not practically adopt it. They went into the case in all its minuteness, and let the jurymen know before they took their seats that the seditiousness of the convention,

and of all its proceedings, and of the prisoner's speeches there, was so clear, that in truth there was nothing to be ascertained except the facts, or rather, that since these were admitted, there was nothing to try at all. Not that the prisoner might not show all these to be legal, for *in words* this privilege was most fully and most formally reserved to him; but then they expressed their concurrence in the prosecutor's constructions and imputations, not hypothetically, but absolutely, and virtually reversed the rule by sending the prisoner to trial under an obligation to prove his innocence. Each judge seems to have spoken nearly exactly as he might have done if he had been summing up.

Henderland indeed seems in one part of his opinion to have so far forgotten his position as actually to address somebody he supposed to be the jury: "*Gentlemen*, as to the particular activity of this panel at the bar, you have his speeches." It had not at this time been proved that he had ever made any speech. Then, after quoting one of his supposed speeches, his Lordship makes this commentary:—"This at least, to push it no further, *shows his conduct and his activity* in this resolution, which *I must, in sound construction of common sense, consider as seditious. Gentlemen*, I will not run over the different proceedings of this convention. *They divided themselves into sections, departments*, and so on. They *also had sittings, committees of organisation, instruction*, and *finance*. And, *taking all those into consideration*, I am at a loss to find out the necessity of such a form of government if they only intended to petition parliament." (vol. xxiii. p. 892.) He might properly enough have saved some of this, in reference to the averments by the

prosecutor in the indictment. But it is plain from his whole strain that he was speaking from his recollection of the facts proved before him in the previous trials, and was telling (unconsciously perhaps) what he thought of the real *truth of the charge.*

Eskgrove goes over all the leading facts, accompanying each with a commentary decisive against the prisoner. I shall only quote one passage in further evidence of the important fact that the court did not recognise the clearly constitutional right of every British subject to propose whatever reform he chose, provided he did so honestly, and proposed to effect it by lawful means. Throughout all these trials the judges uniformly held that certain reforms, as for example universal suffrage and annual parliaments, were criminal objects *in themselves*, were not only hurtful, *but necessarily carried with them their own evidence that mischief was the intention* of their promoters. Thus *Eskgrove* says: "They were endeavouring to obtain universal suffrage and annual parliaments. My Lord, as to universal suffrage, I never heard that it had obtained in the British Constitution, and therefore, though it may be lawful to obtain A change, *yet if it is a change* OF THAT SORT, *it goes to show that it was not their intention to improve the Constitution, but to subvert and overthrow it.*" (p. 895.) Yet this change has not only been advocated since, but had been advocated then with impunity by many unquestionably well-intentioned and eminent men, and it is now one of the ordinary subjects of unchecked public discussion—which shows how careful a judge should be not to assume his own political principles to be eternal truths, or to hold everything to be clearly wicked which alarms him.

One of the speeches ascribed in the libel to the prisoner contains the following exposition of the principle of all representation, whether universal or not: —"If you appoint a man to act as your agent, and make his situation such that he has every temptation to betray you, without incurring the danger of being called to account, the probability is that he will sacrifice your interest to his own. It is therefore that a free suffrage of the people is what every man ought to desire, as that alone can make the interest of the representative and his constituents the same. The great art of government is that all should be governed by all. But unhappy is the country where men are called upon by every interest to act in opposition to their duty." (vol. xxiii. p. 816.) It is not constitutionally correct to hold the representative to be a mere agent; and there may possibly be other errors of a similar kind in this passage. But it could scarcely occur to anybody now-a-days that there was anything in it to excite the horror of a judge coolly deciding a question of relevancy. Yet this apparently very harmless text produced the following discourse from *Swinton*:—

"The gentlemen who have appeared and displayed so much ability for the panel have taken a great deal of pains to fritter down what is meant by universal suffrage. My Lords, I maintain that it is not only inconsistent with the British Constitution, but inconsistent with every constitution or government that ever did exist, *or ever can* exist, that every mortal who has arms and legs and head—(and we are all equal, all of like passions and like judgments with one another)—that every one of them shall have equal suffrage—in what? Not only in the election of legislators, but of magistrates, of

ministers, and of judges too. *Universal suffrage, according to their meaning, is a suffrage to rejudge what judges may do* [!]; also to judge whether they will obey an Act of Parliament or not; and whether the Acts of these annual parliaments are agreeable to their mind or not. I will tell you what: annual parliaments are inconsistent with any government at all; because if these parliaments should pass an Act which these universal suffragants disliked, they have a right from nature to meet and say, this is a wrong Act; we did choose these people, but they have gone contrary to our universal suffrage, and we have a right to rejudge them, and overturn what they have done. And I will give it you in the prisoner's own words,—if it be true as charged in the libel,—in his own speech." His Lordship then reads the words above quoted, and proceeds thus:—"Now mark this: the great art of government, I apprehend, is that all should be governed by all. That is to say, that the whole of the suffragants, the whole voters, shall be governed by the whole voters. What is this but saying that the mob shall be governed by the mob, the multitude shall be governed by the multitude? *Who would be chosen a judge by such governors? Because they would rejudge him* [!]. There has been one instance in France where the revolutionary tribunal and the jury having found that the people were innocent, these suffragants, these general voters, thought the judges did wrong, and they judged them over again; and, if the account we have be true, every one of them were carried to the lamp-post. *So the plan is that there should be an eternal appeal from the guillotine to the lamp-post—that is the plan of this universal government* [!!]. He (the prisoner)

says: 'Were all mankind to assemble in public meetings, one of two things must follow—either they will behave properly or improperly; if properly, their meeting will tend to do good; if improperly, it carries its own cure along with it. The people will soon be brought into a better method by a sense of self-preservation, by which they will correct the errors into which they have fallen.' *That is to say, they would cut one another's throats, and the few that remained would see their folly*" [!!] etc. "But, my Lords, you need only to read these things; *they do not need argument.* I am, THEREFORE, clearly of opinion that it is sedition, not only tending to overturn the British Government, but every Government, and that it is most clearly relevant to infer the pains of law." (p. 898.)

The gentleness of the prisoner's subsequent apology for this harangue well entitles him to the praise of forbearance. He repeated his own words and re-asserted the sentiment in his defence, and quotes Sir William Temple as an authority for the principle that "the only skill or knowledge of any value in politics was the secret *of governing all by all;*" "words," says he, "which his Lordship thought proper to ridicule, *because he did not understand them.*" (vol. xxiii. p. 975.)

Dunsinnan, Abercromby, and the Lord Justice-Clerk say nothing, except generally that they think the indictment relevant, which was the best course they could adopt.

The prisoner objected to two of the persons selected by the Justice-Clerk to serve as jurors.

The objection to Mr. Rankin, that he held the honorary appointment of tailor to the king, was clearly bad in law—that is, as a challenge for cause.

But it is equally clear that since the prisoner doubted his having a fair trial if this person served, it was harsh in the Justice to persist in having him. There were so many other jurymen, indeed, who could be very safely trusted, that, had it not been for the jealousy with which, during the days of picking, every interference with the picker was received, no doubt Mr. Rankin would have been dispensed with. So his Majesty's tailor was allowed an opportunity of punishing the imputation on his candour by being put into the box.[1]

The other objection, which was to Mr. Creech, bookseller, though repelled, seems to me to have been relevant. I do not know what the exact English rule is, but I see several cases in which, whenever it was ascertained, especially if by a proposed juryman's own admission, that *he had given an opinion upon the subject of the trial*, he was dispensed with. They frequently dispute whether he should be withdrawn by consent, or challenged, or held rejected for cause; but, one way or other, they seem always to get rid of the man. (*See*, for example, *State Trials*, vol. xxii. p. 1039, case of *Rowan*.)

Now, the objection to Mr. Creech was that "he has repeatedly declared in private conversations *that he would condemn any member of the British Convention, if he should be called to pass on their assize*." (vol. xxiii. p. 901.) It is not easy to conceive more distinct prejudication, or a spirit less becoming a juror. And what were the answers to it? The prosecutor said nothing. But *Henderland* said that "if he (Creech) had said that he would

[1] The only juryman who was for convicting the Seven Bishops was Arnold, "the brewer of the king's house." (Mackintosh, James II., p. 274.)

condemn them *whether they were guilty or not*, it would have been a good objection." "But it is not stated that he said he would do so, whether they were guilty or not." (p. 901.) This formal addition, however, was immaterial. He was accused of having said that he would condemn on the mere fact of a prisoner having been a member of the convention, obviously implying that, to him, this fact would be conclusive of guilt. All the other judges, however, adopt the same ground. *Eskgrove* observes that the juror is not stated to have said "that he would convict Mr. Gerrald *whether right or wrong;*" and besides, "if it was only in common conversation that he *had such an opinion of the intentions of the British Convention*, it is not a good objection." (p. 901.) Nobody was interfering with his opinion of the British Convention. But it was admitted on all sides that that institution might contain innocent members; and the objection was that, notwithstanding this, he had declared that he would convict on the mere fact of membership, and, of course, whether right or wrong, though he did not use these words.

Braxfield (who rarely did things by halves) gives his opinion in these very considerate words: "As this objection is stated, I HOPE *there is not a gentleman of the jury, or any man in this court, who has not expressed the same sentiment*"[!!] (p. 901.) Gerrald then restated his objection, and explained it to be, not that Mr. Creech had said generally that he would convict *all disturbers of the public peace*, but all members of the convention,—*though the illegality of this association was one of the very points to be ascertained;* and that thus "he had prejudged the *principles* on which I am to be tried." But their Lordships said no more. It was

unfortunate for the Justice's *hope* that Creech had the audacity to protest that it was *impossible* he could ever have uttered such a sentiment. But the Justice did not leave him out, as in consistency he ought to have done, on this account.

The evidence was very short, and a mere repetition of what had been given in the previous trials. Its object was to prove that the prisoner was an active member of the convention, which was the scene of all the guilt imputed to him. The speech ascribed to him was not very satisfactorily proved; but instead of denying it, he admitted, and defended it.

The Lord Advocate was in London attending his duty in parliament, where the conduct of the Court of Justiciary in relation to these trials was at this very period under discussion. The jury was therefore charged for the prosecution by Blair, the Solicitor-General.

His speech has nothing in it of the slightest permanent interest or attraction. But still, for the case, it was a powerful and respectable prosecutor's address—the different points well arranged, and well put, and not with much more frequent or stronger appeals to the terrors or the party feelings of the jury, than what were excusable in his situation. His argument is, that the constitution, language, and resolutions of the convention show it to have been a seditious association; that the prisoner was an active member, and, consequently, responsible for what it did; and that, besides this constructive guilt, his own speeches involved him in sedition personally. All the circumstances, sentiments, and expressions are worked up in support of these propositions clearly and forcibly. There are some

things, however, that will strike a modern reader with surprise.

He repeats his notion that there was sedition in the very title of a "Convention of *Delegates* of the People," because this was an usurpation of the character and authority of the House of Commons. (p. 935.) Burnett thinks it worth his while to record that the merit of this idea is due to Blair. (p. 248.) And the steadiness with which the Solicitor-General recurs to it in every one of these trials makes him appear more pleased with the conception than might have been expected from so sensible a man.

He expresses his strongest possible concurrence with the court in the opinion that seeking universal suffrage is not only dangerous, and inconsistent with the nature of our government, but *seditious*. It is "a complete subversion of that form of government under which we live;" and this form of government having been fixed at the Revolution, such a change can *never be advocated* without carrying with it its own evidence of seditious intention. (p. 936.)

This could not be maintained without suggesting to his mind the case of a well-disposed man maintaining any given form as a speculative theme, and the constitutional right, as generally conceded, of every individual to propose even dangerous innovations, provided he does so honestly; and it is distressing to find such a case—being the one on which the whole privilege of public discussion depends—disposed of by a man like Blair on such shallow and incorrect views. He holds that the Revolution settled the government; that we owe what he calls "*allegiance*" to the *government as thus settled*, including all its parts; and that, therefore, the recommendation, though even as a mere speculative

opinion, of any change inconsistent with the settlement, is seditious.

His words are these: "But we are told that universal suffrage is a speculative opinion with respect to government; that wise men differ upon it; and that it is a part of the freedom which we enjoy to have the liberty of fairly discussing every political subject, and this among the rest. Gentlemen, *this is a proposition which I will take the liberty to deny.* I will take the liberty to say that the maintaining the freedom of discussion of political questions to the length which *is* [not which is *meant to be,* but which *is*] *subversive of the Constitution, is most illegal,* and most unconstitutional. For what is the situation in which we stand? We are not here in a state of nature; we are not savages, and now for the first time to choose a constitution for ourselves—not like a man shipwrecked upon a desert island, free to choose any mode of government we please. No; we are all of us born subjects of the British Empire—subjects of Great Britain—which is the most inestimable blessing, and the most inestimable birthright, that can be bestowed upon us. *From our birth we owe allegiance to the Constitution established at the Revolution, and we are not to venture to say that another constitution would do better in its place.* I say by law we owe allegiance to it from our birth, and by law we are bound to prevent *it* being *encroached* upon; and that no body of men have a liberty to say *that we will indulge in speculation,* and there is no harm in speculation. Now, gentlemen, I ask, was universal suffrage any part of the constitution established at the Revolution? Gentlemen, I shall only suppose that in place of associating themselves for the pur-

pose of obtaining universal suffrage, as they tell us, suppose they had entitled themselves an association in order to obtain a demolition of kingly power and of nobility. To be sure, they might have told us it was mere matter of speculation, and that many good men had thought we were much better without kings and without nobles. But I am sure, living in this country, and under the constitution of Great Britain, *any* proposition of that kind, maintained by *any* body of men, would be illegal and seditious." (p. 936.)

No wonder that reformers were easily convicted, where such a doctrine was openly and responsibly propounded by a public accuser, and with the cordial assent of the bench. Its plain result is, that all reform, at least where it amounts to material organic change, must be seditious. We are always to go back to the year 1688, or thereabouts, and to take the structure of the government, and consequently of its essential parts, as we then received them, and every subsequent change implies sedition. There is to be no talking of expediency. All considerations of the kind are excluded by our allegiance to the original government, exactly as they are in relation to the sovereign, by our allegiance to him; and this rule is given us in the one case, as it is in the other, by the mere fact of British birth; and this for the very purpose of precluding even speculation on a subject so dangerous to be touched, or to be even reasoned about. The Revolution settlement fixed that there should be three parliaments, one for each of the three divisions of the empire; that each English one should endure only three years; that all Catholics should be excluded from either sitting in any of them, or from voting at

elections; that there should be no popular representation in Scotland; that the number and the distribution of members, and the qualifications of electors, should be as then recognised; and that juries should have no right to decide upon the guilt of defendants on their trial for libel. Yet all of these vital and organic forms and principles of the Constitution, as adjusted at the Revolution, have been changed. And many others, such as universal suffrage, annual parliaments, vote by ballot, the inexpediency of an Established Church, the exclusion of bishops from the House of Lords, and the policy of even the institution of hereditary nobility, have not only been discussed, as political speculations, by philosophers, but have long formed subjects of common popular argument.

This may be all very dangerous, but its legal criminality is a very different matter. The misfortune (as some would call it) is, that under a government not absolutely despotical, we cannot arrest the progress of thought; and wherever speculations, strange to our habits, come, in the progress of thought, to be familiar to the public mind, the only safety is in letting them have free vent. Blair's error consists in his not perceiving that susceptibility of improvement, and consequently the right to suggest it, *are parts of the Constitution.* We would never have got out of the heptarchy upon his principle. What he ought to have said was, that to constitute sedition, there must be both immediate and intended public mischief or danger; that the important element is the evil design; that this does not always require external evidence, but may, in the discretion of the jury, be inferred from intensity of language, or outrageousness of project;

and that the prisoner's conduct supplied such evidence. But instead of thus leaving the objects of the convention to be judged of by the jury, as one of the circumstances from which public danger or evil intention is to be deduced, he, and the judges still more, lay it down in such a way that the jury must understand it to be *matter of law*, that there are certain reforms, the urging of which no purity of intention could prevent being criminal, and that annual parliaments and universal suffrage were two of these.

The sensitiveness of people's alarm at any doubt of the absolute perfection of every part of our system, is evinced by his observation on Gerrald's statement, that the Constitution was not so pure now as at the Revolution. This may have been a very erroneous opinion, but it would scarcely occur to any calm man that it was criminal, even though the Government at the one period should be compared to a living body, and at the other to a carcase. Yet when Gerrald's speech said that "the present form of government, in my opinion, no more resembles the Revolution, than a dead putrid carcase does a living body," Blair is at the trouble to make this commentary, "which is just saying, in other and more florid words, what is stated in the minutes, that the blessings obtained by the Revolution were now *totally done away*." (p. 941.)

But it was dangerous to question even the policy of the Union, though this was, at this very period, as well as long both before and after, one of the ordinary questions for discussion at all Scotch debating societies. Gerrald had said (in the speech libelled on) "that it was justly observed by citizen Callender that soon after the union of the crowns"

[he clearly meant kingdoms] "of England and Scotland, the people of both countries were deprived of some of their most valuable privileges. It was from that period that the greatest encroachments began to be made on public liberty. But if that union has operated to rob us of our rights, let it be the object of the present one to regain them. If the event exists for our shame, as it has existed for our chastisement, let it also exist for our instruction." This seems tolerably harmless, though not perhaps very wise. But what does the Solicitor-General say to it? "Now, gentlemen, I here say that that is a most abominable *libel upon the union* of the two kingdoms, one of the most auspicious events that ever happened. To say that 'from that period the greatest encroachments began to be made on public liberty' is an assertion that is most false and *seditious*, for since that period there have been *no encroachments* on public liberty, and no individual citizen has been deprived of any of his most valuable privileges." (p. 940.) Very likely. But can an opposite opinion not be held without sedition?

There can scarcely be better evidence of the guiltlessness of the prisoner's speech in the convention, than that these two passages, about the Revolution and the Union, are the only two that the prosecutor brings specially under the notice of the jury, and we may be sure that they are the worst.

The Solicitor, however, after all, closed by putting it to the jury correctly enough, telling them that the point they had to try was, whether, on a review of the whole facts, the prisoner's intentions were pure, or "were seditious, wicked, and criminal." (p. 947.)

If the prisoner had had any chance of escape, or even of candid trial, it would have been throwing it away not to have let his defence be stated to the jury by counsel. A person trained to reason, or to represent, solely with a view to *success*, and therefore practised in the art of knowing how to reach the understandings or the hearts of others, would have put the defence on the safest grounds, and in the least offensive manner. And considering how much the principles at issue, particularly the great principle of the free right of suggesting not ill-meant reforms, accorded with the opinions of themselves and their party, it was a case which, under the exquisite talent of Erskine, or the strong sense of Gillies, might have been dignified by the sincerity of the pleader, and not lowered into a mere exhibition of professional skill. But, from the first, the prisoner was a doomed man. Independently of panic and general prejudice, the jury were directed, by authorities to which, when conveying doctrines so acceptable, they were very willing to yield sometimes, that the mere advocacy of the reform which the convention avowed its anxiety to promote, was in itself criminal; and at other times, that this advocacy was at least so perfectly conclusive as evidence of seditious intention, that all of them might safely be satisfied with it, and indeed that no rational juror could doubt it. Gerrald could not be so absurd as to deny, nor, in his position, so base as to abjure, his cordial accession to the advancement of this reform. And from the moment he admitted, and adhered to this, he stood virtually condemned. In this situation it was just as well that he spoke for himself. It gave him the satisfaction of making no concession. He proclaimed

his principles to the last, and was sacrificed with the chaplets he was proudest of on his brow.

His address, amidst great merits, had all the defects that might have been expected. Unaccustomed to the discussion, in a court-like way, even of the political matter with which he was familiar, but most of which was very new matter to his judges and jury, he does not exhibit it luminously. Chiefly anxious about his universal suffrage and annual parliaments, he labours this hopeless topic with much curious, but, to a modern ear, not very satisfactory authority, while he is far too short and casual on what ought to have been his great theme, the right, under the Constitution, of every one to recommend what the majority may think unconstitutional and dangerous reforms, provided the reformer be bucklered in honesty. And, certain of his fate, though perfectly gentle, he is at no pains to conciliate prejudice, or to soften offensive opinions, but gives the worst of his politics as freely out as if he had been lecturing to the convention. But still, notwithstanding these imperfections, delivered with what I have always heard described as his graceful impressiveness, it must have been a striking speech, the more striking from these very defects of art. He discusses all the public principles involved in his trial, and all the topics urged against him and his cause, acutely and forcibly, and in a way that makes even the cold, distant, reader feel that he must have been a man of a rich and amiable mind—able, sincere, and naturally eloquent. It is the only speech I can recollect, by a seditious prisoner personally, that is entirely free, not merely of all impudence and bluster, but of everything harsh, or disrespectful, or boasting, or vulgar. His very

firmness in avowing his principles is without any air of defiance; but is evidently the result of honesty, joined to the certainty of his fate, which produced a calm disregard of the errors of those in whose hands he was. Throughout, it is the sedition of a literary gentleman. If left entirely to himself, he would certainly have avoided that part of his defence in which he questions the sufficiency of the evidence to prove the precise words of some of the resolutions of the convention, and of his own speeches and motions there. He took up this point solely to please his counsel, who thought it well-founded; for whatever doubt there might be of the exact terms, he was perfectly aware, and nowhere disguises, that both he and the convention had said enough to bring him within the reach of that law of sedition by which he was tried.

Some of his personal allusions are very touching. For example, his opening: "If, at any early period of my life, it had been announced to me that the task of defending the rights and privileges of nine millions of people would have devolved upon me, a simple individual, I should certainly, from my youth up, have devoted my whole time, with unremitting application, that I might be enabled to execute so sacred and important a trust. Unfortunately, though a considerable period has intervened between the time of my being served with my indictment and my trial, yet I have been in a great measure distracted by various avocations, and my health much impaired by continual sickness. From my duty, however, no earthly consideration shall induce me to shrink. I, this day, come forward to advocate a cause, than which the sun never shone upon one of more deep and general concernment. And

impressed with this awful consideration, I advance to it with a tremor that shakes every fibre of my frame. But whatever be the result of this day's deliberation, I shall always look back to the part I have taken, with the consciousness of a man who has endeavoured well; for however weak the flesh may be, the spirit is strongly inclined to the service." (p. 947.)

And this allusion to one of the sources of his opinions:—"Gentlemen, I am aware that every practice and institution is alone defensible upon its own intrinsic merits, and the reason of the thing. Yet the adoption of any principle by men eminent for virtue and learning is certainly no small presumption in favour of the soundness of the principle itself. Sir William Jones, a name too distinguished in literature to derive splendour from any encomiums I can bestow upon it, and who has acted as a judge for more than twelve years in India, previously to his departure published a tract in which he vindicated the doctrine of universal suffrage. At a very early period of my life I was honoured with the patronage and friendship of this gentleman; and I am sure he would deeply feel, even after this long separation, any calamity which might befall me—a calamity (if it be one) certainly not altogether, but in some measure perhaps produced by conversation with those whose practices were pure, and whose principles I conceived to be just; and who were therefore objects of reverence among men. Yet this very gentleman, at this very period, holds an office of great trust and great emolument in his Majesty's important settlement of Bengal, and unseals those sacred fountains of justice which gladden and refresh fifteen millions of men." (p. 957.)

His peroration (too long to be all copied here) is in a high and moving tone. It contains the following passages :—

"Those who are versed in the history of their country—in the history of the human race—must know that rigorous State prosecutions have always preceded the era of convulsion, and this era, I fear, will be accelerated by the folly and madness of our rulers. If the people are discontented, the proper mode of quieting their discontent is, by redressing their wrongs, and conciliating their affections. Courts of justice indeed may be called in to the aid of ministerial vengeance ; but if once the purity of their proceedings is suspected, they will cease to be objects of reverence to the nation ; they will degenerate into empty and expensive pageantry, and become the partial instruments of vexatious oppression. Whatever may become of me, my principles will last for ever. Individuals may perish, but truth is eternal." (p. 995.) "Surely the experience of all ages should have taught our rulers that persecutions can never efface principles, and that the thunders of the State will prove impotent when wielded against patriotism, innocence, and firmness. Whether, therefore, I shall be permitted to glide gently down the current of life, in the bosom of my native country, among those kindred spirits whose approbation constitutes the greatest comfort of my living ; whether I be doomed to drag out the remainder of my existence amidst thieves and murderers, a wandering exile on the bleak and melancholy shores of New Holland, my mind, equal to either fortune, is prepared to meet the destiny that awaits it:

> . . . 'seu me tranquilla senectus
> Expectat, seu mors atris circumvolat alis ;
> Dives, inops, Romae, seu fors ita jusserit, exsul.'

"To be torn a bleeding member from that country which we love is indeed, upon the first view, painful in the extreme. But all things cease to be painful when we are supported by the consciousness that we have done our duty to our fellow-creatures; and a wise man, rising superior to all local prejudices, if asked for his country, will turn his eyes from this 'dim spot which men call earth,' and will point, like Anaxagoras, to the heavens. Gentlemen, my case is in your hands. You are Britons. You are freemen. You have heard the charge. You have heard the evidence. And you know the punishment which follows upon conviction." [1] (p. 996.)

Some who were present and still remember the scene, say that during the delivery of this address he had occasionally to struggle with a deep-seated, consuming cough. At one part indeed he was

[1] The opinions of a boy on the *matter* of such an address can never be important; but emotion excited in youth is good evidence of the success of that eloquence which resolves chiefly into feeling. The future author of the *Pleasures of Hope*, then only sixteen, heard this speech, and wrote this account of it at the time: "I witnessed Joseph Gerrald's trial, and it was an era in my life. Hitherto I had never known what public eloquence was; and I am sure the Justiciary Lords did not help me to a conception of it—speaking, as they did, bad arguments in broad Scotch. But the Lord Advocate's [1] speech was good; the speeches of Laing and Gillies were better; and Gerrald's speech annihilated the remembrance of all the eloquence that had ever been heard within the walls of that house. He quieted the judges, in spite of their indecent interruptions of him, and produced a silence in which you might have heard a pin fall to the ground. At the close of his defence, he said, 'And now, gentlemen of the jury—now that I take leave of you for ever, let me remind you that mercy is no small part of the duty of jurymen; that the man who shuts his heart on the claims of the unfortunate, on him the gates of mercy will be shut; and for him the Saviour of the world shall have died in vain.' At this finish I was much moved, and turning to a stranger beside me, apparently a tradesman, I said to him, 'By heavens, sir, that is a great man.' 'Yes, sir,' he answered; 'he is not only a great man himself, but he makes every other man feel great who listens to him.'" (Beattie's *Life of Campbell*, vol. i. p. 88.)

[1] He was so much of a boy as not to know that it was the Solicitor who spoke.

obliged to stop. "My feelings, my exertions, and my state of health, have exhausted me." *Lord Henderland*—"You may sit down, Mr. Gerrald, and take a little breath." (p. 991.)

The temper with which his defence was received on the bench is disclosed in a single episode. The necessity of change in human institutions, and the consequent duty of toleration of new doctrines, was an unavoidable topic in any enlightened defence of these prisoners; and it is one which must generally enter essentially into the defence of any sedition which consists in the promotion of new opinions. Gerrald was commenting on this fact, and after quoting Hume the historian's words that "the history of England is little better than a history of reversals," he gave some of the instances usually referred to in illustration of the general truth; such as the example of Christianity, which was originally attempted to be crushed, partly on account of its novelty—an example which has been cited a thousand times by divines and pious philosophers, as a case which ought to make all ages cautious in condemning moral changes merely on account of their being innovations. In stating this view, Gerrald's words were sufficiently guarded. They were these:—"After all, the most useful discoveries in philosophy, the most important changes in the moral history of man, have been innovations. The Revolution was an innovation; Christianity itself was an innovation." Instantly upon this the following interruption took place:—

Lord Justice-Clerk.—"You would have been stopped long before this, if you had not been a stranger. *All* that you have been saying is

sedition [!!] And now, my Lords, he is ATTACKING CHRISTIANITY" [!!!]

"*Lord Henderland.*—I allow him all the benefit of his defence. But to compare the present situation of this country with what happened at the Revolution, when the forms of civil government and the liberties of the subject were done away by the infringement of all law! or with a period in which the sovereign is said to have forfeited his life! I cannot sit here without observing, as was done in England when the rebels were tried —I cannot sit here as a judge without saying that it is a most indecent defence [!!]. It is my duty to observe this; but I am for the panel going on in his own way.

"*Mr. Gerrald.*—I conceive myself as vindicating the rights of Britons at large; and I solemnly disclaim all intention of attacking Christianity. I was merely stating the fact.

"*Lord Justice-Clerk.*—Go on in your own way.

"*Mr. Gerrald.*—I think I may be allowed that at least.

"*Lord Justice-Clerk.*—Go on, sir.

"*Mr. Gerrald.*—I should have been going on if your Lordship had not interrupted me." (vol. xxiii. p. 972.)

No religiousness on the part of their Lordships could have accounted for this shocking perversion of what the prisoner had said. But none of them were religious. Braxfield's very name made the pious shudder. And the very moment before he interrupted the panel he chuckled over a profane jest of his own, on our Saviour's success as an innovator—a jest too indecent to be recorded, but which transpired next day, because his brethren thought it

too good to be kept to themselves, and has never been forgotten.[1]

The thing called summing up was in the ordinary style.

His Lordship lays it down, and with perfect propriety, that the first point to be settled was whether the convention was or was not a seditious association. And he fixes this speedily enough. The prosecutor and the prisoner had argued its guilt or its innocence by discussing the evidence, and the import of its acts. But my Lord troubles himself with nothing so plaguy, but concludes the matter in a moment, on the authority of what had never been even proposed to be made evidence. No convictions or outlawries of other persons had been made proof in this trial. Yet this judge—or rather this person occupying the judicial chair—tells the jury that the seditiousness of the convention was already settled to their hands by fifteen other men several months before. He absolutely disposes of the whole of this, by far the most important part of the case, in these words: "Gentlemen, as to the first question, how far there is evidence to establish this convention of delegates to be a seditious meeting, it will occur to yourselves, gentlemen, that *there have been already no less than two of your fellow-subjects convicted of the crime of sedition, as members of that convention,* and accordingly *condemned to transportation;* and that there *are other two indicted for the same crime,* but did not think proper to stand their trial, and that *they accordingly stand fugitated.* You have therefore the verdict of

[1] I see that it has been adopted by Galt in one of his novels: "They denied they were traitors, but confessed they were reformers. Was not, they said, our Lord Jesus Christ a reformer? And what," etc.—*Annals of the Parish*, chap. xxxiv.

two *very respectable* juries stamping upon this meeting the character of sedition." (p. 997.) No one fact here stated was proved, or was relevant. Yet the illegality of referring to them was the least improper circumstance in the proceeding. Its chief iniquity lay in its obvious tendency to confederate the whole class of jurors in each other's support, and against every prisoner.

He then disposes, with the same ease, of the great plea, founded on the right of the people, not merely to petition, but to suggest reforms, and to agitate for their promotion. The doctrine here, as in a former charge, is, that it was seditious to distract the public, or to disturb Government by demanding redress, even of real grievances, at such a time; or that, if this was not actually sedition in law, it was conclusive evidence of sedition in fact.

"Gentlemen, it has been said, and much insisted upon, that it is contrary to the rights of mankind in general, not to be allowed to apply to parliament. I do not say that is a criminal act, if it rested there alone. But, gentlemen, I would submit to your own feelings—*it is not a matter that rests upon evidence, but upon your own feelings* [!] as men, as members of society, and as subjects of this kingdom—whether YOU feel any grievances that this country labours under, that should entitle *them* to make such a cry against the Government of the country. For my own part (and I appeal to your own feelings if it is not a just observation), *I* have always considered this country as the envy of the world at large, as the happiest kingdom upon the face of the earth; and I submit to you, whether as much happiness does not exist in this kingdom as ever did. Every man is sure of enjoying everything he has in perfect

security. His life is secure; his liberty is secure by the laws of his country; and his property is also secure. He is absolutely certain that nothing will be taken from him which he has any right to enjoy. And I submit to you whether, EVEN IF THERE HAD BEEN GROUND FOR COMPLAINTS, it was *a proper time* to bring forward those complaints—at a time when we were involved in a war with a ferocious and cruel nation, at present setting the rest of Europe at defiance, and when the greatest unanimity among the subjects of this kingdom is absolutely necessary to put an end to that war. I submit to you whether any good member of society would prefer his complaint against the Government of the country at such a time. But *if you feel, as I feel,* that the complaints are groundless, and that the country is living in a state of tranquillity, secure of their lives and properties against every attack whatever, I submit to you whether *is that man innocent* who calls the people together, and impresses their minds with ideas hostile to the Government of the country, with ideas of mal-administration on the part of the king, the parliament, and the administrators of public affairs," etc. (p. 998.)

How few opponents of Government could escape the penalties of sedition, if this constituted the crime, especially if they dared to ascribe discontent to abuse, and to suggest reform as its remedy!

His Lordship then proceeds to deal with the French terms. He first says, correctly, but not consistently with his doctrines on former trials, that in itself, and without reference to other circumstances, this French imitation is harmless; and that it is only important as an element of evidence. And then he gives this as the result of the whole

proof: "You will consider whether, upon a fair construction of the whole, they were not imitating France in the *form of their government*, and that *the object of their meeting was, like France, to overturn the established Constitution, and put everything upon the same footing with France*, where aristocracy is reviled, the king reviled, and indeed where there is no Constitution at all. That, gentlemen, is the great object of your inquiry. And when you attend to the whole," etc., "you will judge whether it does not appear to you that these people were *imitating the French Convention, and that they meant to follow the spirit of the French in establishing their form of government.*" (p. 999.) Yet, as usual, there was a total absence of evidence, not only of the constitution, but of the very existence of a convention in France, and of the authenticity and meaning of its alleged forms and terms.

After some observations on the proof of the resolutions and speeches in the convention, his Lordship concludes, by turning the accident of the prisoner's birth, nay, his very talents, against him. "When you see Mr. Gerrald taking a very active part and *making speeches such as you have heard to-day*, I look upon him as a *very dangerous member of society*, FOR *I dare say he has eloquence enough to persuade the people to rise in arms.*" (p. 1002.) No wonder that the prisoner interfered on this. "Oh! my Lord, my Lord! this is a very improper way of addressing a jury. It is descending to personal abuse. God forbid that my eloquence should ever be made use of for such a purpose." On which the Justice, adding insincerity to harshness, retracted by this paltry evasion: "Mr. Gerrald, I do not say that you did so, but that you had abilities to do it."

And this was his Lordship's penult sentence: "Gentlemen, he has no relation, nor the least property, in this country," [I don't see the evidence of this,] "but he comes here to disturb the peace of the country, as a delegate from a society in England, to raise sedition in this country. I say *he appears to me to be much more criminal than Muir, Palmer, or Skirving, because they were all natives of this country.*" (p. 1002.) This in the *first* place was irrelevant, for the circumstances of their cases were not before the jury, and Palmer's had not been tried even before this judge or court; and in the *second* place, it was not true, for Palmer was an Englishman.

The prisoner was convicted of the *crimes* libelled.

What these *crimes* (as distinguished from the simple, generic, crime of sedition, which alone was charged) were, it is not easy to say. They were stated, or rather talked of in a loose, desultory way, at the trial, as consisting in the promotion of universal suffrage and annual parliaments; in complaining at that period of grievances, real or imaginary; in exciting discontent; in imitating the French; and in aiming, as evinced by the general mass of the circumstances, at the overthrow of the monarchy; but whether the jury meant to convict of all these *acts*, or only of some of them, remains a matter of mere conjecture. If these *acts* be what they meant by *crimes*, then the legal construction of their verdict is, that they intended to convict of the whole; and this, I dare say, is the truth.

An objection was taken to the verdict by the prisoner's counsel, on the ground that it *did not bear* that the jury had considered the *evidence* for the defence. But it was properly repelled; because no

evidence, apart from that for the prosecutor, had been adduced.[1]

It was also objected that, *de facto*, the jury *had not* considered either the evidence or the defence. This was offered to be proved; but it was explained by the prisoner's counsel that the proof was implied in the fact that the jury had only been enclosed twenty minutes. This also was properly repelled, upon the plain ground that it is the province of juries alone to determine what consideration any evidence or defence requires. Had it not been for the necessity, according as the law then was, of making up a written verdict, any jury might have said Guilty, or Not Guilty, without leaving the box, or waiting longer in it than to collect the general opinion. This was the answer made by all the judges except the Justice. They laid it down that it was the duty of the jury to consider the defence, whatever it might be, but that it must be held that they had done so. But the Justice did not concur in this. He seems to have thought it too complimentary to this defence. He said (vol. xxiii. p. 1007): "Then they say there was a long defence, and they should have stated that they had considered that. My Lords, the jury did their duty *in not* CONSIDERING that defence. It was a defence against the relevancy of the indictment, and the first two hours of his speech went to show that all that he had done was innocent. But, my Lords, was it not offered to the court in a very long pleading, and found relevant? I apprehend the jury

[1] The subsequent abolition of the necessity of having a *written* verdict in every case, makes these technical objections to the forms of verdicts rather incomprehensible now; but they were of hourly occurrence formerly. He was deemed a poor-spirited counsel who had not a quibble against the written verdict.

have done their duty properly. They have a power, to be sure, if they think proper, even after the libel is found relevant. They may acquit. But the duties of a jury and of a judge are distinct. It *is the business of the court to determine the law as to the relevancy of the libel, and of the jury to judge of the fact; and as it was found relevant by the court, the jury had no more to do but to consider the evidence.*"

So far as I am aware, this is the only occasion on which a Scotch judge ever ventured to reduce our law to the condition in which the law of England stood prior to the passing of the Libel Act. Though our judges are obliged to decide on the relevancy, as appearing on the indictment, it is (with the present exception) invariably proclaimed that the jury are entitled to differ from the court, by holding that the facts, though proved, do not imply the crime. Of all Braxfield's many stretches of power, none is more original or more daring than this attempt to take the ultimate relevancy out of the hands of the jury. The statement that there could be any defence, allowed by a court to be pleaded, which a jury is entitled not even *to consider*, is not to be condemned, solely or chiefly on account of its legal outrageousness. Its principal claim to reprobation lies in its tendency to encourage political juries in a careless and prejudiced apparent performance of their duties.

The consideration of the sentence was a mere form. Every judge was committed to transportation. But in repeating this sentence now, their Lordships seem to have been under the influence of a worse spirit than even that which had originally misled them. It can scarcely be doubted that this was owing to the recent parliamentary discussions

to which their conduct had been subjected. The attack on their law and humanity made them angry; the defeat of that attack, confident. Pride came to the aid of prejudice; and the most outrageous reasons that could be invented in order to show that they might have gone still further, were resorted to as evidence of their past moderation.

Henderland proposes fourteen years; and for this reason:—"My Lord, it appears to me that *by* NO *means* an adequate punishment CAN *be inflicted for this offence;* and even if this has the *appearance* of severity, which I cannot think it has, it is the only judgment which could be pronounced in such a case, to secure the safety of this country from the commission of such crimes." (p. 1008.) This is no misprint; no error; no misrepresentation. The opinion of his Lordship really was, that *nothing* could be too severe for such sedition. If they could have hanged, we have their own authority for believing that they would have done so. *Swinton*, it will be remembered, had said in Muir's case, that it was impossible to punish sedition adequately, *now that torture was abolished.*

Swinton's opinion, and his whole opinion, in the present case was in these words:—"My Lord, in considering this crime, about which your Lordships have heard so much, the more I consider, and the more I turn my mind to it, the more I am convinced that this court did right originally in imposing the sentence that they did impose. My Lord, in considering this case, and comparing the punishment with the crime, I HARDLY KNOW WHAT PUNISHMENT IS ADEQUATE TO IT." And no wonder—for this is his Lordship's conception of sedition. "It was *well* said by one of the ablest and greatest men that

ever lived, that sedition was like Pandora's box; it contains every evil, it contains every vice. My Lord, it is said he is to be sent among *pickpockets, thieves, and robbers.* But, my Lord, THIS CRIME IS NOT TO BE COMPARED WITH THEIRS. IT COMPREHENDS EVERY SORT OF CRIME—MURDER, ROBBERY, RAPE—EVERYTHING THAT IS CRIMINAL. I think, my Lord, the punishment that has been proposed the *mildest* that can be inflicted; and I hope it will be sufficient to deter others from committing the same crime." (vol. xxiii. p. 1008.)

Lord Dunsinnan thought that any difference that there might be between this case and the former ones was unfavourable to the prisoner. "My Lord, he is one of these persons who came to this country for the purpose of exciting civil discord, by inflaming the minds of the people. We have had an opportunity of seeing that *he possesses talents which render him exceedingly* CAPABLE *of mischief.* The harangue which we heard last night, though addressed to the jury, was, I believe, rather intended for another part of this court. WE SAW *that his political principles are extremely dangerous.* And, my Lord, if there is any other country which does not inflict such a punishment for such a crime, I am happy that I live in such a country as this; and if I were to propose any difference of punishment, *it would be rather to increase than to diminish it.*" (p. 1009.)

Of all the circumstances which can enter into the composition of a strong claim for mercy, few, if any, are more powerful than the existence of some mental innocence in the person for whom mercy is sought. To be lenient according to the measure of a prisoner's reserved goodness, is only an application

of the principle that entitles him to an acquittal where he is entirely guiltless. And there may sometimes be great legal criminality without much moral badness. A cup of water may be stolen to save a dying child. Murder may be committed by duel, required by society, and provoked by intolerable insult. Heresy, which for many ages shone in the very front of European offences, and which no nation upon earth has yet expunged from its criminal code, has often sprung from conscientious piety; rebellion often from patriotism. Courts cannot always act upon this; because it is their business to execute the law, which it is the duty of a wise, good subject to obey, and the law is often absolute. Society cannot always leave every man to be a law unto himself. Where the law, therefore, is so clear as to exclude its being violated from honest ignorance, and so positive that courts have no discretion in the event of its being infringed—he who breaks it, though he may have the consolation of conscious purity, must do so at his peril.

But there are cases—and sedition is one of them—in which, even in ascertaining the fact to be tried, and while the matter is still before the jury, the wickedness or the goodness of the accused does not merely aggravate or alleviate the offence, but forms a part, and a principal part, of its legal essence. And if this be so true that, even on the question of guilty or not, evidence of good character is receivable and material, how much stronger are its claims when the period arrives for the exercise of discretion in determining the punishment? No conceivable circumstance so powerfully recommends the infusion of lenity into a discretionary sentence as moral worth. Tyrannical governments may get

their judicial tools to show less mercy to a political victim of good, than to one of bad, character, because the former has more influence. They punish the dangerousness of his virtues. But this is never the view of a court of justice. It may be laid down as a principle universally sound that in fixing discretionary punishment it can never be right to disregard any portion of moral worth in the prisoner.

Judge Buller, to be sure, a man whose hardness offended his age, was of a different opinion. Townsend, his latest and most favourable biographer, says of him, speaking of Donellan's trial: "The circumstances of this trial tended to confirm the impression of Buller's rigorous severity, which two rash sayings of his had previously created. The first of these dicta was that previous good character went rather in aggravation than in mitigation of punishment, for the longer a person might have lived in the good estimation of his neighbours, the more guilt was there in losing it,—a paradox certainly very alien to the mild spirit of a Christian judge." (vol. i. p. 19.) Yes, and to the common sense of a sane man. The meaning of the principle is that the greater scoundrel a man is, the more entitled he is to mercy.

Good intention in the particular act charged ought to be more in a prisoner's favour than even general good character.

Nevertheless, *Lord Abercromby* acknowledges that he acted on the following principle, with the exposition of which his opinion is almost exclusively occupied: "My Lord, it has been said within these walls that his intentions all along were innocent, that they were perfectly pure and honourable, and that had the same crime been committed in England

it would either have been passed with impunity, or with a very small punishment, as imprisonment or pillory. My Lord, upon that I shall say a very few words. With respect to the panel's *motives, I shall for a moment suppose that his intentions were pure, and perfectly innocent. But even considering the case in that view, I must give it as my opinion, sitting here as a judge, that it would afford no motive for a* MITIGATION *of punishment.*" (p. 1009.) His Lordship is at the pains to repeat this declaration in a subsequent part of his opinion: "My Lord, *though the panel could have established by the clearest and the most satisfactory evidence that his intentions were all along perfectly innocent, and his motives perfectly pure, it would have afforded no ground whatever for* MITIGATION *of punishment;* but I am sorry to say that I can discover no proof of such innocence of intention," etc. (p. 1011.)

It would be unjust not to quote the explanation of this frightful view given by his Lordship himself. "My Lord, we all know it as a fact, undoubtedly undeniable, that a mistaken principle, either in religion or in politics, has often *led the way, with the best of intentions,* to commit crimes of the *deepest atrocity.* My Lord, the history of this country affords many instances and many examples of this kind. For example, in the case of the Gunpowder Plot *many of the conspirators were men of character.* Sir Everard Digby was one of the most accomplished, one of the most virtuous, men in England, and, my Lord, he was sentenced to die as a traitor for the part he took in that plot. And on the eve of his execution he wrote a letter to his wife in which he expresses himself in these precise terms: 'Now for my intention, let me tell you that if I had thought

there had been the least sin in the plot I would not have been of it for all the world; and no other cause drew me to hazard my fortune and life but zeal to God's religion.' My Lord, this letter, written at that fatal period by a man who was beloved by every person in Europe, *leaves no room to doubt of the sincerity of this confession.*" (p. 1010.) He adds, a little further on, "My Lord, we have the example of our own times also. I need not remind your Lordships of 1745 and 1715, when many men, *who had acted with the best intentions*, died the death of traitors."

There are very few understandings to which it can be necessary to point out the gross fallacy of these analogies. In the *first* place, courts have *no discretion* in the punishment of murder or of treason, the two offences committed by the rebels of 1715 and 1745, and by the Gunpowder plotters. If the penalties had been discretionary, even general good character ought to have had its influence. In the *second* place, the law defines clearly what murder and treason are, and having fixed the punishment of each, the penalty follows the act, and there is no relaxation of the rule in favour of those who choose to set themselves above the law, and to think its violation a duty. Sir Everard Digby knew that he was going to murder the king and various others, and meant to do so, and certainly no mercy could be shown to him because he was pleased to think this not a sin. And, in the same way, *if a person be guilty of sedition*, his good intentions will not save him from the consequences. But such intentions must be taken into view *in ascertaining the fact of the guilt;* and then, even after conviction, the punishment being discretionary, they ought to operate in alleviation. His Lordship makes no dif-

ference between a crime clearly intended and clearly committed by a person of good *general* character *in other respects*, and a crime said to be excluded or palliated by good intentions *in the very act challenged.* He mistakes the situation of a prisoner accused of sedition,—that is, of acts calculated and designed to produce what others, but possibly not the prisoner, think public mischief, with the situation of an avowed murderer or traitor, who acknowledges that he meant to perpetrate these acts, but thought them right.

Yet did *Braxfield* contrive to exceed this, for he actually makes the absence of bad intention an *aggravation.* "My Lords, we have heard a great deal of the innocence of his intentions. But it was *justly* observed by my brother who spoke immediately before me, that, taking his own account of the matter to be just, supposing that he acted from principle, *and that his motives are pure, I do say that he becomes a* MORE *dangerous member of society than if his conduct was really criminal, and acting from criminal motives. A man acting from criminal motives is not so dangerous a member of society as a man who thinks he is acting from principle;* for when a man is so misguided in his principles he overturns society and government itself. I say, *Salus populi suprema lex,* and it becomes us, let his intentions be as pure as they possibly can be, to remove that man from society, and put it out of his power to disseminate these dangerous principles. I do not know whether his principles are so pure as he professed or not; but *if they are,* I think *it justifies this punishment just as much* as if he had acted *from the worst of motives,* and therefore any other punishment would be insufficient." (p. 1112.)

How different from this is the tone of Chief-Justice Eyre in his charge to the jury in the trial of Horne Tooke! He instructs them to give full weight not only to his general character, and to the prevailing peaceableness of the prisoner's political principles, but even to all the circumstances in his private condition and habits, which seemed to indicate a man rather withdrawn from faction than inflamed by it—to his literary occupations, his feeble health, his quiet Sunday visitors, his cultivation of his garden. (*State Trials*, vol. xxv. p. 741.)

Chief Justice Jeffreys sentenced Tutchin to be imprisoned *seven* years, to be whipped in *each* of these years through *every* market town in the county of Dorset, and to find security for good behaviour during *life*. The prisoner, who escaped this infliction, met with his judge in his evil day, after the Revolution, and asked his Lordship "where his conscience was when he passed that sentence on him in the West? Jeffreys said, You are a young man, and an enemy to the Government, *and might live to do abundance of mischief, and it was part of my instructions to spare no man of courage, parts, or estate.*" (*State Trials*, vol. xiv. p. 1199.) Gerrald's virtues made him more alarming than either parts or courage.

The power of transporting for sedition having been since abolished by statute, it is a matter of indifference to modern practice whether the view taken of the law in 1794 was sound or not. But this is a question of great legal curiosity, and very material as a criterion of the court; and it is one, therefore, that cannot be overlooked in any judicial picture of these times.

The legality of all these sentences was vehe-

mently denied by the whole whig lawyers of the time, whose protest has been adhered to with gradually increasing confidence by all their successors. The opposite opinion has been maintained with equal positiveness by their political adversaries. It would be very satisfactory if, amidst these party creeds, the truth, whatever it may be, could be clearly ascertained. But each party being perfectly satisfied with its own conclusion, nothing has been done to get nearer the truth since the publication of Hume's work in 1800. Those who approve of the sentences have ever since been contented to refer to that book as their triumphant defence; while those who condemn them, despising this defence, have, without any accurate exposition of its errors, been satisfied to take what they hold to be its obvious insufficiency as all that they require. The question therefore stands now on both sides exactly as it did when Hume left it.

The *general* views and reasonings are capable of being easily apprehended. What is wanted is, *exact historical truth*, including the history of legal proceedings. He would do most towards the solution of this doubt, who, sinking all party feelings, would honestly and minutely examine the whole course of our practice in political crimes prior to 1793, but particularly prior to 1703, explaining the rise, objects, and results of the various statutes, —separating the proceedings of the Privy Council from those of the regular courts,—detailing the precise circumstances of every sentence in reference both to its design and its execution,—and unfolding enough of collateral history to enable us to see what must be ascribed to law, and what to tyranny. This, and this alone, could ascertain whether, prior

to the system which the year 1793 began, we had anything that deserves to be considered as a law of sedition, and what it really was.

Beyond examining most of the cases mentioned by Hume, I have made no attempt in this vein. It is a vein which no one can work who is not familiar with our old records. But Hume, who was probably consulted by the prosecutor on all these cases,—who published his defence of them a few years after they occurred, when he had had full leisure for inquiry, and was under the strongest inclination to place the transactions of his friends on the surest grounds, and whose statement has ever since been received as the case for his party—may fairly be taken as the best expounder of their law; and it requires no antiquarianism to appreciate his argument. Malcolm Laing, who lived among the ancient records, and read them sagaciously, and, besides the stubbornness of his natural honesty, was trained by his favourite pursuits to habits of historical candour, used to declare, long after he was removed from the prejudices with which it might be supposed that a whig, and one of the counsel, had at one time viewed Gerrald's trial, that Hume's display of ancient precedents was too partial for any effect except to mislead. Nevertheless, not having been refuted by any opposite display, those who profess to differ from Hume have no unfair task assigned to them when they are required to contest his result upon his own authorities.

The argument, as given by the prosecutor and the court, and as corrected and improved by Hume, comes to this,—that sedition is a crime at common law, and a crime of so dangerous a nature that the acts which constitute it have frequently been de-

clared by statute to be treason; that, though different in its legal principle, it is in many respects scarcely distinguishable, practically, from *leasing*, which, during a long period, was a capital offence; that even the Act 1703, c. 4, though passed after the Revolution, recognised this kindred offence of leasing, and only abolished its punishment of death, leaving the punishment of fine, imprisonment, or banishment; that at this period banishment, as established by the previous practice of the court, and the understanding of the country, included what is now termed transportation, that is, not mere expatriation, but fixing the convict, or enabling the Crown to fix him, to a particular place abroad; that this continued to be its meaning so clearly and universally that, without any declaratory statute, banishment, as distinguished from this transportation, has entirely disappeared, both in the term and in the thing; that the court being thus intrusted by that very parliament which gave the people all the protection the Revolution owed them, with the discretionary power of transporting for leasing, was legally entitled to inflict this punishment for the nearly identical offence of sedition; that, besides this statutory authority, the Court of Justiciary has an inherent, original, and independent power of declaring new crimes, and of attaching what it conceives to be proper punishments (short of death) both to new crimes and to old; that the court acted lawfully in availing itself of a punishment which, even if it had been unknown anciently, had been regularly introduced into modern practice; and that, in the circumstances of the times, it would have been mere folly to have employed any other check than the

only effectual one, of fixed exile, for a crime then immediately connected with revolutions.

The first thing necessary to be done in order to appreciate a view so complex and so gravid with postulates, is to make an entire separation of that part of it which justifies transportation *upon the pre-existing law*, from that part which only justifies it on the ground of its being within the power of the court *to create new law*. If there was law for it without the "native vigour," this curious power need not have been resorted to. Its being resorted to is no slight proof that there was felt to be no law without it. Let it be so laid aside for the present.

Next, it is necessary to apprehend distinctly what it is that is disputed. For Baron Hume probably misled himself, and has certainly misled many a reader, by what may be described as a mere play upon words.

He is at considerable pains to show that, anciently, the *term* Banishment included the *term* Transportation; that is, that these *words* were used synonymously. And he has certainly succeeded in showing this triumphantly, at least with all the triumph that a victory over what was never contested admits of. He has shown that to *transport* often meant nothing beyond what its etymon imports, viz., to *carry beyond*. "The books of the kirk librarie shall be catalog and *transported* to the librarie within the college." (*Kirk-session Records of Aberdeen*, 11th Nov. 1621; reprinted by the Spalding Club, p. 98.) "That the Erle Marschall be desyret that his Lordship caus nocht his tennentis to raiss or *transport* ony carreage on the Sabbaoth." (*Ibid.* p. 189.) Banishment, which im-

plied going, or being sent, beyond the limits of the territory, meant no more than extra-territorial residence. But neither of these terms signified anything more than *mere expatriation.* Nay, to transport very often signified much less. It signified nothing but *portation trans,* the trans being measured from the spot where the convict stood. Thus Janet Spens was sentenced to be *banished;* and for this purpose the magistrates of Dysart are ordered "*to transport her to the Tolbooth of Dysart,* etc., until occasion offer for *transporting her beyond seas.*" (Hume, vol. i. p. 355.) And Andrew Henderson is to be kept in jail till "ordour be tane for convoy and *transport of him to his schip.*" (Hume, vol. i. p. 358.) There are many other examples, which show that the word transportation indicated mere compulsory removal; without necessarily involving any idea of the removed person's condition after reaching the line beyond which he was sent. The first part of Janet Spens's sentence was a sentence of transportation; but it only transported her from Dysart to a ship. There could be no doubt at the period of these trials about the *word* transportation, if this be all that is wanted, because it is recognised in the Act 1701. That statute enacts, "that no person be *transported* forth of this kingdom except with his own consent, given before a judge, or by legal sentence." Nobody will say that every such transportation necessarily implied something more than mere expatriation. The practice fixes that it did not. Of the hundreds of people who were dealt with under this enactment, the great majority, I suppose, but at any rate certainly a great number, were merely sent out of this country. They were banished *forth of Scotland.* Yet because

this banishment took place under a statute warranting their *transportation*, Baron Hume lays it down that the first of these comprehends the last; and this supposed identity of the *words*, supported as it is by a grand array of useless authority, has gained more careless converts to his side of the question, than have been gained among the cautious by all his better arguments.

But it is not the *word* that those who differ from him object to, but the *thing*. And the thing is this: mere expatriation, which is our modern idea of banishment, leaves the culprit at liberty to go where he pleases, so long as he keeps out of the country from which he is ejected, and to do what he pleases in the place to which he withdraws.

Expatriation, *combined with compulsory residence abroad, in a place and under regulations fixed by the Crown*, which is what was meant in 1793 by transportation, leaves the prisoner no liberty at all. The banished man suffers nothing beyond exile. He may carry his fortune, his family, and his power of movement, with him.

> "Round the wide world in banishment we roam—
> Forced from our fertile fields and native home."

Forced absence from home, especially for a crime, is generally equivalent to ruin; and even when the sufferer is sustained by the applause of a party, it always reduces him to a painful position. But in its worst state it is heaven, compared with the hell of the best state of transportation, particularly with transportation forty or fifty years ago, when the voyage was far longer and more horrid than it is now, the colony frightful, home intercourse impracticable, and return hopeless. This was a punishment which degraded, tortured, and killed. The victim

was not merely a slave, but he was reduced suddenly to that condition from perfect freedom and perhaps great luxury; and he was made a slave, far from all sympathy, to a master who had little interest in his welfare, and who probably considered his being a convict as an apology, if not a recommendation, of any severity that he might be inclined to exercise over him. The one punishment might be survived; the other never could. Private respect and public honour have frequently awaited the man who, corrected and purified by some years of penal absence, has returned to national usefulness and domestic affection. The transported man may perhaps bring his body home, but it is marked. Under hiding, he may possibly be cheered by some of the love which can never be eradicated from the heart of a wife or a daughter—feeling his shame, but adhering to him; but he can never be dignified by general respect or public employment. No time, conduct, or worth, can ever cleanse him from the moral stain of his punishment. Till the grave shall protect him, he will be pointed at, and thought of as a returned convict, and as little else.

Now the question is, as to the power of the court to inflict *this last punishment*, no matter in what terms. Was it lawful to visit *sedition* with these consequences? I say *sedition*, for the learned commentator is very apt to confuse this very peculiar offence with two others, to one of which it has no resemblance whatever, and to the other very little. These are *treason* and *leasing-making*. Wherever Hume finds seditious *acts* prosecuted as treason or as leasing-making, and these acts thus prosecuted punished by transportation, or by torture, or by death, he assumes that the same result, except

death and torture, could lawfully follow where the acts were prosecuted only as *sedition*. But this is an essential mistake. As to treason, it is a mistake so clear that it would be idle to speak of it; and as to leasing, on the identity of which with sedition nearly the whole of his doctrine depends, it was in many respects a totally different offence. Leasing-making was the crime of calumniating the monarch, or his advisers, or nobles, or of creating discord and hatred between the king and the people by falsehoods, and was punishable capitally. It was a tyrannical and savage law, by which, while there was no public opinion, and no practice of constitutional privileges, each successful faction of barbarous churchmen or nobles was enabled, on the pretence of having been abused by its defeated opponents, to take their estates and their lives. It seems very odd to talk of this as even resembling the modern offence of sedition. No doubt the modern crime may be implied in some of the old Acts. Sedition may be committed by libelling the king or his counsellors, and thereby making them disliked. But 1*st*, There are other sorts of sedition of which the facts are *not* implied in the facts of leasing. In particular *pure resistance* is not; nor is the promulgation of dangerous *doctrine*. If such an idea as that of parliamentary reform can be supposed to have entered into the head of any pamphleteer or demagogue in old Scotland, the maintenance of this object would not (without an abuse of law) have fallen under the meaning of the bloody interdiction against leasing; 2*d*, Although the acts constituting the two crimes be supposed to be in all respects identical, still if they were prosecuted and punished *on different principles, and for different objects*,

there is no correct reasoning from the one to the other. Take the case of a libel on the king. This in the days of the Stewarts would have been called leasing-making, and would have been punished by forfeiture of life and property. Is this any reason why, when a similar crime is prosecuted under the House of Hanover as *sedition*, the old punishment of leasing, or such part of it as a statute has not abolished, should be inflicted for this new, or new-modelled crime? In 1793 there was a crime at common law called sedition. Hume's argument is, that because this offence resembled another anciently called leasing-making, it must be punished now as leasing-making used to be.

In order to get one step nearer a sound result, it is necessary to distinguish the period prior to the year 1703 from the period after it. Because Baron Hume says that the Act of 1703, which abolished certain previous punishments, must be understood to have left the law, in other respects, as it was then standing; and that, as the statute did not introduce an entirely new system, but only amended the old one, the old one must be continued, as corrected, and must be carried forward into subsequent generations. Well—assuming all this—*how was sedition punishable, or rather, how was it punished prior to* 1703? Much depends upon the answer to this question. Baron Hume's exposition of the law turns mainly upon it.

Now the only just answer that I can conceive its admitting of is implied in what I understand to be the fact, that *no one* (or at least not above one or two—but I believe no one) *in Scotland had ever been convicted of pure sedition before* 1703. I have never heard of any such conviction. Hume refers

to no Scotch case of sedition till 1793; and since none was discovered by this laborious searcher, it may be pretty safely conjectured that none exists. Leasing-making I do not admit to be sedition.

And this is less wonderful than might at first appear, because sedition is only the growth of considerable general liberty. For several centuries, Scotland was torn to pieces by a fierce nobility, the slaves or the rivals of the Crown, while the Crown was struggling to defend itself from its aristocracy, and to curb a people which had no means of resistance except by rebellion. So long as all power was in the hands of the kings and nobles, and the people, as such, were nothing, there was no need of a law of sedition. The laws against treason and leasing-making were sufficient. He who disturbed the Crown was crushed by the one; he who even insulted the aristocracy, or the Government, or any of their members, by the other; and the ferocity of the age, untamed by the practice of liberty, disdained all penalties for political offences except death. Power, having no public basis, was precarious; and depending chiefly on successful violence, each tyrant of the hour thought he could only protect himself by the extermination of his enemies—an opinion recommended by the long prevalence of family feuds and bloody factions. The seventeenth century, instead of softening these habits by the breath of approaching civilisation, only brought fanaticism, and consequent persecution. That century was one long rebellion. Every offence connected with the State was called treason. Sedition was not recognised; and indeed, as distinguished from treason and leasing, it probably very seldom existed. Seditious acts, as Hume says, were

raised "from their natural rank of sedition, to that of treason by reason of the exigency of the times."

Whether this be the correct explanation of the fact or not, I assume it to be a fact that, prior to the year 1703, if any law existed in Scotland against sedition proper, it was at least not known in the practice of our courts. And if it be so, the conclusion seems fair that, in inquiring what was the legal punishment of this offence after 1703, there was no use, except for the explanation of terms, in referring to the period before.

Now what change was introduced by the Act of 1703? I think, upon this matter, none whatever.

Its words are these: "Our Sovereign Lady considering that by the Acts of Parliament following [here it recites several bloody statutes, all against *leasing*], the crimes therein mentioned are made capital, and punishable with death and confiscation, and that the said laws *have been liable to stretches, and that in respect of their generality, and the various constructions which the same may admit*, they may be, *as to the foresaid capital punishment*, of dangerous consequence, doth therefore, with the consent, etc., abrogate and discharge, in all time coming, the foresaid sanction and pain of death and confiscation contained in the said Acts, and statutes and ordains that the punishment of the crime mentioned shall for hereafter only be arbitrary according to the demerit of the transgression, that is, by fining, imprisonment, *or banishment*; and if the party offender be poor, and not able to pay a fine, then to be punished in his body, life and limb always preserved."

The argument reared upon this statute amounts in substance to this, that the Act, though it abolishes

the punishment of death, keeps up the offence of leasing and sedition, only with a lower penalty; that these are statutory offences still, and, at any rate, are offences at common law; that sedition, though not specified by name, is one of the crimes virtually included in the Act; and that the banishment sanctioned did, in practice, comprehend compulsory residence in a foreign place.

The answer to this is that there is a flaw in every material part of the statement and reasoning.

Thus I can discover no ground whatever for saying that sedition is included within the statute. It certainly is not so in express words. By what implication is it? No doubt several of the *acts* that used to be punished capitally were what would now be held seditious. But it was not *as sedition* that they were so punished, or even prohibited. It was solely as leasing. And therefore it is only leasing, and not sedition, that the statute of 1703 authorises to be checked by banishment. Hume, because these two are allied, always assumes them to be the same. This error is particularly unfortunate in reference to these trials, because it was distinctly stated both by the prosecutor and the court that these prisoners were *not* tried for leasing, but for pure sedition. "This case (says the accuser of Gerrald) is *not leasing-making*." (vol. xxiii. p. 859.) "The crime here charged (says Henderland) is not leasing-making, it is sedition in the proper sense of the word—sedition at common law." (vol. xxiii. p. 893.) Whatever use, therefore, may be made, analogically, of the leasing, or of the Act 1703, this statute does not profess to regulate the punishment of sedition, or to touch any such offence in any way, or to any effect.

Again: it must, I think, appear very strange to any mind not under the influence of the year 1794, to see it maintained that these old Statutes are not only not in desuetude, but are still in such force that it was proper for a court of justice to proceed upon their principles at the close of the eighteenth century in everything except in the then forbidden punishment of death. Hallam, than whom no safer guide can be found in extracting its true results from history, describes our ancient code of leasing-making as "*the old mystery of iniquity in Scots law.*" "Amidst a great vaunt (says he) of Christianity and civilisation, they took away men's lives by such Statutes, and by such constructions of them, as could only be paralleled in the annals of the worst tyrants." (*Const. Hist.*, chap. xvii.) Nothing can be required to justify this opinion more than the example he gives of the case of Balmerino, who in 1635 was convicted and sentenced to death for leasing-making, under the Statute of 1584, 130, being one of the Statutes specified in the Act of 1703. It was made a capital offence by that Statute even to *hear* a slanderous speech against the king *or his progenitors* without reporting it, "or *to meddle in the affairs of his Heiness and his estate*, PRESENT, BYGANE, *and in* TIME COMING." Certain peers had prepared what Laing describes as "a temperate and submissive petition (to the king) in order to exculpate themselves from the imputation of an opposition to prerogative, and to deprecate the operation of those articles from which they dissented." (*Hist. of Scot.*, vol. iii. p. 107.) They abandoned this most constitutional proceeding (as it would now be thought) on learning that it displeased his Majesty. Balmerino happened to

have kept a copy of the petition, and this being fraudulently discovered and disclosed, he was sentenced to death[1] because the paper, though undelivered and unpublished, was "so seditious that *its thoughts infected the very air.*" It was "a cockatrice which a good subject would have crushed in the egg." No wonder that Hallam asserts this Statute of 1584, 130, and various others touching leasing, to be parts of "one of the *most odious engines that tyranny ever devised against public virtue*—the Scots law of Treason." (*Const. Hist.*, vol. ii. p. 678, 4to edition.)

Nevertheless Hume makes it a material part of his argument that, provided death and demembration be avoided, these Statutes were part of our law in 1793, and are so still. It is really curious to see how a man of humanity and sense, and a friend to fair trial, can linger over and tolerate these long exploded atrocities. He admits that these were "*the laws of arbitrary times.*" But "the *principle* which they enforce, that of maintaining the obligation and authority of the existing Government, is a principle of all times and situations." "EACH of these enactments, in its order, is *an acknowledgment and confirmation of the common law.*" [!!] "The crime, therefore (leasing) and *nomen juris*, and THE STATUTES IN RELATION TO IT, still remain a part of our system [!!!], though these last are not now *so likely* to be used as grounds of charge by themselves, *as in confirmation of the common law;* for I think it

[1] Laing, whose book was published in 1804, says:—"As peremptory challenges are unknown in Scotland, the jurors are invariably selected by the judge from the return made by the clerk of court. Nine of the jury, with a single exception, were ineffectually challenged; but when Traquair, a *minister of State*, was admitted, it was no longer doubtful that the rest were industriously selected for their hostility to Balmerino, or their devotion to the Crown." (vol. iii. p. 110.)

is not to be *doubted* that the offence would have been cognisable, and to the effect perhaps of inflicting as high pains as those in the Act 1703, although the Legislature had never interposed with any provision on the subject." (vol. i. p. 345.)

So that, except in its capital punishment, the Act 1584, 130, is still a part of our law! And any one who utters, or, without reporting it, hears an observation slanderous of the reigning sovereign's great-grandfather, or who meddles in his affairs past, present, or future, is still liable to transportation at common law!! It seems odd to call these Statutes confirmations of a common law, which they outrage and trample upon. They are so in the same way that torture, to procure confession, may be said to be a confirmation of the common law, which requires men to speak the truth. They are evidence, to be sure, that in all communities, existing Governments must receive a certain degree of protection,—a principle which Power is always sincere in extolling. Does this prevent a Scotch Statute from falling into desuetude? These Acts were not merely liable to the stretches and misconstructions referred to by parliament in 1703, but in their punishments, provisions and principles, they were repugnant to the common public law of any unchained people. Yet, as I read the Commentaries, Balmerino could be lawfully tried still on the Act 1584.

There is another, and an important, logical error in his reasoning. He admits (or seems to do so) that as it was not the practice ("by reason of the exigency of the times") to try these political crimes as sedition proper, there was no known and established punishment for this precise offence. How

then does he make it transportable? By this process of argument: Sedition was anciently punished capitally as treason, or as leasing-making. But both the crime and its penalty being reduced to their proper level by death being prohibited, *it follows* that any penalty short of death is competent. In short, whatever arbitrary times made capital must remain so, *though as a new offence,* next to capital in legal times. His own words are these: "Being now lowered from that degree by the Statute 7 Anne, cap. 21, which abolishes the peculiar treasons of the law of Scotland, these and all other instances of transgression in the like sort, as *mala in se*, and evils too of a very high order, retain, *of course*, their *proper* place and quality, *as acts of sedition* at common law, whereby the offenders are *justly* exposed to the HIGHEST arbitrary punishment. *On these grounds* many convictions have of late years been *obtained.*" These convictions are those that were got in the very trials under examination.

Now it is clear that this is what is called "Missing the Point." Where *a known crime* is punished in one way, and a Statute orders it to be punished in another way—this being the only change—the criminal character of the act continues as before. Therefore, if sedition had been formerly punishable by death, and this punishment had been suppressed, sedition, as a crime, would remain. But it does not follow, that when an act is punishable, no matter how, only *as a specific offence*, and it is declared that it shall no longer constitute this offence, it must remain as an offence *of a different kind.* Yet this is Baron Hume's error. Seditious acts used to be prosecuted as *Treason.* The Statute of Queen

Anne, by introducing the English law of treason, prevented this. *Therefore*, says he, seditious acts remained to be prosecuted *as sedition*. But sedition, *as such*, was *not* a known crime prior to Queen Anne; and how does it become one, merely because the acts which constitute what we would now call sedition are declared by Queen Anne's Act not to be treason? Suppose that the act of counterfeiting the coin had been punishable solely as treason, and that a Statute were to pass, enacting that this should be treason no longer, does this declaration, that it is not to be treason, make it a new offence, never heard of before, called coining?

It is said that sedition is, and always must be, a crime at common law. If it be true that Scotland subsisted, without recognising such a crime, till 1793, this proposition may be reasonably doubted. But let it be assumed. It is next said that in seeking for a punishment the court could not do better than take the precedent of the kindred case of leasing, for which the Act of 1703, passed after the Revolution, permitted banishment. This might be fairly doubted also; for leasing and sedition are not kindred offences. But concede this too. Did a permission to banish imply a permission to carry the exile to a particular place, and to keep him there? Certainly this is not implied in the mere habit of using the *words* "banish" and "transport" as the same.

Accordingly, Baron Hume asserts that, *in point of fact*, transportation, *in the modern sense*, was one of the regular judicial punishments. And it is in evidence of this that he produces that imposing display of cases, in which the strength of his argument is said to lie, and the mere outside of which has

convinced, or confounded, so many willing adherents.

If fixing culprits, during the years of their sentences, to particular places abroad, was really one of the ancient established acts of judicial discretion, the fact is certainly very strange, considering that the modern system of giving convicts over to be removed and detained by the Crown, was only introduced by a Statute in the reign of George the Third. How *could* the practice of transporting arise *as a regular judicial proceeding*, before this, in the face of these two considerations?—*First*, that anciently Scotland had no foreign possession, or at least none that was used for the detention of convicts. *Second*, that, as Sir George Mackenzie lays it down, "With us no judge can confine a man whom he banisheth, to any place without his jurisdiction, because he hath no jurisdiction over other countries, and so cannot make any Acts, or pronounce any sentences relative to them." (*Criminal Law.*)

However, as Hume asserts this practice as a positive fact, the cases on which his statement rests must be examined.

They are forty in number.[1]

Now of these forty, *ten* are *posterior to* 1703; and consequently cannot be referred to as explanatory of what the term "banishment," as used in the Statute of that year, meant. We might as well refer to the cases of yesterday, or even of 1793-94. Most of these ten cases run into the modern period, when, under recent Statutes, the word, and the thing, "transportation," came to obtain its present significance. This leaves thirty cases.

[1] There may possibly be some error in these reckonings; chiefly because the same case may recur twice. But I am pretty sure that the countings are substantially accurate, and within a case or two of the truth.

In *eleven* of these thirty, *no residence in any foreign locality is specified in the sentence.* The prisoners are merely sent out of this country. This leaves nineteen.

In *five* of these nineteen, the prisoners were convicted of *capital* offences; and their bodies being thus at the Crown's disposal, were liable to be sent, and kept, anywhere at its pleasure. Sir George Mackenzie asserts that *nobody* was ever sent to the *plantations*, in the reign of Charles the Second, except on this ground: "As to the sending away people to the plantations, it is answered that none were sent away but such as were taken at Bothwell Bridge, or in Argyll's rebellion; and the turning capital punishment into exile was an act of clemency, not of cruelty." (*Vind. of Charles Second*, Works, vol. ii., folio, p. 344.) This statement cannot be confidently relied on merely upon the vindicator's authority: but wherever the fact did occur, this commutation of a capital sentence destroys the case as an example of judicial transportation. And it may occur, though not in the *form* of a commutation. But in one of these five cases it is in this very form. This leaves fourteen.

And the whole of these *fourteen* were transportations *by the consent of the prisoners*, and in general on their own application; and even in these cases the place of exile is not always prescribed; and when it is, this is sometimes not as essential to the sentence, but from accidental convenience.

What the people got for justice anciently was so tedious and so cruel, that rather than be tried, the accused, and even the suspected, were apt to beg to be sent out of the country at once; and on an application to this effect, the prisoner's desire was com-

plied with without any trial, and frequently without even an indictment. When this course was followed, the prisoner, where he was a person whose continuance here was sure to be detected, was generally left to expatriate himself in his own way. Where he could not be trusted, or had not the means of getting himself off, it was necessary, *but only in order to get him abroad*, to take measures for his removal. Two very simple and effective methods presented themselves. "The younger sons of the Scots gentry were soldiers of fortune in almost every service of Europe, and it appears that they were permitted to recruit at home." (Hume, vol. i. p. 359.) And besides them, there were colonial planters who wanted white slaves, and there were masters of vessels interested in exporting them. The convenience of making use of these gleaners of men, who engaged both to take convicts abroad, and to keep them there, was so great, that nothing else was thought of. Now in most (but not in all) such proceedings a place was mentioned merely because this was useful for the execution of the contract for getting the prisoner taken away, and not as any addition to the punishment of simple expatriation; no more than the sea-sickness, without which few convicts can now reach New South Wales, is meant as an addition to transportation. Accordingly it cannot, I believe, be shown that any locality was ever assigned anciently, where there was any other satisfactory security that the prisoner would stay abroad.

These irregular arrangements, consented to generally by the prisoners, cannot be taken as examples of the orderly practice of a court. These miserable creatures were plainly often compelled to

give an apparent consent, merely from terror and oppression. Hence the Act 1701 expressly forbids transportations upon such consents, unless the consent be given *before a judge*. This implies that formerly these consents were not judicial transactions at all.[1]

Moreover, at least eleven of these thirty precedents were sentences issuing from no court, but from the *Privy Councils of the three, and chiefly of the two, last of the Stewarts*. Except for the meaning of terms, we might as well go to Spain or Venice as to the proceedings of this body, for anything deserving the imitation of a modern judicial tribunal.

Yet Hume feels it necessary to defend; or rather to apologise for, this political inquisition. And, to a certain immaterial extent, what he says (vol. i. p. 357) is true. No doubt the council was partly composed of lawyers, and even of supreme judges; no doubt it had a certain ill-defined criminal jurisdiction; no doubt its general interference with all public, and with innumerable private matters, was conformable to the usage of the age; and no doubt some councils were better than others. But still there is just as little doubt, not merely of the general iniquitous character of the body, but of this —that its peculiar wickedness consisted in *perversions of the law*—that the punishment of political

[1] John Ahannay and Robert Slowan were banished in 1643 by the Justice-Depute, in *virtue of a warrant from the Privy Council*, "without any trial," and they "*accept the sentence*, and become bound to pass away with Capt. Macmath, and to serve him as soldiers in the foreign wars." (Hume, vol. i. p. 362.)

Even the judicial consent was often no protection against great abuse. For example, *in the year* 1755, Sir D. Dalrymple, Advocate-Depute, informs the court that instead of trying Alexander Cameron at Glasgow, HE *had sent him to the tender* lying in Clyde; but that the tender would not take him. This he "*submits*" to the court, and *forthwith* the man is sent to America for life; and, as I read the record, without any other consent than that implied in silence. (*Record*, 25th January 1755.)

proceedings was its favourite food, and that hence its voracity during the religious resistance of the people—which, however, is the period from which most of its cases founded on by the learned Baron are taken.

Nothing can be more just than the estimate of the Privy Council of Scotland by two of the least passionate, and most discriminating, of historical censors. "The parliament" (says Laing, speaking of the year 1661) "was at length adjourned, and the Government was again vested in the Privy Council. At once a court of justice and a council of state, in which policy *must* ever predominate over the laws, the institution *necessarily* became tyrannical; *the judicial functions were united with the executive powers of the State, and a legislative authority was not unfrequently assumed.*" (vol. iv. p. 19.) "The Privy Council" (says Hallam) "was accustomed to extort confession by torture—*that grim divan of bishops, lawyers, and peers,* sucking in the groans of each undaunted enthusiast, in the hope that some imperfect avowal might lead to the sacrifice of other victims, or at least warrant the execution of the present." (*Con. Hist.*, vol. ii. p. 683, 4to, chap. xvii.)

Observe the following example, taken from their proceedings in the year 1704, after the judges had been warned and instructed by the Revolution, and restrained by the Act of 1703. It is the case of Baillie, *one of Hume's cases.* It was brought forward by Blair in Gerrald's trial, as proving triumphantly the court's power to transport for sedition. And its effect was so complete that Eskgrove declares that "if I had any difficulty before, I own an authority quoted this day by Mr. Solicitor-General would at once have done away every

hesitation on the subject." (*State Trials*, vol. xxiii. p. 897.) It was acknowledged to have been a Privy Council case, but Blair thought he had removed all exception on this account, by stating that the Lord President, the Lord Justice-Clerk, and several other judges, had been present; that the accused had six counsel, and that the proceeding occurred in February 1704, only nine months after the passing of the Act in 1703, when the meaning of this Statute could not have been unknown to these lawyers.

Now, after all this, see what the case comes to.

Government had opened some private letters at the post-house, "which gave alarm to the ministers of a plot intended." Upon this they apprehended Baillie, who seems to have been a gentleman, the brother of Manorhall. He, being brought before the council, stated that the Marquis of Annandale and the Duke of Queensberry had been treating with him, in order to entice him to represent certain other noblemen as having been in a plot against her Majesty. On this he was proceeded against, *not for sedition*, but for leasing-making against Queensberry and Annandale, the former of whom was then Secretary of State. The proceedings are well worth the perusal of any one who wishes to see how matters were conducted in the Privy Council, even in its best and last days. They utterly confound and shock all our modern notions, not merely of law, or of form, but of commonplace justice. Blair was correct in saying that the complaint was made upon the Act of 1703. The demand of the libel is that "he ought to be severely punished with the pains of law, or *at least conform to the fourth Act of the last session of this current parliament*" (being the Act 1703.) He was condemned. And what was

the punishment? which is all that we have now to do with.

The Statute provides that the penalties shall be "fining, imprisonment, *or* banishment, or *if the offender be poor*, and not able to pay a fine, *then* to be punished in his body, life and limb always preserved." But the Privy Council, composed of judges though it partly was, declared the prisoner "*infamous*, and have *banished*, and hereby banishes him, *forth of this kingdom for ever;* and have also appointed and ordained, and hereby appoints and ordains, the said David Baillie to be *transported to the West Indies*, and to lie in prison aye and while he be transported, and hereby appoints and ordains the said David Baillie before he be transported to be *set on the pillory* at the Tron, and there to stand from eleven to twelve of the clock in the forenoon," etc. (*State Trials*, vol. xiv. p. 1054.)

It seems to me, from this sentence, that when they meant to fix the prisoner to the West Indies, they felt that the word "banishment" would not do, and that for this object the use of the term "transport" was necessary. This, however, is not very important. But where did they find authority for *infamy* or the *pillory?* Certainly not in the Statute on which they professed to be proceeding. If the pillory was meant as a punishment in the body (which is not the legal view of it), then there was no warrant for it, because, so far as appears, there was no inability to pay a fine, and no fine was imposed. These were *illegal additions* to the punishment by the Privy Council.[1] Yet this was the case that removed all Eskgrove's doubts.

[1] No wonder that such a sentence was not carried into complete effect. Lockhart says that the prisoner underwent the pillory, but this is doubt-

If the proceedings of the Privy Council of Scotland are to be recognised as evidence of the correct practice of the law, or of the understanding of the country, there is no atrocity that may not be sanctioned on the same authority. The suppression of the tyranny of the Crown, *as practised by its getting the Privy Council to dictate to the courts of justice*, was the subject of one of the principal articles in the Declaration of Rights. And the final extinction of this necessarily iniquitous conclave is justly stated by Laing and most other historical observers as one of the great benefits of the Union. Yet this was the body on whose proceedings, and in political cases, supreme British judges avow themselves to have acted in 1794, and which are recommended for the imitation of the successors of these judges by a grave institutional writer.[1]

The conclusion, on the whole, is, that transportation, in our sense of the word, was warranted by nothing that ought to have been considered as a

ful. He was liberated from jail by parliament on 21st July 1704, on account of his health.

[1] The *eleven cases without any place of exile* being specified are the following:—

1. Andrew Henderson, 12th September 1609.—P.
2. William Tweedie, March 1612.—P.
3. James Moffat, 13th September 1615.—P.
4. Colin Bruce, 18th March 1618.—P.
5. George Nicol, 8th March 1633.—P.
6. William and Thomas Mackie, 2d February 1636.—P.
7. David Davidson, 4th April 1637.—P.
8. Janet Spens, 24th July 1676.
9. Archibald Guine, 15th February 1692.
10. Elspeth Johnston, 11th November 1702.
11. Janet Syme, 17th November 1702.

The *fourteen consents* were in the following cases:—

1. Robert Arbroath, 24th August 1626.—P.
2. John Cummin, 15th June 1631.
3. Daniel Nisbet, 22d March 1633.—P.
4. John Lawson, 13th July 1633,—P.
5. James Gordon, etc., 7th August 1635.

precedent,—*by no judicial judgment, by no judicial dictum, by no statute, by the doctrine of no institutional expounder of the law.*

Some will probably be more struck than the author of the Commentaries professes to be with the fact that, anciently, when compulsory residence was meant to form part of the punishment of common law offences, *Statutes were sometimes obtained to sanction this.* Thus the Act 1670, 2, directs that culpable refusal to give evidence (a common law crime) shall be punished by "fine, imprisonment, or banishment by *sending them to his Majesty's plantations in the Indies, or elsewhere as his Majesty's Council shall think fit.*" Baron Hume despises this as merely "*one instance of the employment of a fuller phrase.*"

6. Patrick Davidson, 8th August 1636.
7. John More, 15th November 1636.
8. Alexander Craig, 6th February 1639.
9. Richard Lauder, 6th February 1639.
10. John Tailzour, 25th February 1639.
11. William Barr, 1st March 1639.
12. John Maccarall, 28th October 1639.
13. Henry Malcolm, 19th July 1642.
14. John Ahannay, 6th January 1643.—P.

The *five capital* cases were :—

1. John Vallance, 7th May 1687.
2. Hugh Smith, 7th May 1687.
3. Maxwell and Rankine, 7th November 1690.
4. Helen Scott, 21st November 1693.
5. Thomas Anderson, 12th March 1701.—P.

N.B.—The last was an *express* commutation.

The *eleven* Privy Council cases are marked above by the letter P.

The *ten* posterior to 1703 I need not take down here, as their dates in Hume show them.

So my reckoning stands thus :—

Posterior to 1703, . . .	10
Consents, ...	14
No specified place, . . .	11
Capital, ...	5
Total cases in Hume,	40

The details of the cases are often so confused that this may not be absolutely accurate. But I scarcely think it can be far wrong.

(vol. i. p. 357.) But there are other instances, and Acts of Parliament are not passed for the mere employment of phrases. The sound inference seems to be that, *without express statutory authority*, the court, even in dealing with a common law offence, had no power to send anybody to his Majesty's plantations, or to extend its own jurisdiction into foreign parts.

So the matter stands, exclusive of the power claimed by the court to be its own parliament, and to declare new crimes and invent new punishments at its own discretion. The only plausible case for the court depends on its being held that such a power exists. Without this the ancient practice will not do. If the existence of such a power be assumed, then it is said that the court was bound to exercise it, and that transportation having at least become common before 1793, no other punishment, where judicial discretion was allowed, would have suited the sedition of that period.

The answer to this is twofold.

In the *first* place, the power claimed for the court did not legally exist. I will not stop to discuss this. It is a power that *cannot* legally exist in this or in any other free country. The court shrinks now from its avowal as much as possible; but if it shall ever come to be generally known that such a power is acted upon, parliament will put it down.

In the *second* place, the acknowledgment that the punishment was not absolutely fixed, but that, under this "*native vigour*," it depended on the discretion of the court, raises the view in which it is least possible even to extenuate the conduct of the judges; because, *beyond all doubt*, they had no such precedents for transporting as made a deviation

from the practice improper. *Most certainly* no prisoner had ever been transported for *sedition* before. Then, they had the alternatives of fine, imprisonment, or banishment presented to them by the Statute, as adequate for what they deemed the analogous offence of leasing. And, as applicable to the very day, and to the very emergency before them, they had the *living example of England;* a portion of the empire endangered at that moment by the same crime; and exposed by the greater number, freedom, and ignorance of its people, to far greater peril by popular excitement, but where transportation was not resorted to, and yet the law was upheld.

The principle of excessive severity in the punishment of political offences was condemned by the claim of right, and even by the Act of Parliament (1703), on which the judges professed to be acting. Yet their Lordships, insensible of their opportunity, allowed the very spirit of the old Privy Council to possess them. The dangerousness of the times, which has been the apology of all their defenders, only made their error the greater. When courts of justice are requested to allay political troubles, it is only by calm mildness that they can do so. The prisoners set themselves up as leaders of the people, and there is too much reason to fear that the court fell into the vulgar blunder of believing that it was possible to put down political opinions by exterminating the most prominent of those who express them. Their Lordships seem never to have been aware of the enlightened sentiment of our great philosophical historian—a sentiment fully as applicable to judges as to governors,—that "Rulers can never render so lasting a service to a people as by

the example, in a time of danger, of justice to formidable enemies, and of mercy to obnoxious delinquents. These are glorious examples, for which much is to be hazarded." (Mackintosh, *History of England*, chap. viii., Henry the Eighth.)[1]

Gerrald was sent off in a convict ship, and died soon after reaching New South Wales.

Such was the fate of a man who was thus described, with the eloquence of truth, by Laing towards the close of his speech :—

"My Lord, on the immense disproportion between the punishment and the offence, let me suggest a distinction which I am too much exhausted to illustrate. Clarendon was banished ; Barrington[2] transported. Clarendon, when exiled by a vicious court and a venal monarch, lived abroad to himself and to his country, to illustrate the annals of British story. Bolingbroke, though expelled for treason, lived to return, and, in a corrupt age, to revive the flame of patriotism in every English breast. Atterbury, though in exile and under discountenance, closed the honoured remainder of his life in dignity and peace. But a man whose offence is inferior, whose abilities are equal, and his integrity, I am bold to say, superior to Bolingbroke's ; whose genius may distinguish his name, and enrich the

[1] In discussing the competency of transporting, I take no notice of Lord Dreghorn's objections (*Works*, vol. ii. p. 58), because I think them ill founded, and, even if well founded, frivolous. He carps at the *words* of Muir's sentence, but there is nothing solid in his criticisms. His chief objection is that under the 25 Geo. III. cap. 46, the court, besides transporting, ought to have *adjudged his services*, which Burnett is quite correct in saying (p. 255) they ought not to have done. Then he states (p. 63) that *Braxfield admitted* that a sentence of transportation did not, in effect, bind the convict to remain in the place he was sent to, but that if it did, then a power to *transport* could not be held to be included within the power to *banish* conferred by the Act of 1703. That Braxfield ever made any such statement is incredible. If he did, and was sober, the whole proceedings, and especially his own conduct, are nonsensical.

[2] A famous London pickpocket, recently convicted.

literature of his country, depends on your sentence, whether his future life shall be lost to society, himself doomed to a receptacle of vice and misery, and transported to a shore from which, apparently, there is no return. From the state of his health, I must add, that a sentence of transportation is, in all human probability, a sentence of death." (vol. xxiii. p. 888.)

These sentiments are received now with nearly universal sympathy. But they were transmuted at the time into feelings hostile to the person who had the honour of being the subject of such statements, from such a man. "Both the one and the other of his counsel" (said *Lord Abercromby*, p. 900), "in speaking of the punishment of transportation, stated that his case would be extremely hard, because he was a gentleman, a man who possessed talents, qualities, and *virtues*, which would be useful and ornamental to society. My Lord, I am very sorry that such a man should be in his situation; because if he should be convicted, *it aggravates his crime highly.* Had he been a man ignorant and uninformed, it might have been some apology for his offence; and though such a man, when he transgresses against the laws of his country, must be punished, yet it would have been a good reason for inflicting the mildest punishment that we could, consistently with our duty, inflict. But, my Lord, *if such are the qualifications of the panel now at your bar, so much the deeper and more aggravated is his guilt.* For, my Lord, we all know that to whom much is given, of him much will be required."

In one sense, though not in the proper sense, as applied to the particular case, this is true. Crime by talent and knowledge is less excusable,

and generally more formidable, than when it is committed by stupidity and ignorance ; though certainly this principle can only be received with many qualifications when it is applied to the political offence of sedition—a crime into which, chiefly in consequence of their ability and knowledge, many good men are led. But the objections to his Lordship's observation, in relation to the case before him, are, 1st, That he extracts an aggravation not merely out of the prisoner's intellectual powers, but out of his very *virtues*, and virtue certainly aggravates no crime ; 2d, That he makes both virtues, and *the station and habits of a gentleman*, entitled to no consideration in the matter of *discretionary punishment*. Some punishments are fixed, and do not admit of being mitigated. A gentleman murderer, like every other murderer, must be hanged, and there is only one way of performing this operation. But no *discretionary* punishment can be well administered, except in reference to the particular circumstances ; and even if the principle of equality is to be recognised, how can it be said that transportation is the same suffering to a virtuous gentleman as it is to a low, coarse blackguard ?

So that the mercy of this judge was reserved in regard to political offences for the low and illiterate, who can rarely be tempted, or ennobled, to commit them ; and the very virtues which lead men of a higher order into public affairs, and consequently into the risk of occasional excess—their talent and spirit, their humanity and enthusiasm—are all so many aggravations of that guilt which, at the worst, often consists merely in a generous desire to hasten the removal of real grievances more rapidly than those who convict think safe. And the legal principle being in

favour of equality of punishment—a principle which requires all the circumstances of each case to be taken into view—the man of education and refinement, to whom community with ordinary felons is worse than death, is to be dealt with, *for a political offence*, exactly as a common blackguard, of whom these have long been the chosen associates! When the Earl of Argyle's daughter saved her father's life, for the time, by enabling him to escape, after conviction, in disguise, the Privy Council proposed that she should be *publicly whipped*, which Hallam says (vol. ii. p. 684, 4to, chap. xvii.) was only prevented because "the Duke of York felt as a gentleman upon such a suggestion." I do not believe that Lord Abercromby, who was a gentleman, would have differed from His Royal Highness; but panic and faction had so confounded the logic and the feelings of himself and his colleagues, that he was not aware how directly the reasoning that he applied to Gerrald implied the propriety of whipping the lady. Lord Ellenborough, unrefined by the refinement of his age, made the pillory a part of the sentence passed upon the son of a peer.[1] But this so shocked the feelings of that people, who, of all people upon earth, are the fondest of fair equality of punishment, that not only was this prisoner saved, but the punishment was abolished.

[1] Lord Cochrane.

PROCEEDINGS IN PARLIAMENT.

THESE trials were more than once discussed in parliament.

On the 31st of January 1794, the Earl of Stanhope moved, in the House of Lords, for an address to the king, beseeching that the sentence against Thomas Muir be not carried into effect until the House shall have had time to inquire into the case. His Lordship had, apparently, been very ill instructed, for he took up objections that were quite untenable, and omitted all those that were well founded. But in these respects he was fully as well informed as any of his noble brethren, among all of whom there seems to have been the usual ignorance of our system, and conceit of their own, which distinguishes Englishmen, and especially English lawyers, in thinking of the two.

The motion was supported by nobody except the mover—the contents being 1, the non-contents 49. The opposition was rested on the ground that whatever might be done to *correct* judicial error, it was irregular to address the Crown to *suspend* its execution. "Who ever heard (said Loughborough, the Chancellor) of an address being moved for in this House praying His Majesty to postpone the execution of a sentence" (*Parliamentary Hist.*, vol. xxx. p. 1303.) Even Lauderdale, who approved of the justice of the motion, concurred in this view

of its form. This objection may be parliamentary, but I cannot reconcile it to common sense, especially as applicable to a Scotch prosecution, where, except through the Crown, there is no remedy for judicial error or misconduct. If it be competent for the Crown to protect the subject against an illegal sentence, how can it be incompetent for parliament to ask the Crown to do so? And what protection does Parliament give to the victim of such a sentence, if it can only interfere after the doom is suffered?

In the course of the discussion, two very opposite opinions were delivered as to the general conduct of the court.

On the one side Lord Stanhope said that "if this was the law of Scotland, he would only observe that Scotland had no more liberty than it had under the race of the Stewarts." (*Par. Hist.* vol. xxx. p. 1300.) And Lord Lauderdale (then the leader of the Jacobins in Scotland, now of the tories) stated that "there were circumstances attending these trials which were most dreadful in their nature, and reflected no small disgrace on the jurisprudence of Scotland." (vol. xxx. p. 1302.)

On the other hand, Lord Mansfield (not *the* Lord Mansfield) had the courage to assert that "he could take it upon him to answer, that *in no court under the glorious constitution of this country, had justice been administered with more fidelity.*" (p. 1301.) And the Lord Chancellor (Loughborough) permitted his party zeal to prevail so entirely over his official caution, as to intimate that "if ever their Lordships should think proper to entertain an inquiry into the case, *he would pledge himself* that they should find the conduct of the judges of Scotland had been such as their Lordships would always

DESIRE to find in men intrusted with functions so important." (p. 1303.)

Would that history could be of this opinion! But it will probably think, that no Lord Chancellor ever disgraced himself by grosser rashness.

It is scarcely worth while to state that Thurlow defended the proceedings; because on matters of political or judicial purity his opinion is of as little weight as Loughborough's. But the fact that he did so has produced these sentiments from his latest biographer:—"He resisted the attempt that was made to obtain a reversal of the *atrocious* sentence of transportation passed by the Court of Justiciary, at Edinburgh, on Muir, for advocating parliamentary reform." It is added in a note: "The trials which took place in Scotland about that time cannot now be read without amazement and horror, mixed with praises to heaven that we live in better times. In the year 1834, being a candidate to represent the city of Edinburgh in parliament, I was reproached for not being sufficiently liberal in my opinions. I said truly that although Attorney-General for the Crown, I had uttered sentiments for which, forty years before, I should have been sent to Botany Bay." (Campbell's *Lives of the Chancellors*, vol. v. p. 612.)

See also Campbell's condemnation of Loughborough's conduct on the occasion mentioned in the text. (*Lives of the Chancellors*, vol. vi. p. 264, chap. 172.)

Campbell has since risen to be the Chief-Justice of England. There was an interval of some years between his reaching this station and his ceasing to be Attorney-General. Instead of wasting this period in idleness or in political contention, he com-

posed the *Lives of the Chancellors*, a work which, notwithstanding its many defects, will last as long as the language in which it is written. His elevation to the chief seat on the English bench, though it gives him a natural sympathy with judges, has not abated his horror of the proceedings of our criminal court at the period I am referring to: on the contrary, it is by good judges that these proceedings will ever be most severely condemned. He has spoken to me of them since reaching his present position, and never without indignation and shame.

On 24th February 1794, Mr. Sheridan presented a petition to the House of Commons, in favour of *Palmer*, who was then aboard the transport which was to convey him to New South Wales. The petition described his sentence as "illegal, unjust, oppressive, and unconstitutional," and prayed for such relief as the House should think proper. (*Par. Hist.* vol. xxx. p. 1449.) Mr. Pitt at first opposed the principle of the petition, on the ground that the House could not regularly obstruct the execution of a judicial sentence, and that the correct course was to apply to the Crown for mercy; but at last he agreed to an adjournment of three days—till the 27th. On this, Mr. Whitbread, in order that the pause, and the discussion, might not be made a mockery by the vessel sailing in the meantime, moved an address to His Majesty to prevent its sailing till after the 27th. This motion was rejected by 104 against 34. On the 27th Sheridan moved "that the petition be *committed*." This was not opposed; and the result, in point of form, was, that the "petition was *read*," and nothing more was done.

But in the course of the discussion various

opinions were disclosed as to the merits of the case. Mr. Dundas (Henry, the first Lord Melville) was resolute against even a moment's delay in sending off the convict. He blamed the friends of the prisoner for not having brought the matter forward till they knew that the vessel was about to sail, and repeated a previous assertion, "that the sentence was legal; and that the Court of Justiciary, in passing that sentence, *had exercised a sound discretion.*" (p. 1452.) Mr. Whitbread, senior, fell into the strange blunder of claiming mercy for the prisoner on the ground that he was insane. (p. 1456.) This cruel mistake was corrected, on a subsequent occasion by Whitbread, junior, and Mr. Sheridan, who explained that the lunatic was the prisoner's brother. (p. 1559.) Sheridan, and others, insisted that the prisoner had done nothing beyond promoting what had been recommended by the leading members of the administration which patronised his prosecution. Fox held the sentence to be utterly indefensible, and maintained that the interference of parliament was constitutional, and not unusual. (p. 1460.) The Marquis of Titchfield (an adherent of ministry) thought that "the sentence ought to be suspended, if it was urged by no other arguments than the dictates of humanity." (p. 1459.) "Mr. Wilberforce ridiculed the idea of humanity as applying to Mr. Palmer, *although he had not read his trial.*" [!!] "He declared upon his conscience that he did not conceive the sentence ought to be suspended." (p. 1460.)

The whole subject was brought again before the House of Commons on the 10th of March 1794, upon a motion by Mr. Adam for a copy of the record in the case of Muir,—a proceeding liable to

no objection on the ground of irregularity. Mr. Adam is the person who has since been known to Scotland as the head of the tribunal for introducing trial by jury in civil causes into this country. A thorough Scotchman by birth, tastes, and interests, but an English lawyer, and generally resident in London, he was on friendly terms with the leaders of the profession in both countries, particularly with such of them as acknowledged the principles of the whigs, the party to which he belonged. To the delight of a large circle of friends, this venerable and excellent person still survives,—one of the very best specimens of old age,—afflicted by infirmities enough to sour and to cloud the mind, of which nearly total blindness is not the most troublesome; yet kind, cheerful, and entertaining, his intellect unimpaired, and the last remains of his vigour given to improve civil trial by jury, which his native country certainly owes mainly to his skill and perseverance.

He had prepared himself thoroughly on the facts and on the law of the case, and made a most admirable speech. It was full, luminous, and generally, though not always, sound,—strong, without one unnecessarily offensive word; and besides glancing at the incidental improprieties of the trial, laid open the illegality and the cruelty of the sentence, the exposure of which was his more particular object. Few legal cases have ever been better introduced to either House of Parliament.

The Lord Advocate's answer consisted in a mere repetition of the prosecutor's version of the circumstances, and a re-assertion of the law, as maintained by, or for, his Lordship at the trial.

It is more important to know how the matter

was viewed by English members, in whose country certainly no such proceedings could have occurred.

Sheridan followed the Lord Advocate in a clever and contemptuous speech, of which I see no reason to question that the expressions of doubt and amazement at what was said to be our law, and of abhorrence of the judges by whom he held its defects to have been aggravated, were at least quite sincere.

Mr. Whitbread declared that "since he had a seat in that House he had never heard a speech which so much excited his indignation as that of the Lord Advocate, and he hesitated not to declare that if the law of Scotland was such as represented by the learned Lord, it was a law of tyranny and oppression, and it was absurd to speak of personal liberty in that country." (*Par. Hist.* vol. xxx. p. 1559.)

Mr. Windham acknowledged the principle that cases might arise where it would be proper for the House to inquire into the conduct of judges, though there was no proof of actual illegality; "but he hoped the House would never enter into an inquiry when they had, *as in the present case, proof* before them that the sentence proposed to be inquired into was a *proper* and legal sentence." He did not actually say that he preferred the law of Scotland, in this matter, to that of England; but, with reference to the law of either country, "he, for his part, would be the one to say that IF justice was baulked, and the laws were not adequate to the punishment of crimes, he had no difficulty to declare his opinion that they should be made so." (p. 1161.) A very safe opinion. But not made by courts.

As to this, *Fox*, after reminding Windham of his old opinions as a reformer, said that there was much

virtue in an If. The case, being one not so much of law, as of oppression practised under the forms of law, was one which never failed to rouse the spirit of this just and merciful man. That he should have been technically accurate in Scotch trials was not to have been expected; but his abhorrence of the punishment, and his indignation at those who inflicted it, makes his speech the strongest impeachment of judges (except Lord Macclesfield's impeachment) that has probably occurred in Parliament since the Revolution. "If (said he) the day should ever arrive, which the Lord Advocate seems so anxiously to wish for,—if the tyrannical laws of Scotland should ever be introduced, in opposition to the humane laws of England, it would then be high time for my honourable friends and myself to settle our affairs, and retire to some happier clime, where we might at least enjoy those rights which God has given to man, and which his nature tells him he has a right to demand." (p. 1563.) "Indeed, sir, so striking and disgustful are the whole features of this trial, that when I first heard of them, I could not prevail upon myself to believe that such proceedings had actually taken place. The charge itself, and the manner in which that charge was exhibited, made my blood run cold within me. I read the first edition; I discredited. I read the second and third editions. I was inclined to disbelieve them all; nor would I even believe it now, but in consequence of what I have heard from this Lord Advocate himself." (p. 1565.) He, and all the speakers on that side, asserted that Muir and Palmer[1] had done no more than what had been

[1] I don't see why there is no allusion ever made in this debate to the cases of *Margarot* or *Skirving*, both of which were over long before. I suppose two were enough for the discussion.

done by Mr. Pitt and the Duke of Richmond, whose claim, addressed to the populace, he says, went far beyond petitioning, and demanded reform "as their right." (p. 1571.) He reminded the House how many of themselves had been guilty of popular appeals, out of which, as well as out of what these prisoners had done, constructive sedition might be extracted.

"But there is one strange assertion made by one of the Lords of Justiciary. He says that no man has a right in the Constitution,[1] unless he possesses a landed property; men of personal property, though they may have immense sums in the funds, have no lot or part in the matter. How absurd, how nonsensical, how ridiculous! When judges speak thus with levity, at random, and in a manner that discovers the most profound ignorance of the Constitution, what is the inference I would draw? That the temper of the judges is manifest from such conduct, which never occurred even in the reign of the Stewarts. Another learned Lord said that as he saw no punishment for sedition in our law, he must go into the Roman law; and having recourse to this extra-judicial authority, he at last discovered that the mildest punishment that could be inflicted on the unfortunate gentleman was transportation for fourteen years! The Roman law left it at the learned Lord's discretion to give Mr. Muir either to the gallows! to the wild beasts! or to Botany Bay! and of the whole, he had happily selected the mildest![2] He was utterly amazed when he learned that a judge had seriously supported such unaccountable non-

[1] This refers to Braxfield's observation in the trial of Muir (*State Trials*, vol. xxiii. p. 231) about the lairds alone being entitled to be represented in Parliament.

[2] This was Swinton. (*State Trials*, vol. xxiii. p. 234.)

sense from the bench—such nonsense as ought not to be suffered from the youngest or most ignorant student. He had always entertained the highest veneration for the character of a judge, and his indignation was roused to find that the learned Lord, instead of discharging his duty with the gravity becoming the bench, had acted with ignorance, levity, and hypocrisy. After having put his invention to the rack, he had at last hit upon the mildest punishment, of fourteen years' transportation beyond the seas! Good God! sir, any man of spirit (and such he believed Mr. Muir to be) would prefer death to this mildest instance of the judge's mercy. But another of these learned Lords, or perhaps the same (for with their names I profess myself totally unacquainted[1]), asserted that now that torture was banished, there was no adequate punishment for sedition! Here, sir, is language which shows the temper, the levity, the ignorance, the hypocrisy, of this imprudent man. Let him be either serious or in jest, the sentiment was equally intolerable. I know not which of them advanced such a proposition; but God help the people who have such judges!" (p. 1569.)

Mr. Pitt (rashly) pretended to discuss the Scotch law of the case, and was not more unfortunate than an English gentleman might be expected to be who involves himself with the mysteries of leasing-making, and the Act 1584, and the case of *Baillie*, &c. He gave it as his opinion "that an inquiry into this business would lead to the conclusion, that *no doubt could be entertained* either of the legality of the trials under review, *or of the propriety of the manner in which the Lords of Justiciary had exercised their discretion* upon this occasion" (p. 1572). *He*

[1] It was the same—Swinton.

thought that the judges would have been highly culpable, if, vested as they were with discretionary powers, they had not employed them for the present punishment of such daring delinquents, and the suppression of doctrines so dangerous to the country." (p. 1575).

Mr. Grey (now Earl Grey) corroborated Fox's statement that both the Duke of Richmond and Mr. Pitt, and many others then in the House, "had gone *greater* length than either of the prisoners in recommending universal suffrage, and *telling the people that they must depend on their own exertions* in procuring a parliamentary reform." And "he entirely agreed with Mr. Fox that if the criminal law of Scotland were extended to England, then it would no longer be the country where a freeman could live" (p. 1576).

The motion was rejected by 171 against 32.

The subject was once more brought before the House of Lords on the 15th of April 1794 by a motion by Lord Lauderdale, "for the production of the papers respecting the trial and sentence of Mr. Muir and Mr. Palmer, and any minutes that may have been made in regard to the challenge of jurors, the exhibition of evidence," etc. The motion was confined to these two cases, because his Lordship held that certain peculiarities rendered them particularly unjust.

The report gives the mere bones of his discourse; but still it was plainly a strong, intelligent, and clever speech;—not certainly without bad points (such as that there was no sedition charged in the major proposition of either indictment), but, upon the whole, it hit all the material blots. He maintained, as to both cases,—"1*st*. That the crimes set forth against Mr. Muir and Mr. Palmer were what

the law of Scotland termed leasing-making, etc., and that those indictments charged no other crime whatever; 2*d*. That the punishment of transportation could not, by the law of Scotland, be inflicted for the said crime of leasing-making." (*Par. Hist.* vol. xxxi. p. 267.) And on the particular case of Muir, he objected specially,—1*st*, to his challenge of the Goldsmith Hall jurymen being overruled; 2*d*, to the admission of evidence against him (meaning Flower's book, etc.) of which he had no notice; 3*d*, to his being deprived of the evidence of Russell, who was sent to prison by the court for prevarication. On the great question of the power of transporting, his argument is better in its details than in its enunciation. If nothing could be urged against the sentences, except that the indictments only charge leasing, and that in punishing this offence, the *word* transportation can never be used, nothing could be said against them. But he puts his objections on better grounds in the course of the discussion. And on the soundness of the discretion exercised, assuming these to have been cases of discretion, there is great force in some of his facts. "Had the Scotch judges turned to the cases in 1715, when a rebellion was raging in the country, they would have found, at a time infinitely more perilous to the Government than the present, similar, or rather infinitely more glaring, offences had been punished with a very short imprisonment, and a small fine. Had they looked to the conduct of England they would have found that the publishers of Paine's book, which Muir had only lent, were sentenced to pay a fine of £100; and that in Ireland, Hamilton Rowan, the author of the letter which Muir only read, was sentenced to two years' im-

prisonment." (vol. xxxi. p. 275.) "His surprise at the difference of punishment in the two countries led him to look for antecedent cases in the practice, or in the statute law, of that country (Scotland) to justify these proceedings. He had done this in vain. *Not one case in the whole history of the Scotch criminal law stood upon record either to justify, or even to countenance, these proceedings.*" (p. 263.)

Lord Mansfield, holding the sinecure office of Lord Justice-General,[1] deemed himself bound to defend "that court to which he had the honour to belong." (p. 277.) In doing so, he (literally) *went over* the usual topics; and, among other things, made this assertion: "I have not the pleasure of personal acquaintance with the Lord Justice-Clerk, but I have long heard *the loud voice of fame, that speaks of him as a man of pure and spotless integrity, of great talents, and of a transcendent knowledge of the laws of his country.*" (p. 283.)

Lord Kinnoul "defended the proceedings of the Scotch judges, who, in his opinion, merited the encomium bestowed upon them by his noble friend." (p. 283.)

The *Lord Chancellor* again disgraced himself, as the head of the law, by defending every one of the proceedings, including even the selection of the Goldsmith Hall Jurymen, and the case of *Baillie*.

Lord Lauderdale's motion was rejected without a division. After which the *Lord Chancellor*, not satisfied with a mere refusal to inquire, thought proper to encourage the judges by a positive eulogy on their conduct. For this purpose he moved, and of course the House agreed, "that there is no

[1] He was also cousin by affinity to Lord Henderland; that is, he was full cousin to Henderland's wife.

ground for interfering in the practice of the established courts of criminal justice, as administered under the Constitution, and by which the rights, liberties, and properties of all ranks of subjects are protected." (p. 287.) A very safe motion certainly, if it had not been intended to apply to a particular case. Nobody was objecting to "*criminal justice, as administered under the Constitution.*" The only question was, whether what Muir and Palmer had got had been justice, and whether, in the administration of this justice, the spirit of the Constitution had been acted upon. It was meant as a *compliment by the House of Lords* to the *Scotch* judges *for their conduct in the recent trials.* It served its purpose in Parliament, though certainly not in the country, at the moment; but history has since ascertained the weight of the compliment by weighing the public character of the Chancellor who procured it. No reputation stands lower than that of Loughborough—the sycophant, and the deserter, of every party—the chief author, contrary to any convictions he can be said to have ever had, of the British reign of terror, and who, it was believed, and was said, would have held the great seal under the French Republic rather than not hold it, and would not have scrupled to promote such a republic for the purpose, if necessary.

Technically, this is the best defence of these judges. Parliament approved of their conduct. The completeness of the defence in any other view must depend on our estimate of the value of the opinion of parliament on such matters at such a time. Both Houses partook of the prevailing alarm; this gave Government overwhelming majorities on every question; the motions were discussed entirely as

party objects; and Scotch law was not a matter on which almost any person was either intelligent or docile. The parliament which sat in 1794 *could* not have been candid on such a subject. It could not have done anything which might have had the appearance of condemning judges for undue severity to popular political offenders, without virtually reversing its feelings and ends.

The whigs could not possibly avoid bringing the matter forward. But the result was very unfortunate. It hardened Government against mercy to the prisoners, by making the stern execution of the sentences a point of party triumph; and it encouraged judges, who not only saw their sentences approved by both Houses, but every part even of their tone and demeanour praised by the head of the law, to persevere in courses so greatly admired.[1]

[1] Contrast these discussions, in 1794, with the debate in the Commons on the judicial conduct of Lord Abinger on the 21st of February 1843. There cannot be a more striking example of the extent to which the forty-nine years that intervened between these two periods had changed the feelings of the country. Lord Abinger had been sent to try criminal Chartists; and in the course of his addresses to juries had indulged in political opinions. His general tone was objected to, but the *worst* thing specially found fault with was, his telling the grand jury at Chester that "the object of the prisoners was, the attainment of universal suffrage, annual parliaments, and vote by ballot; the necessary consequences of which would be, that those who have no property would make laws for those who have, and the destruction of the monarchy and aristocracy must necessarily ensue." This was exactly one of our Braxfield's old judicial topics; but it was less reprehensible when addressed to a grand, than to a petty, jury. Yet no one member, even of Government, directly defended this introduction of political matter, by judges, into judicial proceedings. Some apologise; some compliment his Lordship for his general eminence; and some doubt the language. But there is no indication that if he had behaved like our Scotch judges systematically, or had even approached some of their more outrageous indecencies, he would have been allowed to sit on the bench again. The sole ground (and a very wise one) on which the motion for inquiry was resisted, was, that such a motion should never be acceded to except where, if the thing complained of should be established, a resolution by Parliament for *dismissal* must be the consequence; and that the misconduct here was not so gross as to imply this result. Still 73 voted even for inquiry, against 228. The remarkable circumstance is the entire change of sentiment since 1794,—over the whole House.

In his speech for Hamilton Rowan (*Speeches*, p. 185) Curran has one of his Irish flights on the sentences pronounced on Muir, Palmer, Margarot, and Skirving; Gerrald had not then been tried. "There is a sort of aspiring and adventurous credulity, which disdains assenting to obvious truths, and delights in catching at the improbability of circumstances as its best ground of faith. To what other cause, gentlemen, can you ascribe that in the wise, the reflecting, the philosophic, nation of Great Britain, a printer has been gravely found guilty of a libel, for publishing these resolutions to which the present Minister of that kingdom had actually subscribed his name? *To what other cause* can you ascribe, what in my mind is still more astonishing, in such a country as Scotland—a nation cast in the happy medium between the spiritless acquiescence of submissive poverty, and the sturdy credulity of pampered wealth; cool and ardent, adventurous and persevering; winging her eagle flight against the blaze of every science, with an eye that never winks, and a wing that never tires; crowned, as she is, with the spoils of every art, and decked with the wreath of every muse, from the deep and scrutinising researches of her Hume, to the sweet and simple, but not less sublime and pathetic, morality of her Burns; how, from the bosom of a country like that, genius and character, and talents, should be banished to a distant, barbarous soil, condemned to pine under the horrid communion of vulgar vice and base-born profligacy, for twice the period that ordinary calculation gives to the continuance of human life."

This is eloquent, but no more. The circumstances selected as descriptive of Scotland had no reference to its political character, and were perfectly consistent

with slavery. And the orator soars far too high when he supposes that our prosecutors, judges, or juries, were moved by anything so metaphysical as aspiring credulity, or the pleasure of catching at improbabilities. Descending to earth, he would have found two practical things, one called panic, the other party spirit, which would have explained the whole phenomenon.

XIV.—Case of GEORGE MEALMAKER, 10th, 11th, and 12th January 1798.[1]

BURNETT, who saw no injustice in any of these proceedings, and even if he had, was very probably not aware that injustice, however triumphant for a time, never allayed discontent, remarks, with great simplicity (p. 255) that "the British Convention was by these proceedings put an end to, but the spirit that had been raised in the country was far from being put down. On the contrary, it *seemed to gain strength by the check it had received by the above convictions.*" Rather an awkward commentary. But the fact undoubtedly was, that these trials, instead of reconciling the disaffected to the law, provoked them to defy it; and while they increased the insolence of every adherent of the party in power, impaired the confidence of even their reasonable opponents in the administration of political justice.

About the year 1797, societies of "United Irishmen," "United Scotsmen," and "United Englishmen" were formed in each of these countries; which, connected as they were with the rebellion which broke out in Ireland in 1798, were unquestionably of a criminal and most dangerous character. They acted by secret meetings, affiliated branches, and unlawful oaths; and however innocent individual members might be, the views of the leaders

[1] *State Trials*, vol. xxvi. p. 1135.

certainly went far beyond any reform, even universal suffrage and annual parliaments. To check such associations, the Act of the 37th Geo. III. cap. 123, was passed on the 19th of July 1797. The principal object and enactment of this statute was to prevent the taking or administering of certain oaths or engagements, which acts it was provided should be punished by transportation for any period not *exceeding seven* years.

Mealmaker was the first person who was tried in Scotland under this Act. Had he been tried under it alone, his case would not have come within the scope of this examination, which is confined to sedition. But he was charged with sedition also, and was convicted of this offence.

The indictment sets forth *sedition, as also a violation of the statute.* The facts stated in reference to the infringement of the Act were, that the Society of United Scotsmen was an association which, under the pretence of reform, aimed at rebellion; that besides secret committees and meetings, signs, countersigns, private words, etc., its members were bound, by an engagement called "the test of secrecy," never to inform or give evidence against each other; and that the prisoner, being delegate for Dundee, took and administered this engagement. And the facts on which the general charge of sedition rested were, in substance, that this society was of a seditious character; that the prisoner was one of its most active promoters; and that he composed and distributed "various seditious and inflammatory papers or pamphlets, the general tendency of which was to excite a spirit of disloyalty to the king and of disaffection to the existing laws and constitution of Great Britain,"—of which papers two

are specified, one being "The moral and political Catechism of man, or a Dialogue between a citizen of the world and an inhabitant of Britain," the other a publication entitled "Resolutions and Constitution of the Society of United Scotsmen." It is a peculiarity in this indictment that *it quotes no words* from either of these publications, but merely asserts, in general, that they are seditious and inflammatory.

Since the trial of Gerrald, Lord Henderland had died (16th March 1795), and had been succeeded by Lord Craig; and Lord Abercromby had died (17th November 1795), and been succeeded by Lord Methven. These two, along with Dunsinnan and Eskgrove, formed the court. Braxfield, who died next year (30th May 1799), was unwell; and Eskgrove, who afterwards succeeded him as Justice-Clerk, presided. Craig and Methven were good, respectable men; the former formal and empty; the latter heavy and soft, but benevolent, and a gentleman. Neither of them had any marked political intemperance; but neither were they superior to the prejudices which, in those days, affected the class to which they belonged.

The prosecution was conducted by the Lord Advocate, Blair and Burnett; the defence by John Clerk and one Alexander Whyte, junior.

But the proceedings are so imperfectly reported, even in the *State Trials* (vol. xxvi. p. 1135), that no opinion can be formed either of the facts, or of the manner in which the case was managed. The evidence and the speech of the Lord Advocate are very meagrely given; and the speech in defence, the summing up, and the observations from the bench, are not given at all. In short, the case is not reported.

Some objections were taken to the relevancy, but what they were is not very apparent from the few words ascribed to the counsel. Burnett says (p. 260) that they were nearly the same with those that had been disregarded in the former trials. This seems somewhat improbable, because the cases were in all respects different. It is not very likely that in the year 1798 John Clerk, in resisting an indictment founded on a prisoner being one of the Society of United Scotsmen, and a distributor of the "Moral and Political Catechism of Man," would repeat arguments applied in the year 1794 to the case of persons accused of accession to the British Convention and the circulation of Paine's *Rights of Man*. But whatever the objections were, the report, such as it is, suggests no ground for doubting the propriety of their being repelled.

The evidence (if what be given deserves the name) clearly establishes the statutory offence, and the circulation of the writings; but as no part of these writings is quoted, it is impossible for us to say whether they were seditious or not. The speech assigned to the Lord Advocate professes to give his Lordship's construction of certain of the passages; but if these contain the worst sedition in the pamphlets, it is probable that most candid people will think now that the case was by no means clear. For what his Lordship is chiefly made to object to is, that what the prisoner and his friends aimed at was, "annual parliaments and universal suffrage," and "*for* THIS they form themselves into a Society of United Scotsmen, declaring that they will never desist till they have obtained their object," (vol. xxvi. p. 1160); that "in another part they declare that the will of the *majority* is not rebellion,"

(p. 1161); and that "in another part of the pamphlet it is said that nothing is able to resist a determined *people*." (p. 1161). Since there were oaths or engagements of secrecy, it is not unreasonable to conclude that there was deeper sedition than what the reporter makes his Lordship extract from it.

He adopted the opinion, formerly expressed by the court, that the exercise of privileges, unquestionably constitutional generally, might be rendered seditious by mere inaptitude of time. The first quotation stated that they professed themselves friends of good order, etc. "Now," said his Lordship, "if they were so, *is this the time*—this the period—which friends of good order would fix upon *for inquiring into the defects of our Government*, and raising up complaints of grievances, when every good man would feel it his duty to make every exertion in behalf of his country, and in allaying discontents?"

All that we are told of the defence is, that "Mr. Clerk, on the part of the panel, made a very excellent reply to the Lord Advocate, in which he employed much ingenuity in the interpretation to be given to the meaning of the different exceptionable parts of the pamphlet." (p. 1162.)

After which, "Lord Eskgrove, in the absence of the Lord Justice-Clerk, summed up the evidence."

The jury unanimously found the prisoner guilty of the crimes libelled; and he was sentenced, *generally*, and without any discrimination of offences, to transportation for fourteen years.

I have seen other examples of one general punishment for a plurality of distinct crimes of different kinds; but they have always appeared to me to be incorrect, if not illegal and inoperative. The *whole* fourteen years here could not be for the

offence at common law, otherwise the statutory crime must have gone unpunished. Nor could they all be for the statutory crime; because for it the Act only authorises transportation for a period *not exceeding seven* years. How much of the time, therefore, was for each? For one-half of it might have been given to each offence; or thirteen and a half years might have been allotted to the sedition, and six months to the unlawful oaths. The sentence afforded no means of extricating the matter, in the event of the prisoner having received a pardon for one of the crimes. Would he still have had to complete the fourteen years? or how much of them? And to which of the delicts would he have been entitled to ascribe the portion that had passed? If in the end of the seventh year he had been forgiven the statutory crime, he might have maintained that these seven had been suffered for the sedition, and that, as *some* period *must* have been intended for the pardoned offence, he could not have other seven to endure. But, on the other hand, the Crown might have argued that the past seven belonged to the Act of Parliament, and that other seven were still due to the common law.

In all such cases, doubts should be avoided by a specific appropriation of time to each delinquency, at least where they are of different sorts.

The prisoner (a weaver in Dundee) was transported, I believe, but I do not know his subsequent history. I was present—a lad in the gallery—when he received his sentence, and remember his parting speech at this hour.

XV.—Case of Angus Cameron and James Menzies, 15th and 17th January 1798.[1]

These two persons were accused of sedition, mobbing, and rioting.

The judges were Eskgrove, Craig, Dunsinnan, and Methven.

The counsel for the prosecution were the Lord Advocate (Dundas), the Solicitor-General (Blair), and Mr. James Oswald, Advocate-Depute. The last was younger of Dunnikier—an able man, who died a few years afterwards.

The prisoners' counsel were John Clerk, James Fergusson, and James Graham. Fergusson was then, and continued through his whole life, which extended till the year 1842, a steady but liberal tory. He was one of the four judges in the Consistorial Court when it was abolished in 1830, and died one of the Principal Clerks of Session. His abilities were not inconsiderable; but for practical purposes were made nearly useless by the greatest Hibernianism of manner and of spirit that probably any Scotchman was ever inspired by. He was a general favourite, good-hearted, restless, social, and hilarious; his blunders and absence kept Edinburgh laughing for nearly half a century. Whatever else people fought about, they all liked Jamie Fergusson. James Graham was afterwards the author of "The Sabbath" and other poems, and died an Episcopal

[1] *State Trials*, vol. xxvi. p. 1170.

clergyman in 1811. There never was a better man. Too good for the law, and indeed too benevolent for this world—the patron of birds, beggars, slaves, and of all beautiful or oppressed creatures, his poetical republicanism made it impossible for him to see anything but tyranny in any State prosecution. But he had no opportunity of letting off his amiable indignation on this occasion. For after appearing and pleading not guilty, and undergoing a debate on the relevancy, Cameron, who was the person chiefly aimed at, took advantage of an adjournment to escape, and was outlawed; and the proceedings against Menzies were abandoned.

I only mention the case because the *word* sedition is sprinkled over the libel. It is said (*State Trials*, vol. xxvi. p. 1171) that the relevancy was sustained; and I suppose, from the interlocutor, that this includes the relevancy of the charge of sedition. It is difficult to judge of any such matter without seeing the grounds on which the relevancy was attacked and defended—as to which there is no report; but, looking merely at the indictment, I have great difficulty in discovering how the relevancy of this particular charge could be sustained, or where, indeed, except in a few casual and apparently meaningless words, the charge is even made.

The crime really meant to be prosecuted was that of mobbing and rioting, "*more especially* with the intent and purpose of violently opposing and resisting a public law;" and the facts stated are, in substance, that the prisoners were active in a mob which resisted the execution of the statute for raising a militia in Scotland. It is a description of mere mobbing and rioting; only the *terms* sedition and seditious are thrown in here and there, appa-

rently at random. Thus the object of the mob is said to have been "illegal and seditious;" it is called a "riotous and seditious mob," a "wicked and seditious assembly;" where it is said that the prisoners "did utter many wicked and seditious speeches, tending to excite the people to attend a tumultuous assembly as aforesaid; thus endeavouring, as far as it lay in your power, to procure an illegal and seditious convocation of the lieges." But no facts are stated, no words are given, to sustain, or even to explain, the charge of sedition. It looks as if Burnett had merely told his clerk to put in the word sedition occasionally, where he could find room. I do not understand how a relevant charge can be made by a mere slight verbal garnishing.

XVI.—Case of Robert Jaffray, Stirling. 6th September 1798.

This case is not reported even in the *State Trials*, and there is only the usual meagre entries of the proceedings in the record.

The counsel are not named. Lord Methven was the judge.

The major proposition of the indictment states that "sedition, *as also* the uttering seditious speeches, *are crimes*," etc. He must have sharp eyes who can see a distinction between these two. The only fact set forth in the minor is, that the prisoner (a weaver), having been in a party at a public-house, had given, and twice repeated, as a toast, "The old dog's head cut off; the bitch hanged; and all the whelps drowned;" thereby meaning "death and destruction to the king, queen, and royal family." But in addition to this precise and most relevant fact, the framer of the libel was at the pains to assert that the prisoner "did further, time and place libelled, *as well as on other occasions*, behave and express himself in a manner *unbecoming a faithful and loyal subject*." In support of this general charge there is no circumstance whatever stated. The libel, however, was found relevant only "in so far as regards the *special act of sedition committed upon the evening libelled*."

Our practice at this period, and for long afterwards, was very odd. A plea of guilty did not

supersede a verdict. It was only evidence, though evidence of a conclusive character. The prisoner was first asked if he was guilty or not. Even when he said guilty, a jury was empanelled, and then he was asked again, in presence of the jury, what he pleaded? If he adhered to his plea of guilty, the jury then found him guilty "*in terms of his confession.*" This nonsense was admired and defended as one of the great bulwarks which it was Jacobinal to attempt to remove, for many years after this. Since the plea was only evidence, the friends of antiquated absurdities never could explain what they would do if a jury had chosen to acquit.

The prisoner pleaded not guilty, but (foolishly) admitted "that he gave the toast libelled, but without any criminal intention whatever." Instead of simply recording this as a plea of not guilty, the admission was taken down, and afterwards made a part of the prosecutor's evidence. The record bears that the prisoner's declaration was read, as "also the panel's admission upon reading the indictment, *which was again read over, and judicially adhered to by the panel, in presence of the court and jury.*" If the admission had been contained in the prisoner's defences, it would clearly have been liable to be used against him. But though nothing be more common than for prisoners to hurt themselves by injudicious additions to their plea of not guilty, I have never seen these slips taken advantage of; and asking, or even permitting a prisoner afterwards to commit himself to any such statement by subscribing it, in order that it may instantly be employed against him, was a proceeding which would scarcely be allowed now.

The jury "by a *plurality* of voices, find it proved

that the said Robert Jaffray, panel, proposed and repeated the toast libelled, *and with the meaning and intention libelled.*" They might as well have said guilty in plain terms; but the special facts which they find, necessarily imply this result. Mark the *plurality!* It was the first time that any portion of any Scotch jury was for acquitting any prisoner of any sedition.

He was sentenced to three months' imprisonment, and to keep the peace for one year, under the penalty of 100 merks Scots—apparently a very lenient punishment.

XVII.—Case of David Black and James Paterson, Perth, 20th September 1798.[1]

This case was very similar to that of Mealmaker.

The indictment, in its major proposition, charges sedition at common law, and a violation of the 37th of Geo. III. cap. 123, against taking or administering unlawful oaths. The minor proposition sets forth that the prisoners were active members of the Society of United Scotsmen; that this was a seditious association; that at its meetings the prisoners made speeches, which, "by inveighing against the Government and Constitution of the country, did all that in them (the prisoners) lay to excite and increase a spirit of discontent, and ultimately of resistance, to the established authorities;" that they applauded and circulated Paine's *Rights of Man* and *Age of Reason*, and "most *traitorously*" expressed sorrow for the success of his Majesty's arms, and joy at the existing rebellion in Ireland; and that they took and administered a criminal oath or engagement, binding each other to secrecy. The material difference between this indictment and Mealmaker's is, that in this one there is no charge of sedition founded on the circulation of unrecited and unknown pamphlets. Paine's works had been often condemned already, and were therefore familiar to everybody.

The court was composed of Lords Dunsinnan

[1] *State Trials*, vol. xxvi. p. 1179.

and Swinton. Mr. John Anstruther was the Lord Advocate's Deputy, and he was assisted by Mr. Joseph M'Cormick, both of whom I knew well afterwards. M'Cormick's dulness made it almost unfair to class him among intelligent beings. Anstruther (of Ardie, in Fife) had been in the army, and with his grave visage, stiff manner, and thick queue, carried the appearance of an old major to a pretty advanced life. He was so entirely out of the legal profession that had I not seen his name on the record, I could not have supposed that he could ever have been either asked or disposed to conduct a prosecution. He afterwards became one of our commissaries, which means one of the judges of our consistorial court, a situation which supplied him with that store of extraordinary and indecorous anecdote, which, when safely set, he used to give out with a polite gravity of manner that made the exhibition more odd. He lived very retiredly, and was liked by the few friends he troubled himself with. The defence was conducted by Clerk and Hagart. Black, like a sensible man, let himself be outlawed for non-appearance.

The libel was found relevant as against Paterson, and indeed it does not appear that any objections were stated to it, nor am I aware that any could have been stated.

Neither the evidence nor any speeches are reported. (*State Trials*, vol. xxvi. p. 1179.) The jury unanimously acquitted the prisoner of the statutory offence, *and by a plurality* found him guilty of sedition at common law.

He was sentenced to five years' transportation.

The sentence repeated the blunder which had been noticed in parliament, and avoided in Meal-

maker's case, of making the capital certification only apply to his returning illegally to *Great Britain.* (vol. xxvi. p. 1190.)

Both of the accused were common weavers, yet the jury that tried Paterson, *as picked*, contained no fewer than *eleven* landed gentlemen.

XVIII.—Case of William Maxwell, Edinburgh, 23d June 1800.[1]

The judges present at this case were Eskgrove, now Justice-Clerk, Dunsinnan, Craig, Methven, and Cullen. The last had only been appointed to the Justiciary, in the room of Swinton, a year before. He was one of the sons of the great physician—an able man, literary, and a respectable lawyer, with rather elegant manners; but idle and dissipated, tarnished by a disreputable marriage, and greatly injured, in reference not merely to the bench but to the higher departments of his profession as a counsel, by what, nevertheless, was his peculiarity and his attraction in social life—a power of mimicry which all contemporary accounts concur in describing as unrivalled. I do not know that he stooped to make faces and throw himself into postures; but he could imitate the voices, the language, and the *sentiments* of others with inconceivable success.

Among the prisoner's counsel there was one now brilliant name—then a young man, who had only put on his gown a few weeks before, and whose first case this probably was. They were James Fergusson, James Graham, and *Henry Brougham.*

The prisoner, lately a sergeant in the militia, was one of the United Scotsmen; and his indictment, in so far as it describes the constitution, means, and

[1] From the Record, it not being reported, so far as I know.

objects of that society, is almost in the very identical words with that of Mealmaker. It states that sedition is a crime, and then quotes the statute against administering unlawful oaths; and alleges that the prisoner is guilty "of all and each, or of one or other of the foresaid *crimes;*" in so far as he was an active member of the society, and administered certain criminal oaths or engagements to various persons, but particularly to soldiers under his influence; and had distributed "a most wicked and seditious poem in your own handwriting, entituled A Catch."

The prisoner pleaded "guilty." He did not, in answering to the original question, whether he pleaded guilty or not, specify what he was guilty of, but pleaded "guilty" in general. This must be taken as a plea of guilty *to the whole libel*—that is, guilty of *both* offences. But this was made clearer when, according to the form of proceeding then in use, he repeated his plea before the jury. For, the jury being sworn, and "the panel being interrogated whether he was guilty or not guilty of the *crimes* charged in the indictment against him, he answered that he pleads guilty." The duty of the jury after this consisted in their finding him guilty in terms of his confession. But the fact is, that they only "all in one voice find the said William Maxwell, panel, guilty of the *crime* libelled, in respect of his judicial confession."

It is plain that their not convicting him of *both* crimes was a mere blunder. But, like other blunders, not committed by him, the prisoner was entitled to any benefit that could legally be got from it. What this benefit, if claimed, might have been, I do not say. But when a prisoner is accused of two offences,

and only found guilty of one, without its being stated, in the written and unchangeable verdict, which one the jury mean, I should think that the objection of the verdict being void from uncertainty might be maintained as justly as it ever can be.

No objection, however, was stated either by counsel or by the judges, and the prisoner was transported for seven years.

XIX.—Case of Thomas Wilson, Perth, 7th September 1802.[1]

The prisoner was a weaver, and all his offences are described as being aggravated by his having also been a volunteer. This circumstance may appear to these who did not live at the time as too immaterial. But it must be recollected that the volunteers of those days not only took the oath of allegiance, but took the king's pay, and were intrusted with arms for the very purpose of repelling the king's enemies, and maintaining the royal safety and authority. One of the indirect objects and tendencies of the institution of these bodies of citizen soldiers was to wean the popular mind from French politics, and to interest them in the war and in the internal peace of the country. Hence all disloyalty in that quarter was peculiarly dangerous and offensive.

The prisoner was charged with "*sedition, or* the uttering and using of seditious language and sentiments, especially by any person serving under us in any volunteer corps," etc. I should think that, instead of thus setting forth a plurality of crimes in the major proposition, it would have been more like a skilful accuser to have charged sedition generally, and then to have explained in the minor that it was by the uttering of certain words that the sedition

[1] This case is not reported.

had been committed. But the Crown counsel at that period seem to have always been anxious to strike their key-note at the very outset, and to insinuate their leading facts into their first proclamation of the general charge. One effect of this was that it seems to have puzzled them to count the number of the offences which they themselves meant to set forth. They sometimes announced only one crime, and then, because the annunciation of it was complicated with the facts, they concluded that the prisoner was guilty of the foresaid *crimes*. And on the other hand, the process was sometimes just reversed. On the present occasion the Depute Advocate seems to have been unusually distracted; for he first proclaims that "sedition, or the uttering and using seditious language and sentiments, etc., *is a crime;*" and then he adds: "Yet true it is, and of verity, that the said Thomas Wilson, above complained upon, has presumed to commit, and is guilty, actor or art and part, of the foresaid crime *or crimes* aggravated as said is." The prisoner would not have been unreasonable if he had asked how many offences he was meant to be accused of.

He had been employed with several others in reaping the crop of John Miller, a farmer; and his guilt consisted in his speaking sedition to his fellow-shearers. One of his sentiments was that he wished "that the overthrow of the British Constitution might take place, and hoped that the said John Miller might see it, and that he, the said Thomas Wilson, and his associates, would then be the proprietors of the said John Miller, his farm." Another of his iniquities, and a very great one unquestionably for a volunteer, was in saying, "that he trusted

that Buonaparte and the French would soon be over, and bring about a revolution, and put all things to rights, and that he would immediately join them." And still worse was his sentiment in reference to the recent attempt by Hadfield upon the king's life. "He was sorry the king was not shot, and he could see his heart, or his heart's blood, on the point of his bayonet."

The judges were Eskgrove and Methven, the latter of whom tried the case. Mr. John H. Forbes, now a very respectable judge, was Advocate Depute. Hagart led the defence, assisted by another young man, who was just beginning that career of public virtue and of professional weight, which has since raised him to all the honours that the law can confer. This was James Moncreiff.

The prisoner pleaded not guilty. Evidence was led on both sides, and the jury, after being addressed by Forbes, Hagart, and Methven, unanimously found "the libel proven."

The sentence was a month's imprisonment, and banishment from *Scotland* for two years,—a serious infliction on a Scotch weaver, who had probably never been much beyond Strathmiglo, and was driven from his native country without money or a character; but certainly not the least beyond what he deserved. Two years' banishment was better than two years' imprisonment, and nobody could have thought this too much.

OBSERVATIONS.

AFTER the case of *Wilson* in 1802, no charge of sedition was preferred, so far as I can ascertain, in Scotland till the year 1817.

There are some who describe this truce as the natural and blessed result of what they term the salutary examples which had rewarded the public accuser's first efforts in this department. These persons forget that, in a free country, opinions and their expression, which had formed the basis of the seditious matter in the more important of these first trials, are scarcely ever put down by punishment; and that though severity may operate through mere terror for a short season, it never prevents the ultimate progress of thought; nor, except by taking off a few troublesome individuals—which is only the convenience of the moment—ever permanently consolidates public tranquillity. How often are vast State prosecutions got up, which, whatever form or importance faction may assign to them, are in reality instituted for the suppression of doctrines dangerous to existing power, and end in the fall of some marked and perhaps spotless victim; and then the dignity and apparatus of the scene is scarcely closed, before reflecting men, even of the triumphing party, begin to observe that the show and the sacrifice might as well have been avoided; that it is the circumstances of the age that produce, and can alone allay, the appetite for innovation,

and that a large portion of the blood which has been shed on the political scaffold might have been safely spared. It is not penal justice, still less penal cruelty, and least of all penal unfairness, that checks, or even averts, the movements of public opinion. These may embitter political opposition, and aggravate popular extravagance, but they rarely mitigate either.

It is a poor delusion, therefore, to suppose that the seditious spirit inspired by the French Revolution was extinguished by Braxfield and his transportations. It died away because the irritation provoked by these trials grew fainter, and because the times changed. Facts abated the admiration with which enthusiastic men had beheld the opening of the French drama, a war which gave Britain the commerce of the world, and drove distress for a season from her subjects; terror of invasion united all ranks in defence of the country; the prostration of the rest of Europe, contrasted with our independence, withdrew public attention from the consideration of the sacrifices by which this glory was purchased; and the jealousy of even the popular parliamentary leaders was lulled by the fear of dimming our warlike splendour, in reference to abuses which, though destined to provoke discontent as soon as they should be discussed, were allowed, as if by unanimous agreement, to accumulate round every part of our system in the meantime. These, and not the terrors of criminal law, were the causes of the fifteen years' quiet which succeeded the judicial paroxysm that began in 1793.

And what produced the second attack in 1817? Certainly not the oblivion of the old transportations.

But the cessation of a twenty years' war gave a temporary shock to all our foreign relations, and disturbed every internal arrangement. This mercantile paralysis might have soon passed off, if the general system had been sound. But it was aggravated by many collateral misfortunes, tending strongly towards the growth of discontent—such as bad seasons, the personal unpopularity of the Prince Regent, and the frightful condition of Ireland. A new generation, too, had come into public action, which had no personal recollection of the French Revolution, and on whom the intimation of its horrors, which they had too long heard as the objection to every right measure, had ceased to have much effect. As soon as peace—that distant event for the arrival of which every reform had been adjourned—lifted up the flood-gates of discussion, it soon appeared that beneath the surface of our long course of warlike self-satisfaction an under-current of new opinions, all pointing towards free inquiry, resolute reform, and complete toleration, had been setting in, and was already so strong that the old possessors of power were startled, and saw that they could no longer resist by merely appealing to their parliamentary majorities.

In the midst of this combination of popular suffering and encroaching claim, a new element arose, which operated as a proximate cause of discontent to an extent which those who only live since economy has become the first ministerial virtue cannot conceive. The recent contest had required rivers of gold and clouds of public officers. It was impossible to reduce the war establishment and its consequent taxation at once; but much irritation might have been avoided if the people had

had reason to believe that Government was really sincere in reducing it gradually. But ministers, naturally desirous to prolong the means of influence, yielded no economical claim without a struggle. Hence the exposition of the public extravagance formed one of the easiest, and by far the most effectual, of all the topics for exciting the anger of the people, who were readily persuaded by hunger to ascribe their privations to the folly or oppression of their rulers.

These circumstances revived scenes new to the young, but which reminded the old of the days of 1793—great meetings in the open air, violent petitions, crazy projects, new restrictive laws on the expression of opinions, the burning of machinery, outrageous loyalty, popular excesses, lecturing demagogues, wild theories of government, universal excitement. Public fever implies hot thoughts and hot words, and a state of mind very unfit for the dispassionate appreciation of party motives or actions. Yet, as it is only in seasons of excitement that political excesses are committed, these are, unfortunately, the principal occasions on which the great duty of candour has to be performed by courts. Hence the wisdom of abstaining from political prosecutions, while there is any hope that the danger to be repressed may evaporate of itself. Slightness in the cases tried is sufficient proof that the trials were unnecessary. Tested by this rule, there can be little doubt that it would have been wise not to have instituted the second series of prosecutions for sedition, which began in 1817.

By this time the old criminal judges were all gone. Their seats were now occupied by David

Boyle, Lord Justice-Clerk; George Fergusson, Lord Hermand; Archibald Campbell, Lord Succoth; Adam Gillies, Lord Gillies; David Monypenny, Lord Pitmilly; and David Douglas, Lord Reston.

These were all excellent men. And they had all the advantage of acting in an age which, though violent enough, would not have tolerated the indecorum of some of their predecessors. What they might have been in 1794, when moderation was hated by their party, it would be needless to conjecture. The ineffaceable misfortune of them all, except Gillies, was, that their public taste had been formed under the influence and for the service of the old tory party, which still domineered. Their whole views and feelings were tinged with the colour derived from this unfavourable source. Among other dogmas, Hume was their idol in criminal law; Braxfield, and the year 1794, was to them the golden age of Scotch penal jurisprudence.

In spite of this bad education, Boyle, the head of the court, has always been a laborious, honest judge—with considerable defects, but these redeemed by the greatest of all judicial virtues, an exclusive ambition to do his duty, and the constant prevalence of the feelings of a gentleman. Friends may have lamented his prejudices, or smiled at his manner; but no enemy ever suspected his integrity, or his intended candour. He is a judge on whose honour the public had perfect reliance, even in the most violent times, and from whom his own party might always despair of obtaining any advantage which was only to be gained by his doing what he thought wrong.

Hermand, the son of Kilkerran, was greatly senior to his brethren, and of the real old school,

a school prior even to the French Revolution—the most original and picturesque of men.

Gillies was the person who had distinguished himself as Gerrald's counsel. Clearly the ablest man, he was by no means the best judge, in the court. His whig principles had not yet been abandoned, and he was the first of that faith who had been raised to the bench by a tory Government—an exception which he owed to his reputation for law, and the kindness of the Lord President Hope.

Pitmilly had recently been Solicitor-General, a sensible lawyer, with a beautifully cold, still, judge-like air and tone.

Succoth, who was beneath them all in professional reputation, was the son of Sir Ilay Campbell —a slow, dull judge, but a hospitable gentleman, and profound in the science of gastronomy.

Reston was the nephew of Adam Smith, an excellent, hard-working, inky lawyer, who had been put on the criminal bench in 1816, without, I believe, having ever been engaged in a single criminal trial, or perhaps ever seeing one from beginning to end—a fact which made him so helpless and wretched that he used to say he envied the prisoners.

Alexander Maconochie (afterwards Lord Meadowbank the second) had become Lord Advocate, and James Wedderburn (who died in 1822), Solicitor-General. Even though they had been judicious and popular, the period at which they were called into public action would have greatly impaired their chance of success. For Scotland was beginning to open its eyes, and the time was rapidly advancing when the old hereditary system, beyond which they had no ideas, could not work as it used to do.

XX.—Case of Alexander M'Laren and Thomas Baird, 5th and 7th March 1817.[1]

This case was reported soon after the trial by Mr. Dow, shorthand writer in Edinburgh. The speeches, I believe, were all revised by the speakers, and I can attest the general accuracy of the report.

All the judges were present except Succoth.

The prosecution was conducted by the Lord Advocate (Maconochie), the Solicitor-General (Wedderburn), Henry Home Drummond, and James Maconochie, advocates-depute.

John Clerk, John Peter Grant of Rothiemurchus, now one of the Supreme Judges at Calcutta, and James Campbell, now of Craigie, were counsel for M'Laren; Jeffrey, John Shaw Stewart, and myself for Baird.

The indictment charged sedition, and nothing else.

The facts set forth were, that there having been a public meeting at Kilmarnock, M'Laren, a weaver, made a speech there; that Baird, a merchant (*i.e.* shopkeeper) there, published this speech, and that both the speech and the publication were spoken and published "*wickedly and feloniously*," and were "calculated *to degrade and bring into contempt the Government and Legislature, and to withdraw therefrom the confidence and affections of the people, and to fill the realm with trouble and dissension.*" No

[1] *State Trials*, vol. xxxiii. p. 1.

circumstances whatever, external to the words used, were set forth as tending to establish either the guilty meaning of the language, or the guilty intention with which it was employed. The worst passages were quoted. In his address to the jury the Lord Advocate referred to others; but it may always be assumed, and accordingly it is the fact here, that if there be no sedition in what is recited, there is none in the garnishing which the prosecutor keeps back.

A short statement was made for each prisoner explanatory of the defence, which consisted partly in denying the use of the words charged, and still more in maintaining that, when fairly interpreted, they were not criminal, and that, at any rate, being used in the course of exercising the constitutional privilege of petitioning the Regent and parliament, every tolerance necessary for the free exposition of honestly believed grievances must be conceded.

The libel was not objected to, and the court found it relevant. Gillies was the only judge, however, who struck the correct tone in disposing of relevancy in such a case. He gave no opinion as to the meaning or design of any of the passages, which he held were matters solely for the jury; but went solely on the fact that *the prosecutor asserted, and officially offered to prove*, that the speech and the pamphlet were calculated to fill the realm with trouble and dissension, and were spoken and published wickedly and feloniously. None of the rest inflamed themselves or the jury by premature positive demonstrations of the dreadful iniquity of the words, and of the prisoners, according to the judicial fashion twenty-three years before. But still they did not avoid this mistake *entirely*. Each

of them brought forward the passage which attracted his fancy, and commented upon its probable guilt, not perceiving that this was just anticipating the evidence. In general, however, it was done gently, and conditionally. The correct Pitmilly went furthest wrong when he said, "*no person who reads them can doubt* that the general nature of them is to excite commotion, and to prepare the way for resistance, and for overturning the Government. That this is the general tendency of the facts charged *no person can doubt.*" (vol. xxxiii. p. 15.) The Lord Justice-Clerk said nothing, except that he thought the libel relevant, being all that was required.

Boyle was always a fair picker—as fair as that operation admitted of. The great predominance of tories in the box was not his fault, but the necessary result of the disproportion between the two parties in the country. The same circumstance might have saved the judicial character of Braxfield from one of its deepest imputations, had it not been that he selected the known *zealots* of his party, so grossly, as to defy charity to suspect him of impartiality.

It is needless to give any account of the evidence. Its object was merely to ascertain whether the one prisoner had spoken, and the other had published, the words ascribed to them respectively. The prisoners, acting by the advice of their counsel, disputed these facts; but ineffectually. The proof established them satisfactorily.

In this situation the real question, as usual, was as to the true import of the language, and the intention with which it had been used. On these points there was no evidence except the language itself.

Now, the words charged against the weaver

were that in his oration he had said :—"That our sufferings are insupportable is demonstrated to the world; and that they are neither temporary nor occasioned by a transition from war to peace is palpable to all, though all have not the courage to avow it. The fact is, we are ruled by men only solicitous for their own aggrandisement; and they care no further for the great body of the people than (as) they are subservient to their accursed purposes. If you are convinced of this, my countrymen, I would therefore put the question—Shall we, whose forefathers at the never-to-be-forgotten field of Bannockburn, told the mighty Edward, at the head of the most mighty army that ever trod on Britain's soil, 'Hitherto shalt thou come, and no further,'—shall we, I say, whose forefathers defied the efforts of foreign tyranny to enslave our beloved country, meanly permit, in our day, without a murmur, a base oligarchy to feed their filthy vermin on our vitals, and rule us as they will? No, my countrymen! Let us lay our petitions at the foot of the throne, where sits our august prince, whose gracious nature will incline his ear to listen to the cries of his people, which he is bound to do by the laws of his country. But should he be so infatuated as to turn a deaf ear to their just petition, he has forfeited their allegiance. Yes, my fellow-townsmen, in such a case, to hell with our allegiance!"

The prisoner's counsel made an effort to show that these last words only meant that if the prince should refuse to accede to the *just* petitions of his *whole* people, a case for lawful resistance would arise; and that, *as thus put and qualified*, the statement was constitutionally correct. But this

was plainly a gloss which the circumstances could not support. The actual sentiment was that unless the Regent should grant the prayer of *this Kilmarnock* petition, the patriots of that place should renounce their allegiance. This was clearly sedition.

But it seems to me to be the only material sedition in the harangue. All the rest is mere general eloquence. And accordingly, though each critic nibbled at his own bit, none of them made a decent morsel out of it. *Lord Reston*, the worthiest of men, and in matters political the most prejudiced, whose visage, at its best, was sufficiently rueful, dwelt, with a face of horror which made the audience laugh, on "*the base oligarchy, which fed their filthy vermin on our vitals*"! The *Lord Advocate* laboured to extract an invitation to arms out of the appeal to Bannockburn. And the *rulers*, who care nothing for the people except for their own accursed purposes, were argued to be not the ministers, but the constituted authorities. And, no doubt, it was possible for an honest jury to deduce guilt from these extravagances. But was it not also possible for such a jury to put a construction upon them quite consistent with innocence, though not with moderation, or with the caution of a practised speaker? It is certain that the speech was addressed to a meeting, not *pretending* to petition, but truly assembled for that purpose; and it was further admitted by the Lord Advocate (p. 71) that "at the time when all this took place the distresses of the country were not only great, but that *the misery of the lower classes of the people had reached an extent seldom experienced in these realms.*" To be sure, the use he

makes of this fact is to argue that starvation made inflammatory harangues more dangerous. And so it always does. But how? By making the people more easily excited—a circumstance which might fairly enough be made to operate against the wilful mischievousness of a well-fed demagogue; but it surely diminishes the necessity of ascribing the flights of a hungry orator to anything so intellectual as sedition.[1]

The sentiments charged against Baird, who published a report of the speech, but with passages which, though probably spoken, were not traced by evidence to have been so, and are therefore only charged as against him, were not materially different from those proved against M'Laren. He represented the speaker as having said that ministers and the House of Commons had beggared the nation, and narrowed its liberties, and therefore the former—but only as ministers—were oppressors; and that the latter only represented the people nominally. It was conceded that, *if these were the sentiments*, there was nothing criminal or new in them. And if calling the representation nominal were excusable in any one, it surely might be pardoned in a Scotchman, in whose country the representation was then a mere mockery. But the prosecutor denied that the language admitted of this construction. He maintained that our *rulers* meant the government by King, Lords, and Commons; and that the statement about the nominality of the representation amounted to a denial that *in law* there was any representation. Therefore, said his Lordship, the prisoner was not exer-

[1] M'Laren states in his declaration that he had been working fifteen hours daily for five shillings a week.

cising the privilege of complaining and petitioning, but making a pretence of it to excite disaffection. Which of these views is correct must depend upon the words, which, *as given in the indictment*, were as follows:—

" . . . And a House of Commons, but the latter is corrupted; it is decayed and worn out; it is not really what it is called—it is not a House of Commons." "The House of Commons, in its original composition, consisted only of Commoners, chosen annually by the universal suffrage of the people. No nobleman, no clergyman, no naval or military officer—in short, none who held places or received pensions from Government, had any right to sit in that House. This is what the House of Commons was, what it ought to be, and what we wish it to be; this is the wanted change in our form of government—the House of Commons restored to its original purity; and this, beyond a doubt, would strike at the root of the greatest part of the evils we groan under at the present day." "Is it any wonder, my friends, that this country is brought to its present unprecedented state of misery, when the rights of the people have been thus wantonly violated?" "But let us come nearer home. Look at the year 1793, when the debt amounted to two hundred and eleven millions, and the annual taxation to about eighteen millions; when liberty began to rear her drooping head in the country; when associations were formed from one end of the kingdom to the other, composed of men eminent for their talents and virtues, to assert their rights; when a neighbouring nation had just thrown off a yoke which was become intolerable; what did the wise rulers of this country do? Why, they

declared war not only against the French nation, but also against the friends of liberty at home." "Our oppressors have taxed the very light of heaven, and they seem surprised and indignant that we should not bear the insupportable burden with which folly, corruption, and avarice have loaded us, without reluctance and complaint." "Their *reverend* hirelings would convince you that you are suffering under the visitation of the Almighty, and therefore ought to be submissive under the chastening stroke." "We have these twenty-five years been condemned to incessant and unparalleled slavery by a usurped oligarchy, who pretend to be our guardians and representatives, while in fact they are nothing but our inflexible and determined enemies." "They have robbed us of our money, deprived us of our friends, violated our rights, and abused our privileges." "At present we have no representatives; they are only nominal, not real; active only in prosecuting their own designs, and at the same time telling us that they are agreeable to our wishes."

There is some of this trash which no man in his senses will think seditious. But, on the other hand, there is much of it to which a fair and sensible man will find it difficult to ascribe any other character. However, it forms but a weak case of sedition at the worst. It is a mere passionate description, by a poor and excited man, of what he thought the history of the constitution of the House of Commons, and of his view of the past conduct of the tory party. It is one of the examples of the sedition which consists in mere raving intensity. There is not a statement or sentiment which a cautious speaker or writer could not utter with

the most absolute impunity. It was a seditious *manner*. A passionate *tone* is always calculated to excite; and it is good evidence of a desire to do so. Sedition is apt to be eloquent, because sometimes it is only eloquence that can be seditious.

The Lord Advocate made a respectable address to the jury—of course giving every sentence and word a turn to justify his charge; but everything done in a good-natured, moderate, fair tone. He tried his hand at a definition, and, which is easier, at an explanation, of sedition: with what success may be judged of from this, that he laid it down (p. 58) that every speech or writing asserting of the House of Commons "*that it has become* CORRUPT" was seditious! He read to the jury the papers for which Palmer had been convicted, and argued that his address was not nearly so criminal as the present prisoner's. And neither it was. But his Lordship's error consisted in his assuming the fact of Palmer's conviction to be moral evidence of his guilt. This was a rash proceeding, moreover, for a prosecutor, because if it be competent to him to refer to cases of analogous conviction, it must be equally competent for prisoners to refer to analogous acquittals, and still more to analogous publications, which, though quite notorious, were never even accused—a competition which public prosecutors had better avoid.

John Clerk, who, though always powerful, had a manner which made him least in his element when before a jury, addressed a view of his client's case to them, which was full of strong matter, not impressively put. The most effective part of it was in the use he made of the fact that the language objected to was uttered at a meeting held for peti-

tioning, the same circumstance of which he made such use twenty-three years before in defending Palmer.

Jeffrey's speech for Baird was of the highest order of excellence. There has been no such speech in such a case in Scotland. Gerrald's derived much of its melancholy interest from the accidents of his personal condition—his character, his health, and his obviously fatal doom. Laing and Gillies spoke in that trial at an awkward stage of the proceedings, which did not admit of a full and complex view being taken of the facts and of the law. Jeffrey discussed both in the most masterly manner, expounding the great principle of the necessity of a *guilty intention*, illustrating and enforcing the exemption from criminal prosecution on slight grounds, which is implied as one of the practical consequences of the right of arraigning public men and public measures, and of petitioning, and discussing the propriety of petitioning, for the redress of supposed grievances; applying these views to the circumstances of the case; and pouring into every part of his argument the political and constitutional wisdom of his singularly rich and intelligent mind. *As heard*, this speeeh was an honour to the bar.

There was one part, both of his address and of Clerk's, which it is very material to explain. The Lord Advocate had referred, not merely to Palmer's case, but to all the old trials. This forced the counsel for the prisoners to attempt to reconcile the acquittals which they demanded for their clients with the convictions in 1793 and 1794. The real opinions of Clerk and Jeffrey as to these convictions have been too often stated, both in public and in private, to admit of any doubt. They considered

them as disgraceful to the times and to the court. But it would have been very dangerous, for the interests at present committed to their charge, to have openly stated their sentiments, and denounced the former trials as unfairly conducted, or the sentences as illegal. They had no other course, therefore, than to *appear* to palliate the convictions, by aggravating the circumstances, and thus to make these cases *contrast* with the slightness of those they had now to deal with. But this was merely the professional policy of counsel. Muir's case, however, was too bad to be spoken of except sincerely; and Jeffrey stated distinctly that he had been convicted contrary to evidence, and punished contrary to propriety.

The Lord Justice-Clerk Boyle is always read better than he is heard. His speaking manner spoils his matter. But his summing up on this occasion, even when listened to, was a refreshment to those who remembered Braxfield or Eskgrove. It was a judicial charge. He did not assume that the jurors' minds were made up, but explained the facts to them fully and accurately, in order that they might draw the proper conclusion. He impressed upon them the subjects' right to complain and to petition; that in law a conviction could not be warranted unless they were satisfied both of the dangerous tendency of the language, and of its having been employed with the wickedness of intention to which it was imputed by the prosecutor; and that, in judging of these, they were bound to put the mildest construction on every word and on every fact that was reasonable. Braxfield could have used all these phrases, and would have used them, if any friend had suggested to him that it would increase

his facility of obtaining convictions. But he could not, and would not, have used them, as Boyle did, *sincerely*, and with both a genuine and an apparent anxiety that the jury should honestly act upon them. Boyle leaned against the accused, but not more than fair conviction must compel any judge, whose duty it is, indirectly, to correct the more misleading fallacies of any skilful counsel for prisoners, by whom he has been immediately preceded.

I lament, however, being obliged to say that he committed himself, quite unnecessarily, to an admiration of what had been done in the former cases. "This is the first trial for sedition that has occurred for a considerable length of time; and I can assure the learned gentlemen that I had fondly flattered myself that even at my time of life I should not have again had occasion to apply my mind to the study of this part of the law. I hoped and trusted, that after the CLEAR *exposition of the law* in 1793, 1794, and 1795, in the different prosecutions which were then found necessary, *sanctioned and approved of by the unanimous voice of the country*, I should not have been obliged to consider cases of this description." (p. 133.) He need not have said this; and he should not have thought it. The compliment to the former cases was nonsensical, and is one of the things which have made it impossible for those who differ from him to let those cases, thus revived, sleep in oblivion.

The jury convicted M'Laren by a majority, and Baird unanimously; and unanimously recommended both to the clemency of the court, in consequence of their good characters. The reason of the division of the jury in favour of M'Laren was not explained, and it is not easy to conjecture it. But it

was understood to be, that he had sinned from the excitement of misery and of oratory, whereas Baird, who was in comfortable circumstances, had circulated the poison by deliberate subsequent publication.

The verdict found the prisoners guilty "of the *crimes* libelled in the indictment." The obvious error, which had occurred in almost every one of the cases, of convicting of a plurality of crimes where only one was charged, was at last objected to. But the court held it to be immaterial. "The mere slip of a letter cannot be considered as a substantial objection in this case." (p. 144.) The judgment may be right, but the reason is clearly wrong. Many slips, of many single letters, would certainly be fatal to many written verdicts. The precedent of the former verdicts would have been a better answer. But nobody thought of them.

The sentence was six months' imprisonment, with security for good behaviour for three years,—an adequate, but not a severe, infliction.

In proposing this punishment, *Hermand* gave the following honest and graphic account of the effect of Jeffrey's speech upon him:—"I am the more impressed with a sense of the merits of this verdict, that when, in groping my way, about eleven o'clock at night, in the dark streets of this city, and reflecting with myself what verdict I should have given had I been a juryman in this case, such was the effect of a blaze of eloquence that I cannot say whether I should have said yes or no, if I had been at that time obliged to give an opinion whether or not the prisoners were guilty. Like the jury, I should have wished to have been enclosed for consideration. But having bestowed it, any doubt

disappeared, and I came to the opinion that the relevancy of the indictment was clear, and the facts completely proved.

He adds: "*Every word, every letter*, of this indictment has now been found proved;" and this is not an uncommon inference to be drawn from general verdicts of guilty. But it is undoubtedly an unwarranted one. The jury only did, and only could, convict of what was charged, viz., sedition. The words and letters are only the evidence of this crime. It might be satisfactory if verdicts in such cases could state the precise facts in which the sedition consisted. But this is impossible. Juries cannot winnow pamphlets, and separate the chaff from the grain, in their deliverances to the court. All that they mean to say, therefore, by a verdict of guilty, is, that, *on the whole*, the general charge is established. There are several detached letters, and words, and sentences, in this unlucky speech, which no jury, consistently with its own sanity, could mean to condemn. Accordingly they do not convict of the *facts*, but of the *crime* libelled; though, no doubt, they must be held to have convicted of the crime *as libelled, i.e.* of the crime *as composed of the facts set forth*. But then, when a jury thinks that *enough* of these facts is proved to warrant a conviction, are they obliged, or ought they, to *except* the rest, which they think not proved, from their verdict?

Lord Gillies merely approved of the punishment proposed. But all the other judges, while they concurred — which exhausted the matter before them—went rather out of their way to give their opinions that transportation was a lawful, and even a proper, penalty for sedition. *Reston* had "no

doubt either of the *right*, or the *duty*, of the court" to transport. (p. 148.) *Pitmilly* declared transportation to be "the *proper* punishment, in aggravated cases, such as the old ones." And, for such cases, *the Justice* gave it as his "clear and *unalterable* opinion" that transportation was "the proper, the legitimate, the NECESSARY punishment." (p. 140.)

These were unnecessary, and therefore rash, declarations.

On the whole, however, this was a satisfactory trial. It was perhaps the first perfectly fair trial for sedition that Scotland had ever seen. Would that the court had not tarnished its laurels in a subsequent case!

XXI.—Case of Neil Douglas, Edinburgh, 26th May 1817.[1]

This prisoner had been a member, in the old time, of the British Convention, and active in its proceedings. He was now a clergyman belonging to the sect called Universalists—old, deaf, dogged, honest, and respectable.

The Lord Justice-Clerk (Boyle), Hermand, Gillies, Pitmilly, and Reston were the judges present.

The Solicitor-General (Wedderburn), H. Drummond Home, and James Maconochie (brother of the Lord Advocate), conducted the prosecution; Jeffrey, Grant, John Murray, and myself, the defence.

Sedition was the crime charged; and the general assertion was that the prisoner had, in the course of various "*prayers, sermons, and declamations*" from his pulpit, spoken criminally of the king, who was then afflicted with mental derangement, the Regent, parliament, and the judges. The particular facts were that the prisoner did "assert and draw a parallel between his Majesty and Nebuchadnezzar, King of Babylon, remarking and insinuating that, like the said King of Babylon, his Majesty was driven from the society of men for infidelity and corruption;" that he asserted "that his Royal Highness the Prince Regent was a poor

[1] *State Trials*, vol. xxxiii. p. 633.

infatuated wretch, or a poor infatuated devotee of Bacchus;" that he "drew a parallel between his Royal Highness the Prince Regent and Belshazzar, King of Babylon, remarking and insinuating that his Royal Highness, like the said King of Babylon, had not taken warning from the example of his father, and that a fate similar to that of the said King of Babylon awaited his Royal Highness, if he did not amend his ways, and listen to the voice of his people;" that he had asserted "that the House of Commons was corrupt, and that the members thereof were thieves and robbers, and that seats in the said House of Parliament were sold like bullocks in a market;" "that the laws were not justly administered within this kingdom, and that the subjects of his Majesty were condemned without trial and without evidence."

Every part of these charges was clearly relevant; and so it was found, without any objection being stated. But it was well known, and indeed not disguised at the trial, that the real thing intended to be repressed was the very prevalent practice of abusing the unpopular and luxurious Regent for his personal habits.

There probably never was a prosecution depending on the proof of spoken words which so signally failed.

The prosecutor examined seven witnesses. Now,

1st. Of these, two were common town officers, who had been sent by the magistrates to the place of worship for the very purpose of detecting sedition. (*State Trials*, vol. xxxiii. pp. 649 and 651, Alexander Taylor and John Maccallum.) Had these men been ever so honest, accurate, and full in their reports, they were, from their position,

incredible. What could be expected of such fellows, but that they should please their masters by finding what they were sent to seek?

2dly. The preacher was so exceedingly rapid and indistinct in his utterance that it was very difficult to understand him. There is not a single witness who does not state this fact, or who does not use it as his apology for being able to report so little.

3dly. Hence not one of them pretends to give his exact words. Though all agree that the prisoner spoke of Nebuchadnezzar and Belshazzar—as how could he help it, since he was preaching on their scriptural history?—and though they had all a notion that, in his application of the text he had not been tender of kings, none of them could enable the jury to judge of his meaning by giving either his expressions or even the substance of them. The most sensible man among them was James Waddell, a surgeon, and he first gives only his "*impressions;*" and when asked by the court to state the words, he says that he cannot, and "*I could not say with certainty that I do remember the* SUBSTANCE" (vol. xxxiii. p. 647); and when asked whether a comparison which "strikes me *just now*" was or was not the prisoner's meaning, his answer is, "*I did not say so.* It is the meaning that *I attached to them*" (p. 646), though he "had *no doubt* that it was the prisoner's meaning also."

In addition to this, the prosecutor founded on the prisoner's declarations, where he denied all that was ascribed to him in the indictment, but had no hesitation in making an honest and undisguised statement of his political conduct and creed. It is impossible (for me at least) not to admire the plainness with which this ancient and poor reformer

stands up against his enemies. He seems to have had a pleasure in alarming and defying them. "He does not consider that the battle of Waterloo was a matter of rejoicing, but on the contrary." "And the following he begs may be taken down as a part of his declaration, and that it may reach the ears of the rulers of this nation :—That his Royal Highness has more to apprehend from the measures of his official servants than from the madness of his people; which expression, as to the madness of the people, is used in the prayers of the Church of England as to the recent escape of his Royal Highness, as the declarant thinks, with great impropriety."

No Crown prosecution should have been hazarded on such evidence. Even if it had stood uncontradicted, no sensible or honest jury could have convicted upon it.

But it was blown to pieces, and the whole accusation trampled upon, by the proof in defence. Six witnesses were examined for the prisoner, and more were tendered, but the court thought them unnecessary. The import of what these six swore was that the prisoner, though an avowed and hoary reformer, was a loyal man, always praying for the king and the royal family more fervently than most of the established clergy did; that his very first sermon, after a recent trial and conviction of his son for swindling, contained an encomium on the fairness of the trial, and on our administration of justice; that he did not go out of his way to get at this story of the Babylonian kings, but had been lecturing on Daniel for about two years, and took this passage in its regular turn; that neither the expressions nor the sentiments ascribed to him had been uttered; that he spoke only of kings, sins, and visitations of Pro-

vidence in general, making only the usual scriptural application of the passage; and that, on the whole, it was an orthodox and loyal discourse.

There was a palpable defect in the prosecutor's proof which the counsel for the prisoner thought it safer for their client not to notice. There was *no evidence whatever* of the fact that his Majesty was deranged, though it was solely upon this fact that the whole sedition, consisting in the comparison of him to Nebuchadnezzar, depended. The law presumes that kings do right, and therefore no evidence could be admitted of the profligacy of the Regent. But the law does not presume kings to be exempt from bad health; and it was clearly the prosecutor's duty, since he founded on the fact of insanity, to establish it; and, whatever the advisers of the prisoner might think it most prudent for them to do, was it not a slip in the court not to notice the failure?

After the evidence was closed, Wedderburn, who, though honourable, and in private life not unamiable, was in all public matters a singularly grim, formal, and bitter young man, rose and made a very paltry appearance. Seeing that he had no case, either in evidence or in truth, his plain course was to have abandoned the prosecution gracefully, by consenting to a verdict of not guilty. But instead of this, he lingered over his own refuted evidence, and indulged in a strain of harsh and unwarranted remarks upon the professional habits of the prisoner; and all this in order that, *in a Crown prosecution for a political offence*, his pride in losing his case might be soothed by a verdict of *not proven*, which in our practice is deemed a less honourable acquittal than a verdict of not guilty.

He admits (vol. xxxiii. p. 674) that as to the charge of slandering the administration of justice, "there has been no evidence brought before you." And even as to the other two charges of maligning the king and the House of Commons, though he professes to think his own proof sufficient, he says, even as to these, "at the same time I must observe that the evidence on the part of the Crown falls *far* short of what I expected to have laid before you." (p. 674.) These facts seem to make the prisoner not very unreasonable in thinking that he had a right to be found not guilty. But the Solicitor phrases away about "the functions of clergymen being the *most* important in civil society," and about the rare and horrid iniquity of their introducing political allusions into their sermons. "It is just as *possible* in this indirect manner, by reference to particular portions of Scripture history, to utter libellous or seditious matter, as by the most direct words which language affords. There is no blasphemy or sedition, how abominable and atrocious soever, that *may* not in this form be spread about." (p. 674.)

The way in which he applies these canons of clerical propriety to the case in hand is this: "on the supposition that full credit is due to the witnesses on both sides, there are *some charges made out* against the panel, which render his conduct highly criminal, which establish against him *a very great malversation of duty*, and which bring home to him a *criminality not to be distinguished from sedition*. It is proved by all the witnesses for the Crown; it is proved by those witnesses for the panel to whom any credit is due; it is proved by his own declarations, which cannot be read without

pity for his folly, and *indignation for his impiety* [!!], that he is A POLITICAL PREACHER [!!!] To all who have paid attention to the progress of this trial it must be clear that he has been in the habit of arraigning, in his discourses, the measures of Government, and *of infusing among his hearers political dissatisfaction.*" (p. 675.)

This ascetic vituperation is all disposed of by three facts. In the *first* place, this habit was *not* proved. It was proved that, like other clergymen, the prisoner occasionally alluded to, or commented upon, passing events—not that he did so for the purpose of creating political discontent, but rather the reverse. In the *second* place, he was not upon trial for his general habits, or for the crime of political preaching, but on three specific charges of a different description; and therefore it was irrelevant and unhandsome in his official accuser, even to refer to any other matters, though they should happen to be, in his opinion, not distinguishable from sedition. They were not the sedition charged. In the *third* place, however improper political preaching may be, did any of the Solicitor's party ever object to it when it proceeded in the form of addresses on their side from the Established Church?

But, to be sure, the prosecutor guards himself on this last point by an ingenious exception. It may not be absolutely commendable in the Established clergy to preach politics; but it is infinitely worse in a dissenter! "In a sectarian, like the panel, it is more dangerous, *because he is liable to no ecclesiastical superintendence and jurisdiction.*" Where he learned this fact I do not know; but it impresses him so strongly that he is rather for root-

ing the dissenters out by persecution. His next sentence is: "Such conduct, indeed, *might lead to doubts as to the expediency of that unlimited toleration which the benignity of our Constitution confers.* In the one case or in the other, I repeat it, it is a prostitution of *one of the most important duties of civil society.*" (vol. xxxiii. p. 675.) His inference from this is, "that a *general* criminality characterises his conduct in these respects, no man can doubt." (p. 675.) It was not for general criminality that he was on trial. "But besides all this the evidence of particular offence *is not slight.*" This is coming to the point.

His first example of this is in the case of the comparison of the king to Nebuchadnezzar. He admits that the exact extent of the comparison was not established even by his own witnesses, and that its guilt was utterly disproved by the witnesses for the defence. He gets out of all difficulty however thus: "But I do affirm that it was impossible to draw *any* parallel; that it was impossible to allege a *single* point of resemblance between his most sacred Majesty and the personage mentioned in Scripture without seditious criminality. Whether the cause, nature, or duration of that awful infirmity be referred to, it was *impossible*, without *criminality, even in the most remote degree*, to *insinuate* the resemblance or parallel." (p. 676.) Was the assertion of the fact that, in both cases, it was "for the sins *of the nation* that the Head had been afflicted" (see *Evidence of Will. Warrell*, p. 664), seditious? or that they were both kings?

The next, and last, example is in the case of his saying that the House of Commons was corrupt, and that its seats were sold. The fact was that the

prisoner had made no assertions of his own on these subjects, but had merely referred to the parliamentary proceedings to show that such things were there said. Wedderburn acknowledges this to be the fact. But, says he, "there are many things reported to be declaimed upon within the walls of parliament which would be sedition if uttered anywhere else." (p. 676.) No doubt of it. But would any prudent—I might almost say sane—public prosecutor ever think of founding a charge of sedition on a person's having repeated *this* statement, viz., that in the year 1817 seats in the House of Commons were bought?

The result of this canting harangue is curious. He repeats that his case has failed. "I am satisfied that the proof has fallen short of what I expected at the institution of this trial." "On the whole, *I am clear* that the evidence is not such as to be pressed on a jury." (p. 676.) Well, what is his conclusion? "I submit to you that, while a verdict of not guilty *cannot be reconciled with the evidence*, the proper return for you to give is that of *Not proven*." [!!!]

I remember, even at the present hour, the indignation with which this wretched address was listened to by all of us, and how shabby it was thought by the fair men of the Solicitor's own party. I wanted Jeffrey to make a strong and contemptuous reply, both upon the prosecutor's evidence and upon his illiberal conclusion. But two things did not merely prevent this, but, to our horror, turned the reply into flattery! *First*, Jeffrey was very anxious for a verdict of Not guilty; but he was afraid of provoking the court and the jury to let him have one only of Not proven, if he had disclosed that he

was to consider the other as a triumph over the prosecution. For a counsel, this was perhaps prudent; but considering the perfect insignificance of the form of the verdict, so as the man was acquitted, to this accused, to whom probably sedition was no shame, this prudence was a virtue which I could not have exercised. But, *secondly*, the truth is, that undue gentleness to opponents, even when they happen to be undeserving of mercy, has always been a failing with Jeffrey's soft heart. He has a disease of complimenting.

He therefore answered Wedderburn's comments; but he not only did so without expressing the slightest scorn or indignation, but his remarks went to *apologise* for the failure of his adversary's proof; and he actually set out with the following declaration, which made our very wigs stand on end:—"I cannot help regretting that my learned and honourable friend, who has made, on the whole, such a use of the evidence as is to the credit of his sagacity and *candour*, did not carry his *liberality* a little further; for had he only said, *as I think he must have felt*, that you should find a verdict of Not guilty, instead of a verdict of Not proven, I should not have been called on to address you at all." (p. 677.)

All this was perfectly intolerable. His "*learned and honourable friend*" was a person with whom he had not even any personal acquaintance, and knew only professionally; and his *candour* and *liberality* consisted in his making a most cruel and unhandsome attempt to hurt the character of an old man against whom he had preferred a groundless charge. He should have been excoriated.

The *Lord Justice-Clerk* very properly left this

point to the jury, who unanimously found the prisoner Not guilty.

This was not merely an unsuccessful prosecution, but, for the Crown, it was a ludicrous one. The very appearance of the prisoner—a little, antique, firm, body—with a brown wig, worn bare in the service of what was then called sedition, combined with the absence of public interest in the case, lowered the dignity of a State trial. And then he was so honest, respectable, dull, and obstinate, that no good-natured person could avoid taking his side—a bias that was greatly increased by Wedderburn's grave keenness to destroy him. Except in the circumstance of their mental attack, there was no known ground for comparing the king to Nebuchadnezzar; but there were many points of resemblance between the Regent and Belshazzar, with his gorgeous feasts and Babylonish ladies. Indeed the coincidences were so notorious that it was thought strange how the advisers of the Crown could expose his Highness to the risk of being brought out or discussed. Accordingly, the prosecutors had scarcely got their indictment read, when they began to be alarmed at the scandal they were about to bring upon their royal master. And at last the audience generally smiled at the absurdity of the Crown counsel aspersing the Regent by interrogative imputations, especially as it always turned out that there was no foundation for the assertion that the prisoner had ascribed the vices to his Royal Highness that were alluded to by his servants, though known perfectly to exist. Indeed, the only thing that made the fact of the prisoner's having uttered the words against the Prince probable was the notoriousness of their being true. "Sed Marcellum insimulabat

sinistros de Tiberio sermones habuisse, inevitabile crimen, cum ex moribus principis fœdissima quæque deligeret accusator objectaretque reo: *nam quia vera erant, etiam dicta credebantur.*" (Tacitus, *Annal.*, lib. i. cap. 74.)

XXII.—Case of George Kinloch, Esq., 22d December 1819.

This gentleman was the proprietor of the estate of Kinloch, in Forfarshire. He had been active in calling a meeting of the people of Dundee, at which he presided, and made a speech, which he afterwards published. The sedition now charged against him was said to be contained in this speech.

The country at this time was in a state of great excitement. I have never known a period at which the people's hatred of the Government was so general or so fierce. Prevalent distress among the lower orders was at the root of this; but the feeling was exasperated by the new and severe laws made for preventing popular meetings and punishing popular excesses; by the affair between the people and the yeomanry cavalry at Manchester; the thanks given, with unfortunate prematurity, to the cavalry by Government; and the personal detestation of Lord Castlereagh, the head of the ministry.

I was one of Kinloch's counsel, along with Jeffrey, and, I believe, Moncreiff. As he did not stand his trial, it cannot be known whether he was guilty or not. But this would have depended entirely upon the meaning of his language; for the delivery and the publication of the speech were admitted, and could not have been denied.

He had abused the existing system of representation, because it did not represent the people really,

but only nominally, and in law; had asserted that hence the House of Commons had a tendency to be servile to ministers, and regardless of the people, whose miseries he ascribed to profligate taxation; had described the Manchester affair as an unprovoked and murderous attack by the military; had argued that Lord Sidmouth, the Home Secretary, who had advised the Regent to thank these troops, had committed treason, and ought to be impeached; gave it as his opinion that any attempt to screen him or the soldiers from justice might operate as a signal for civil war; and that there was no remedy for the horrors of the people's situation except a radical reform, including annual parliaments, universal suffrage, and vote by ballot. All this had been spoken at a meeting composed of the lower orders of the people, by a person whose station gave him influence over them, and in a coarse, inflammatory tone.

Although parts of this vulgar harangue might have been explained away or apologised for, we were clear that enough of sedition remained to make it certain that there would, and proper that there should, be a conviction; and that a verdict of guilty would be followed by a long transportation.

Having laid our view of his risks before him, we left him to follow his own course, and he withdrew. With Botany Bay before him, and money to make himself comfortable in Paris, he would have been an idiot if he had stayed.

This is an example of how severity defeats itself. Kinloch undoubtedly did not hold himself to be guilty; and his ignorance made him rely far too much on the candour of a jury, and on his own professed consciousness of innocence. Nay, like

other zealots, he was anxious for an opportunity of defending his principles, and even of suffering for them. But the brutality of the punishment he could not submit to. He therefore retired, and defeated justice, and suffered more from outlawry than he ought to have suffered from conviction.

Immediately after the sentence of fugitation, the Lord Justice-Clerk very unguardedly *expressed his hope that the Lord Advocate would make every effort to bring this accused to justice*—an expression of which the judicious disapproved, it being the business of the court to try prisoners, and not to apprehend them. It is not usual for the court to jog the public prosecutor into vigilance. If this admonition was pointed at the accused's *contempt of court* in not appearing, then, as this contempt is the same wherever any outlawry takes place, there was no reason for giving any hint on this occasion more than on any other, and I never heard it given before. Besides, it was not for this contempt, but, as his Lordship explained, for his sedition, that he was anxious to get him. This was very unlike Boyle's usual caution; and it is a pity that the error was committed in a political case.[1]

Mr. Kinloch went to the Continent, where he lived, I believe, for seven or eight years, when he was pardoned, and came to his family, and was elected member for Dundee in the first reformed parliament.

[1] The Justice-Clerk (John Hope) gave a similar recommendation to the public prosecutor in the case of Peter M'Gachen, charged with forgery. It is the only occasion (except Kinloch's) where I have ever heard it done.

XXIII.—Case of Gilbert Macleod, 14th and 21st February and 6th March 1820.

Shortly before this trial (July 1819) Maconochie had been raised to the civil and criminal benches, on the death of Lord Reston, and had been succeeded as public prosecutor by Sir William Rae, the son of Lord Eskgrove, who had never been known as a counsel, and though then in the twenty-eighth year of his professional life, was only Sheriff of Midlothian.

The prisoner was the printer and editor of a periodical paper published in Glasgow, entitled *The Spirit of the Union*, and the seditious libels of which he was accused were all contained in this work.

A few weeks prior to his trial he was complained of to the court by the Lord Advocate, summarily, for contempt, in having published certain improper observations on the preceding case of *Kinloch*. I was his only counsel on this occasion, and denied both the contempt, and the power of the court to try, in this form, an offence not committed in reference to any *depending* judicial proceeding. I was found wrong on both points, and he was sentenced to four months' imprisonment. (13th January 1820.) Neither he nor his counsel had any malice against other editors; but it was perfectly irresistible to show the court what work it would have to do, if, in times of great excitement, every

deviation from correct propriety, in the discussion of political trials, was to be brought to a strict account. Macleod, therefore, was not discouraged in his desire to institute a complaint, in his turn, against Mr. Watson, the editor of the *Edinburgh Correspondent*, then a leading tory newspaper, and Mr. Murray, one of his compositors, and the author of a far worse article which had appeared in their paper against him, as a person then actually under indictment. The court could not refuse to take the case up, and had to fine the one of these contemners, and to incarcerate the other. (23d February 1820.)

I continued one of the counsel for Macleod, but could not attend his trial.[1] I now regret this the more, that, except by inaccurate newspapers, the proceedings have never been reported. This was owing to no public indifference; for the case was followed, throughout all its stages, with intense interest, chiefly because it was foreseen that it would bring the discussions about the punishment of sedition to a crisis, and that if the court should still persist in transporting, they would probably be prevented by parliament from ever doing it again. But Mr. Grant (now one of the Calcutta judges), the leading counsel at the trial, undertook to superintend a proper report, and thus prevented others from interfering; and then, after many delays, he abandoned it, and nobody took it up. Though I know all the circumstances perfectly, yet as it is awkward not to have any authentic account to refer to, I shall abstain from many details. These, indeed, are not necessary; for the substance and the importance of the case are contained in a few undoubted facts.

[1] Yet I am marked in the Record as present.

The charge was *sedition*, of which seven acts were specified, each consisting of a separate number of the *Spirit of the Union*. The passages objected to are too long to be quoted, and their quotation, even though they were short, would be unnecessary, because their general character can be easily described.

There was nothing *original* in any of them, nor anything peculiar to Glasgow or to this particular publication. The paper merely advocated the common radical topics and feelings that were raging all over the country. Our representation was a mockery; the House of Commons, in consequence of a majority of its members being returned by ministers, peers, and boroughmongers, necessarily corrupt; the taxation was unnecessary and intolerable; monarchy cumbersome and expensive; the people had been unjustly massacred at Manchester; and the minister who had advised the Crown to thank the murderers deserved to lose his head; those who joined the yeomanry in Scotland, but particularly in Lanarkshire, should be publicly named and watched; no taxes should be paid; the people's miseries were all ascribable to Government; and the only cure was in annual parliaments, universal suffrage, and ballot. All this was set forth in coarse declamation; and the tendency certainly was to produce discontent, because the statement was that the people were suffering unnecessarily, that they could indulge in no hope from submission or patience, and that their only prospect of relief lay in their correcting their own wrongs.

Unquestionably a great deal of this was seditious, both in its sentiments and in its tone. But there were some things powerfully in the prisoner's favour.

1. He was only the publisher, not the author of any of the articles. 2. Some of the *worst* of them were mere republications from other, and *unprosecuted* newspapers. 3. His character was excellent, and this was his first offence. His manner and deportment was quiet and gentle. The language, *as read*, indicated an intense and contemptuous Gallowgate orator. But it was not *his* language. He merely copied; and this was the language of the *Spirit of the Union*. He himself was amiable and modest. 4. With a few exceptions, such as the passage (copied from another newspaper) about not paying taxes, his paper stated very little beyond what were the ordinary and proclaimed sentiments and statements of the whole opposition party, consisting of greatly above a majority of the nation. No doubt the majority of a nation may be seditious; but when this happens, there is always ground for tenderness towards an individual of good character, who has not produced, but fallen under, the general contagion. The probability, moreover, that discontent seldom becomes general, and is never long continued, without just cause, ought to operate in his favour; though, of all circumstances, it is the one which most irritates the possessors of disturbed power.

The worst thing about these libels was their exaggerated animation of language. Swift, or Cobbett, or Sydney Smith, could have said most of what the prisoner said with tolerable safety, and with greater force. But vulgar reformers, who air their opinions in newspapers or at meetings, especially if they be honest and ardent, generally despise skill.

The evidence for the prosecution consisted solely in proving the publication.

The Lord Advocate was assisted by the Solicitor, and by John Hope, who, though he only came to the bar in 1816, was Solicitor, on Wedderburn's demise, in 1822. His Lordship, in addressing the jury, did nothing, and perhaps had nothing else to do, than to recite, and comment upon, each most peccant sentence; to praise the constitution of the House of Commons, and of all existing things; to ascribe the people's discontent, not to their sufferings, but to demagogues like the prisoner; and to ask, what would become of us all if he were not convicted.

Grant's junior was James Ivory, of every personal excellence, and who has since been Solicitor-General; but who can be distinguished by no official promotion so honourably as he is by his merits as a man and a lawyer.

Grant's general defect was that, though redeemed by elegance and cleverness, he was frothy and superficial. But his speech to the jury for Macleod was judicious and powerful; the best he ever made at the Scotch bar. It received the highest encomiums, and deserved them. Its chief object was to reconcile the challenged passages with loyalty, or with the subject's right to complain, or with the established limits of political discussion.

It was, perhaps, impossible for any judge not to have been against the prisoner; and the Lord Justice-Clerk did not express his opinion more strongly than it has always been his practice to do. An English judge would probably have been less elaborate, and less demonstrative of the guilt of the accused. But this has always been Boyle's view of his duty; and there was no exaggeration of style, because this was a political case. It was a perfectly

fair, and for him a moderate, address. And the summings up, even of English judges, have assumed a much more argumentative and decided character, and necessarily so since counsel have been allowed to address juries for prisoners. Scotch judges are often compelled to adopt a still more positive style of charge, on account of the prisoner's counsel here always speaking last.

The result was that the jury (whether by a majority or not does not appear from the record) found the prisoner guilty; but in consequence of his good character, *unanimously recommended him to the lenity of the Court.*

His counsel intimated that they meant to contest the competency and the propriety of transporting; and a day was assigned for hearing them. The argument for the prisoner was conducted by Jeffrey and Moncreiff; for the Crown by Wedderburn. I heard the whole discussion, both at the bar and on the bench. A memorable discussion it was.

Moncreiff, who brings his whole soul into every public question he espouses, opened the case in a full argument of the deepest legal talent, given in a tone of sincerity, with a force of personal authority which the highest display of the weightiest judge could not have exceeded. His contempt of Hume's precedents made him expose them rather too lightly, and too little in detail. But otherwise he went into the whole matter in all its legal grounds and views, and made it quite plain to the public that if, after this, the court should still think it had the power, and that it was its duty to transport, a statute must do that by compulsion which it would then be plain that reason could not accomplish.

He was followed by Wedderburn, who knew that he was addressing a court that reverenced the proceedings of 1794, and he did little but appeal to these bad precedents.

Jeffrey replied. Seeing that Moncreiff had left nothing to be gleaned in the law, he disposed of the Solicitor in a few words, and then discussed the expected sentence on the grounds of its propriety. In Jeffrey's generous hands this was a triumphant topic. He did not waste himself on mere feeling—or rather this was one of the cases on which nothing can be more moving than a simple display of facts. He explained the true character of the guilt of sedition, and showed how it might be committed by men of the finest natures—often from awkwardness, and oftener from the rashness of benevolence; how difficult its practical separation was from ardent political discussion; how unavoidably it therefore prevailed on all sides in periods of violence; how rapidly, when not exasperated by severity, it evaporated when its exciting causes were removed; how ineffectual penal law, when not mildly administered, was, except in the ruin of a few pitied victims; what was implied in transportation, with its hulks, its distance, its hopeless duration, its dangers, its degradation, and the desolation of the separated family. All this, in its feeling and reasonable views, unfolded by Jeffrey, seemed to the public to be so unanswerable, that there were few indeed who anticipated the cold shock by which it was to be all overturned.

For the court sentenced the prisoner to *transportation for five years.*

Every allowance must be made for the possible variety of opinion on a long-contested point of law;

and no great wonder can be felt that judges, accustomed from the very infancy of their legal thinking to a particular view of a party question, should be insensible of the steps of what seemed to others a demonstration leading to an opposite result from theirs. But with reference to the exercise of the *discretion*, with which the court was undoubtedly invested, there were some circumstances connected with this proceeding which make it worthy of perpetual remembrance.

Lord Gillies gave it as his opinion that the power to transport must now be held to exist, but that it ought not to be exercised. If he could have thought that the question was still open, he would have held that even the power did not exist, and that the previous judgments were wrong. But having been pronounced, after argument, repeatedly acted upon, and approved of by large majorities in parliament, he thought himself bound by these precedents.

He has been severely blamed for this recognition of these decisions. It has been said that a cruel and indefensible sentence, introduced by political judges in violent times, can scarcely be made law by any repetition of it in the same circumstances; and that this being the first occasion on which an opportunity had occurred of settling the question on true principles and sound authorities, a firm judge would have decided according to his conceptions of the law, disencumbered of these recent stretches of it. There is much force in this; but I can scarcely concur in the censure. It is not easy to draw the line, and to say when law ought to yield to precedent, or precedent to law; but the general principle that solemn decisions are binding in similar cases on future judges can never be

departed from without such danger, that it is the duty of parliament to supply a remedy where these decisions can no longer be safely adhered to. The very circumstance, too, of his Lordship having formerly been counsel on the unsuccessful side, and still *reputed* a whig, might have made candid men regret that he had given the world any pretence for ascribing his conduct to feelings which ought never to operate on the bench.

But while he declared himself constrained to concede the existence of the power, he was only the stronger on this account in the expression of his opinion that it ought clearly not to be exercised.

All the other judges, being the *Justice-Clerk*, *Hermand*, *Succoth*, *Pitmilly*, and *Meadowbank*, delivered opinions strongly opposed to Gillies on both points. They all thought, not merely that they were bound by the former precedents, but that these precedents were according to law, so that if the case had occurred now for the first time, it could only be settled in the way that it had been; but that *transportation was the only punishment suitable to the ordinary form of the crime.* They expressed the highest reverence for Braxfield and his colleagues as judges in the sedition trials of 1793 and 1794; and Boyle, the Justice-Clerk, elevated himself to the flight of declaring *that he was ambitious of no higher honour than that of having his name associated in this question with the names of these great judges* —a sentiment with which some of his brethren expressed their concurrence. I HEARD THESE WORDS, which were uttered steadily, and after obvious premeditation. They scouted all idea of any punishment except transportation being adequate to the crime, unless in the very slightest possible cases,

and openly stated the *horrors*, which had been *truly* described as implied in transportation, to be a *recommendation* of a punishment which made the danger of the crime palpable to the most audacious offender. I never can forget the sensation with which I heard the calm, but hard, Pitmilly say, in his cold, steely manner, with the appearance of gentleness, but the reality of quiet steady severity, "I think transportation the *appropriate* punishment of sedition;" laying a slow, deliberate, unimpassioned emphasis on the word "appropriate," as his contemptuous answer to all that had been urged for the prisoner on this part of the subject, and adding, "Considering what sedition is, if I were to pronounce any other sentence, *I could never lay my head upon my pillow in peace again.* [!!!]

Now it could scarcely be credited, but it is true, that *within less than three months prior* to the day on which these sentiments were uttered, and this punishment of transportation inflicted, parliament, guided by as stern a tory ministry as this country had ever seen, had announced its opinion of the proper penalty of sedition; and had thus made the modern judges more inexcusable than the ancient ones, by giving them a statutory guide, of which their predecessors had not had the advantage.

Hume says (vol. i. p. 556):—"In the end, on the increase of this alarming evil (sedition), to which the powers of the common law of England were found unequal, recourse was had to the Legislature, who, by Statute 36 Geo. III. c. 7, *authorised the inflicting of the same punishments that are competent in Scotland according to the common law, and by means of which, duly and steadily applied,* the judges in Scotland had in a great measure repressed the

growing audacity of the licentious in this quarter of the kingdom." There can be no more extraordinary blunder (misrepresentation I will not suppose) than what is contained in this misleading passage.

Its meaning is, that in the year 1816 an Act of Parliament was passed which legalised in England what had been held to be the common law punishments of sedition in Scotland—those punishments which, as *previously administered by the Scotch judges—that is, transportation for fourteen years on a first conviction*—had been successful in repressing the crime here. Now, 1st, the Act referred to, being the 36 of Geo. III. c. 7, does *not* authorise transportation *for fourteen years in any circumstances.* 2d. It does not authorise transportation, even for a moment, *on a first conviction.* 3d. It only permitted transportation *after a previous conviction.* 4th. It even then only permitted it for *seven* years. 5th. It did not adopt, nor did any sound-headed man ever dream of parliament adopting, even amidst the violence of 1816, "*the same* (that is *all* the same) *punishments* that are competent in Scotland according to the common law." *Whipping* was laid down by all the old judges to be competent by our common law. Does the 36th of Geo. III. c. 7 legalise this? According to Hume, transportation for seven years on a second conviction is the same thing with transportation for fourteen on a first, and scourging to boot. And even this moderate increase of the severity of their law was so repugnant to the ordinary genius of the English system that it was expressly *limited to three years.*

And when these three years were out, though the country was raging under a still more intense

popular discontent, parliament would no longer tolerate transportation, even for seven years, *though on a second or a thousandth conviction.* In the year 1819 the Act of the 60th of Geo. III. and 1st of Geo. IV. cap. 8 passed, upon the expiry of the statute of 1816. This Act settled the punishment for sedition in England permanently. It declared that on a first conviction it should be fine, or imprisonment, or both; and on any subsequent conviction it should either be these "or *banishment from the United Kingdom, and all other parts of his Majesty's dominions,*" "for such term of years as the court shall order." The culprit *is allowed forty days to get himself into banishment;* and if he does not dispose of himself voluntarily within this period, then it is competent for the *Crown* to lay hold of him and transport him. The practical result of this is that transportation for *sedition,* even the short transportation that had been allowed by a statute of only three years' duration, was abolished; and that though a culprit might be sent to Botany Bay for his *contumacy* in not betaking himself to a better place, imprisonment and fine, or both, were the regular penalties *for the crime* on a first conviction, and possible *banishment* for any subsequent one.

Here was the precedent for the court to have followed. This *parliamentary and ministerial* declaration of what was the proper punishment was made on the 19th of December 1819. Yet within three months—on the 6th of March 1820—did five of our judges transport Macleod on a *first* conviction, in spite of an *unanimous recommendation of the jury to mercy, his character excellent,* and *one of their own number recommending a milder course.*

It is painful to ascribe any judicial proceeding by honourable judges to a cause which impeaches their temper, if not their candour. But the truth must be told; and it is that their Lordships were obviously—very obviously—irritated at the conduct of their predecessors being challenged, and alarmed at their own powers being questioned; and therefore thought that they would not vindicate either, by merely *declaring* what they held to be law, but that *its actual enforcement* was necessary, in order to discourage all future objection, and to mark how superior they held their own wisdom to that of the Legislature.

Thus Macleod was transported, and died, before his time was out, in New South Wales.

It was this case that provoked me to examine the whole course of our sedition practice. It was not easy to stand what the court had said in the case of *M'Laren and Baird* (p. 58) about the old sentences having been unanimously approved of by the country. But when to this was now added that *to be associated with what the old judges had done was an honour to their successors*, it seemed to me to be the duty of a living witness of this sentiment to let posterity know its absurdity and its danger. According to this sentiment, all subsequent judges ought to try to imitate the conduct of Braxfield and his judicial associates, in trying political cases criminally. My opinion is that other judges will perform their duty exactly in proportion to the success with which they shall avoid the whole manner, and principles, and spirit thus held up for their imitation. Let posterity decide.

OBSERVATIONS.

MACLEOD'S is the last case of sedition that has been tried in Scotland.

In so far as the power of transporting is concerned, his sentence brought matters to a point. The existence of such a power could not be submitted to in modern times, and in 1825 the 6th of Geo. IV., cap. 47, passed, which enacts that the punishment of leasing-making and of sedition shall be the same in Scotland as the 60 Geo. III. c. 8, had provided for sedition in England, viz., fine and imprisonment, or both, for a first offence, and possible *banishment* for any subsequent one. The last statute is almost a mere transcript of the first.

As this change was effected during a tory administration, and by the instrumentality of Sir William Rae as Lord Advocate, that party have occasionally blamed themselves for indirectly deserting the court by consenting to the mitigation of the law, while at other times they have claimed the merit of it. They are certainly entitled to the praise of having at last, not only not opposed the improvement, but been the organs by which it was carried into effect. Their real credit in this can only be estimated by those who know the history of the new law.

The sentence upon Macleod, and still more the judicial speeches on which it was grounded, excited the utmost alarm among the whigs, who felt as if

the days of Braxfield had come back, or might do so; and thought that the difference of the punishment, for the same political offence, in the two different quarters of the island, was insulting to Scotland. This, of course, combined their antagonists in the defence both of transporting and of picking. Preparations were therefore made for bringing both of these subjects before parliament. Little was requisite in reference to transportation, beyond the mere statement of the fact that in England sedition was thought sufficiently punished without this penalty. The selection of jurymen by the presiding judge was more incomprehensible and complicated, and required a great deal of long continued explanation. I can never reflect without satisfaction on my own humble exertions,[1] in concert chiefly with Mr. Kennedy of Dunure, then in parliament, on this vital question. At last Kennedy introduced his Jury Bill, the rejection of which *through the influence of the Scotch tory party*, only increased the conviction of the whigs of its necessity, and everything was ready for opening the case of the punishment of sedition next session.

It was while matters were in this position, that Government, foreseeing the difficulty, and the absurdity, of maintaining two peculiarities in the administration of criminal justice in Scotland, which would not be tolerated for a single moment in England, began, very wisely, to take these subjects into its consideration.

On the 20th of October 1822 a letter signed by Sir Robert Peel was sent to the Lord Justice-Clerk (Boyle) putting six questions to him and to the

[1] All the articles in the *Edinburgh Review* in 1821 and 1822 on this subject were written by me.

Lord President (Hope), the Lord Chief Baron (Shepherd), the Lord Chief Commissioner Adam, and Baron Hume. These questions related, 1*st*. To our method of selecting criminal juries, and the expediency of introducing Ballot and the Peremptory challenge. 2*d*. To "the powers possessed by the Lord Advocate as public prosecutor." 3*d*. To his other powers, and the expediency of separating these from his functions as public accuser. 4*th*. To the expediency of introducing Grand Juries. 5*th*. To the Lord Advocate's power of getting diets deserted *pro loco et tempore*. 6*th*. To this:—"Can your Lordship suggest any alterations in the Criminal law of Scotland, or in the practice of its courts, which it would be expedient to make for the purpose of securing a greater degree of protection for persons accused of crimes?"

I have seen the Chief Commissioner's answer to this last question. It recommends the abolition of the judge's selection, and of transportation for sedition. But, though so far right, it is right feebly, and (as I understand it) is for giving the benefit of these changes only to political prisoners; and he gives it even to these, only in connection with Special Juries, new trials, writs of error, and other English peculiarities. This must have impaired the weight due to his opinion on the plain Scotch matters, as to which he was clearly in the right track.[1]

As to the Lord Advocate, after joining with his Scotch party in defending our full judicial establishment as indispensable, and in crying out against any abatement of it as insulting to the dignity of the country, and a breach of the union, he was made

[1] The Lord Chief Commissioner states in "a Narrative" of these matters, that neither the letter by Sir Robert Peel, nor the Return, or Returns, to it are to be found in the Home Office.

to act as the hand which abolished our Consistorial Court and its four judges, our Admiralty Court and its one judge, and two Supreme Judges of the Court of Session. He first wrote an eager and very foolish letter to the country gentlemen, and to the Town Councils, of every (then unreformed) shire and royal burgh in Scotland (see *Edinburgh Review*, vol. xxxvi. p. 200), directing them to resist a bill then under discussion for taking away the Judge's power of picking, as it was impossible to foresee the inroad which might thus be made on the Criminal Law of Scotland, *with which the country hitherto had been so truly satisfied* [!] and then, in obedience to orders, he took up this very measure. And after having long adopted and repeated the statement of his party,—that Scotland had been saved, in 1793 and 1794, by transportation for sedition, and was incapable of being saved hereafter without it, — then because Scotland compelled his masters, and his masters compelled him, to be the instrument of its abolition, he and they appropriate the whole honour of the improvement.

Probably it was not attended to, but the Scotch statute virtually condemns the transportation sentences by its phraseology. The great defence of these sentences was that, in our law, the term *banishment* included *transportation*. But the 6th of Geo. IV. cap. 47, makes it *exclude* it; for the words *banish* and *transport* are there used as entirely different, and the whole of the new system there introduced implies that they are so.

The punishment continued to be the same in both countries from 1825, when we adopted the English statute, till 1830. But a very material difference was then allowed to take place. On the

30th of July 1830 the Act of the 11th Geo. IV. and of 1st Will. IV. cap. 73, passed; and this statute repealed the power of even *banishing*, with which, in the year 1819, the 60th of Geo. III. and 1st of Geo. IV. cap. 7, had armed the English courts, and left these courts no power of punishing sedition, however frequently committed, except by fine and imprisonment. But this statute only applied to England. In 1837 I explained to Mr. Murray, then Lord Advocate, how the fact stood, and gave him the heads of a Bill. The Act of the 7th Will. IV. and 1st Victoria, cap. 5, which restores, and I suppose finally fixes, the identity of the punishment of sedition in both countries, was the result.

So the matter rests for the present.

Since *Macleod's* case, the Test Acts have been repealed, the Catholics emancipated, parliament reformed, the Corn Act extinguished, Free Trade recognised, and toryism and whigism, purely as such, have fought their last battle, almost to the annihilation of toryism. No previous conflicts of opinion ever brought into action fiercer passions, stronger interests, or a freer questioning of principles. It is needless to say, that throughout these volcanic discussions there has been no want of sedition. It has been raging upon all sides. I do not believe that a candid balance could detect any other difference between the parties, except that with the one it has been the sedition of the commonalty, and with the other of the aristocracy, including especially the church. Each has availed itself of all the known modes of rioting over the law, and seems to have forgotten or despised the circumstance that there is a crime called sedition. This is the true reason that there have been very few

trials, if any, for this offence in England, and not one in Scotland. Each party has been afraid to throw the first stone.

Begin when they may, may we never forget the description given of a State trial, in bad times, by a very competent judge: "The trials of the accused were exactly like all the State trials of those days, that is to say, as infamous as they could be. They were neither fairer, nor less fair, than those of Algernon Sidney, of Rosewell, of Cornish, of all the unhappy men, in short, whom a predominant party brought to what was then facetiously called justice. Till the Revolution purified our institutions and our manners, a State trial was merely a murder preceded by the uttering of certain gibberish and the performance of certain mummeries." (Macaulay's *Essays*, vol. ii. p. 245: Review of Mackintosh's *History of the Revolution.*)

XXIV. — John Grant, Henry Ranken, and Robert Hamilton, 7th, 9th, 13th, 18th, and 25th November 1848.

After an interval of above twenty-eight years, two more cases have occurred—one that of the above-named prisoners, the other that of James Cumming.

There might have been many more now, if the law had been enforced strictly, or if the public accuser had not been restrained by the consideration, that more encouragement is given to sedition by one prosecution that fails, than discouragement by many that succeed. A thief who escapes is glad to disappear quietly. Every acquittal for sedition is a triumph, and the triumph is the greater the clearer the guilt.

In some respects the times were not very unlike those of 1793 and 1794. Besides the chronic sedition that adheres naturally to the practice of the Constitution, considerable masses of the people were under a violent attack of the acute complaint. This access was chiefly brought on by continental contagion. What the French call a republic had been recently set up in their country; almost every throne in Europe had been shaken or overturned by popular convulsion; Ireland was in rebellion; there was great mercantile distress in Britain; professional demagogues had not neglected the occasion; and these various excitements brought out the idiots called Chartists not only into seditious ora-

tory, but into displays of treasonable organisation. These circumstances crowded the English courts with political prisoners; but as only four individuals were prosecuted here, it at least cannot be said that there was any eagerness in resorting to the terrors of the law.

There are two printed accounts of this case, but as yet only one of them (as I understand) has been published. They are both bad, because neither even professes to give a full exposition of the whole trial. The one that is published is by Mr. John Shaw (the worst of all reporters) in the ordinary Justiciary Reports. But it only reports the legal questions that arose; and as all the material judicial opinions were either supplied or revised by the judges, this report, so far as it goes, is full and accurate enough. But as it neither gives the evidence nor the speeches at the bar, nor the charge, it conveys no impression of the real trial. The other report was got up for the information of Government, and bears to be "printed and published by Thomas Constable, Printer to her Majesty;" but I understand that the publication has not yet (April 1849) taken place. This "*Trial*" leaves out all the legal questions, and only gives the evidence and the speeches by counsel, which is all well done. The charge, however, is not given here either, because to both reporters (as I understand) the presiding judge *declined* to revise. Thus (except as to the summation) a very good idea of the proceedings may be got from both of these accounts, but not from either of them by itself.

Except Boyle, now Lord President and Lord Justice-General (but who did not interfere in any of the proceedings), there was no judge on the criminal bench, at the period of this trial, who was there at

the preceding trial of Macleod in 1820. The court was composed of John Hope, Lord Justice-Clerk; Henry, Lord Mackenzie; James, Lord Moncreiff; John Forbes, Lord Medwyn; Henry, Lord Cockburn; and Alexander, Lord Wood. This was an excellent court. Can I say more of it, than that I really believe that I was the worst judge in it? The other five, notwithstanding some peculiarities in our head, were all admirable. I have no doubt that Moncreiff was the only one who had a proper feeling of the old proceedings. But the rest admired only the *law* of these proceedings, not their *manner*, or *general principles*. Moncreiff and I were the only two whigs. The toryism of our brethren, however, is comparatively harmless, now that the redness of these party lines has faded.

The case was tried by the Justice, Moncreiff, and Medwyn. The other judges were only called in to assist in settling questions of law.

The counsel for the prosecution were Andrew Rutherfurd, Lord Advocate, Mr. James Craufurd, and Mr. J. Montgomerie Bell; for the prisoners Mr. James Moncreiff, Mr. Alexander Logan, Mr. Archibald Grahame, and Mr. Lorimer,—all good men and good barristers; but I have no occasion to make any special mention of any of them except those on whom the real business of the trial fell.

It might be deemed questionable to place any one before Jeffrey or even before Henry Erskine. But laying aside and reserving the claims of these two, Rutherfurd's is undoubtedly the most powerful intellect, whether as applied to law, to policy, or to general knowledge, that has been given to the office of Lord Advocate within the last sixty years. And neither Erskine, nor even Jeffrey, nor any-

body, can surpass him in the moral qualities which elevate public station.

James, the son of Lord Moncreiff, and the grandson of Sir Harry, prolongs the hereditary talent and virtue of the family; and without being what is called learned, he is more liberally read than either of his two sires. He is as likely to reach the highest honours of his profession, purely by deserving them, as any one now in it. A good lawyer, a pleasing and forcible speaker, a most agreeable writer,[1] judicious, honourable, and friendly, there is nothing left for his friends to wish, unless, perhaps, it be that his outward man, which seems scarcely to belong to the strong mind and the strong voice it is connected with, was somewhat more commanding.

In James Craufurd very considerable ability is combined with purity and enthusiasm of principle, and with a very affectionate heart. This union of talent and goodness can never make itself vocal without moral eloquence. Craufurd scarcely ever fails to make his hearers love both his side and himself. The mere frank and joyous hibernianism of his manner goes far to account for his popularity.

The only thing against Logan is that he is sometimes beset by a taste for quaint and heavy jokes. And the innocent confidence with which he enjoys them makes the ignorant suppose that he considers them as his peculiar merit. This mistake of his trump-card sometimes mars his management of his hand; in the dealing of which nature has by no means been unkind. For in reality he is an able, sensible, honest, generous person; a most excellent fellow, and the most candid of pleaders, beloved and respected by all who know him.

[1] See his contributions to the *North British* and *Edinburgh Reviews*.

The indictment contained two charges. One was for "*wickedly and feloniously conspiring to effect an alteration of the laws and constitution of the realm by force* or violence, or by armed resistance to lawful authority." This accusation, of which all the prisoners were acquitted, does not come within the scope of this examination. The other charge was "*sedition.*" The facts set forth in support of it were in substance that certain persons called Chartists had combined to effect certain alterations of the laws and constitution of the realm by force; that a meeting of these persons and of their adherents was called for the 12th of June 1848, its announced object being to show by "a great demonstration" that the people "*were not to rest satisfied until the principles of the people's charter became the law of the land;*" that this meeting was held on Bruntsfield Links; that the prisoner Grant presided; that he and the other two prisoners had spoken; that there was another such meeting held on the Calton Hill on the 24th of July 1848, at which Hamilton and Ranken had spoken; that all these speeches were seditious, and had not only been uttered "*wickedly and feloniously,*" but had been "INTENDED *and calculated to excite popular disaffection, commotion, and violence, and resistance to lawful authority.*"

No *particular words* were imputed to *Grant*, who was only charged as in connection with the meeting on the 12th of June. But it was said in general, that "you did advise and exhort the persons there convened and assembled to form themselves into clubs and sections for the more effectual prosecution of the objects of the Chartist body." The main fact imputed to him was, that "you did, as chairman aforesaid, hear, permit, and sanction

the seditious speeches above libelled of the said Henry Ranken and Robert Hamilton, and you did not call them to order, or stop or attempt to stop them, or express any dissent from, or disapprobation of, the said speeches."

The worst parts of the harangue ascribed to *Ranken* were these: "We therefore declare that it is our intention not to rest satisfied, nor to cease agitating, until the people's charter is the law of the land, being fully convinced that justice can neither be obtained nor preserved, unless the people are put in possession of their rights, which are clearly laid down in that document. We are further resolved to exert ourselves to the utmost of our power to promulgate our principles in every quarter of the land, and thereby create a feeling that will ultimately compel our *oppressors to relinquish their grasp*, which we are satisfied will be ere long; *for we are determined that while there is misery for the inmates of the cottage there shall be no peace for the inmates of the hall.*" "The science of chemistry had entered the workshop, and the *working men could provide themselves with as deadly weapons as Warner's long range*, and if it was to be a struggle for life and death, if it was to be destruction, then you hoped and trusted that the working men would only be true to themselves, *and only abstain from all acts of aggression until they were roused by the oppression of their oppressors, and when they began the work may they do it well.*" "If the leaders of the people are to be incarcerated, *if the people are to suffer this tamely, if those who have an interest in keeping you down feel that you will quietly submit, even then they are secure;* but if the working men look to themselves, and if they look to those who

place themselves in the front of the fray, if they look to those who are willing to brave every danger, then I say the working men ought to consider what means should be taken to protect these men. *Let the property of the country be hostages in the hands of the people for the safety of the leaders of the people.*" "It has been said that the French are inventive, but that the British have this faculty that upon all French inventions they improve. *Should the authorities drive the people into a revolution, then I hope the people will improve upon the French invention of a Republic.*" And *Ranken* was further charged with having advised the people "*to organise into clubs and sections,*" "and *to provide themselves with arms, in case they might require to use them.*" That the *people of Ireland were justified in their determination to resist to the death the oligarchy who ruled them,*" and that he hoped that "*the God of battles would smile on the oppressed, and enable them to improve the victory they were sure to win.*"

The worst language or sentiments imputed to *Hamilton* were that he urged the people "to *organise themselves into clubs and sections, and to provide themselves with guns and bayonets,*" in order to promote the Chartist cause. "*For the love of God prepare yourselves with guns and bayonets, as the day is not far distant when you may require them.*" And that he said that "pikes were easily made, and that the young and the spirited men of Scotland should go to Ireland and help the Irish people, and that at one time you would have been satisfied with the charter as the law of the land, but that now you would accept of nothing else than a republic, and that they would soon obtain one."

This language was not only plainly seditious,

but it was by far the most seditious that had ever been charged against any Scotch prisoner.

It is not worth while to analyse the evidence. The greater portion of it was employed to expose the arrangements and purposes which tended to establish the conspiracy. The rest went to prove the use of the words which were said to contain the sedition.

The trial lasted two days.[1] The Lord Advocate being ill on the second, the jury was addressed for the prosecution by Mr. Craufurd; for Ranken by Mr. Moncreiff; and for Grant and Hamilton by Mr. Logan. Deducting the Lord Justice-Clerk, who is said to censure the whole of them, those who were present seemed to be unanimous in their admiration of these three speeches; and the opinion of the more judicious hearers satisfies me that the admiration was just. This judgment by intelligent hearers is the only safe criterion of a speech. A good report may be a better thing; but, *as a speech*, the best report is cold and bare in comparison with the living words, look, tone, and manner. But it is satisfactory when, as here, the report tends to justify the speaking impression.

I am confident that Craufurd's was the best address that was ever delivered for the Crown, to a jury, in a Scotch trial for sedition. It was able, fair, and temperate; strong for a conviction, but liberally constitutional in public principle; and, above all, it was superior to the paltriness of inflaming, instead of allaying, any prejudices that the jury might be supposed to be under the influence of. It formerly constituted sedition, and proved it, that the prisoner had urged universal suffrage and annual parlia-

[1] This could not be discovered from Mr. Shaw's report.

ments. The Chartists urged these, and several worse changes. But the doctrine of the prosecutor now is this:—"With respect to these political doctrines of the Chartists, let me explicitly avow that the Chartists *are well entitled to hold these opinions, to express and promulgate* these opinions, *and to associate in order to maintain and advance them by all legitimate means*—by addresses to the Crown, petitions to parliament, public meetings orderly conducted, argument, reasoning, entreaty, and remonstrance. They are entitled by all constitutional means to carry out their political object. *This is not a prosecution for opinion;* and whether the changes desired by the Chartists would be wise or salutary, conducive to the public welfare or consistent with the public security, is no question for you or any of us to consider." "It is not for the use of such means that they are now charged with crime. Was it even by agitation? by the stirring, and combining, and concentrating of public opinion? This is a course open, perhaps, to observation, because liable to be carried to excess—a course requiring on the part of those who enter upon it calmness, moderation, and discretion in no ordinary degree; *but it were in vain to disguise or conceal the fact that by the force of popular opinion, gathered and wielded by popular agitation, gigantic abuses have been overthrown, and valuable reforms have been accomplished.*" "Let it, therefore, be understood distinctly, as it is now emphatically stated for the prosecution, that the crime with which the prisoners are charged does not consist either in the opinions they hold, or in the open expression and free discussion of their views, or *in their loud proclamation of their supposed wrongs, their indignant denunciation of alleged abuses, their*

urgent entreaty, their vehement remonstrance, their impetuous demands; nor even in the spirit-stirring popular agitation by which they seek to advance their opinions. But the indictment states," etc. (that they had *conspired* to *use force*, and committed *sedition*). The ghost of Braxfield must have growled when these words were uttered.

In Clerk and Jeffrey, Moncreiff had rivals, the *substance* of whose professional defences of seditious prisoners will scarcely ever be excelled. But he is worthy of being placed by their side. His address was said to be, and must have been, admirable. I shall only quote two passages, because they suggest a curious contrast :—" It is not beyond the recollection of the present generation that there have been times when juries as high-minded as any jury can be have been carried away by the whirlwind of similar excitement. There have been times when verdicts have been returned under circumstances of public prejudice, *in which the voice, not of law merely, but reason and sense, was drowned in one overpowering terror; verdicts which filled some, at least, who pronounced them with undying regret; and have stamped an indelible stigma on the times they characterise. I am under no apprehension of that kind to-day. The bubble is burst,*" etc. " There is a third consideration, and which is the only other preliminary remark I shall urge, and which is perhaps the strongest ground of confidence which I entertain of all—I mean the singular and remarkable advance which the doctrines of constitutional liberty and the principles of freedom have made within the last fifty years. *When I contrast the proceedings of this day with those to which my study for this case has directed me—when I contrast the*

times in which we live, and the sentiments now prevalent, with those that have gone by—when I contrast the tone of constitutional moderation in which the prosecution has been conducted, with prosecutions not yet forgotten, and still too recent to be stamped and characterised in words with the reprobation they deserve,—I say, when I consider the advance of free principles since then, I am grateful to think that we live in times so much happier, and I feel animated by the conviction that I shall have a fair hearing, and these panels a fair trial this day, in the highest sense of the word." (*Trial*, p. 53.) What did the ghost say to this ?

Logan's, for the cause, was an excellent address.

The presiding judge's full summation is not reported. The trial does not even profess to report it; and though Mr. Shaw gives about three pages to it, it is plain that these pages (which were seen and left as they are by his Lordship), even if absolutely correct, could convey no truth of a charge which occupied *three hours and a half, being a longer period than what was required for the whole three speeches at the bar.* His Lordship, it is said, *declined* to revise his charge. Practically, therefore, it is not reported at all. No supposed thought or word in what is given can ever be quoted as an authority for anything—not even for the fact that such thoughts or words were uttered.[1]

The summation, as heard, was not favourably spoken of. Laborious minuteness of detail and of views, especially from a judge wishing to instruct a

[1] His Lordship is made to censure one of the prisoners' counsel for attempting to make the necessary differences of society a defence or apology for criminal violence ! *If he uttered any sentiment of the kind, it was utterly groundless;* for nothing within the horizon of such a defence of apology was even alluded to by any one at the bar.

jury, when luminousness, and consequently simplicity, are everything, always makes darkness darker. As received by the audience, and especially by the counsel for the prisoners, it was a strong charge for a total acquittal. But whether this was the charger's meaning, or whether a display of constitutional liberality was mistaken for an opinion in favour of the prisoners, is by no means so clear.

The judgment of intelligent persons who had attended the whole trial (confirmed, as I think it is, by the report of the evidence) was, that there ought to have been, and but for the charge would have been, a conviction of conspiracy against the three prisoners, and of sedition against Hamilton and Ranken. As to Grant, the language imputed to him was not established; and there was nothing else set forth against him except his virtual adoption of the sedition of the other two prisoners by hearing it, and, though chairman, not checking it. But what they said was uttered in a large meeting, held in a field; and it was not very improbable that, though the chairman must have seen the orators, he might not have heard their exact expressions, or at the moment have appreciated them. It was thought, therefore, that he ought to be acquitted of the sedition.

The actual result is thus stated, and accurately, in the report—"The jury, after deliberating for half an hour, returned the following verdict :—'The jury unanimously find the charge of conspiracy against the three panels, as libelled, not proven. The jury also unanimously find John Grant not guilty of sedition, as libelled.

"'The jury further unanimously find Robert Hamilton *guilty of using language calculated* to

excite popular disaffection and resistance to lawful authority. And by a majority of one find Henry Ranken *guilty of using similar language.*"

It was seen by the court, or at least by the presiding judge, that this was no convicting verdict. Accordingly the Lord Justice-Clerk said :—"Gentlemen, be good enough to observe in regard to that part of the verdict which contains the specialty finding Hamilton and Ranken guilty of *using language calculated* to excite popular disaffection and resistance to lawful authority, that this is the description of sedition libelled.[1] Now, to make your verdict correct, you should determine whether they are guilty or not guilty of *sedition* to any extent you please. You may say, for example, that they are guilty of sedition in so far as they used language calculated to excite popular disaffection and resistance to lawful authority.

"*The Chancellor of the Jury.*—That is what we mean, my Lord.

"*Lord Justice-Clerk.*—In using the word 'calculated,' *do you mean to leave out the word 'intended;'* or does your verdict mean to embrace both ?

"*The Chancellor.*—*We mean purposely to leave out the word 'intended.'*

"The verdict was then recorded as follows :—'The jury unanimously find Robert Hamilton guilty of sedition, in so far as that he used language *calculated* to excite popular disaffection and resistance to lawful authority ; and by a majority of one find Henry Ranken guilty of sedition *in the same terms.*'"

[1] There must be a mistake here ; for this is certainly *not* the description of the sedition libelled. In the libel the description is "*intended* and calculated."

The sufficiency of the verdict as thus recorded being questioned, the point was argued before the whole judges on a subsequent day.

The argument in support of the objection came, in substance, to this:—That the verdict was uncertain, or was defective as a ground for punishment; that every Scotch indictment, *without any one exception*, has set forth either general wickedness and feloniousness of mind as the foundation of the charge, or some particular evil intention; that the present indictment charges both, for it first asserts that all the acts were done "*wickedly and feloniously*," and then specifies the particular sort of wickedness to have consisted in a design to produce the very mischief for which the seditious acts are said to have been both "*intended and* calculated;" that evil intention was thus made an essential part of the crime; or if this be supposed to limit the prosecutor too strictly, the indictment made it indispensable that he should at least establish some sort of wickedness or feloniousness, especially as there can be no crime without some guilt in the mind of the criminal; that nevertheless the verdict, especially when combined with the explanation which must be taken as a part of it, did not merely not convict of any criminality of mind, but virtually acquitted of it; for it did not find the prisoners *guilty*, nor guilty *as libelled*, nor guilty of *sedition* simply, but only "guilty of sedition IN SO FAR AS THAT HE *used language* CALCULATED to excite popular disaffection," etc.; that from this finding all evil intention was confessedly excluded, and no other kind or degree of guiltiness was found; that thus the recorded verdict, adjusted after the court had interfered to get it set right, remains exactly as it stood when originally

given in by the jury,—"*Guilty of using language calculated,*" etc.; that the sedition of which the prisoners were thus found guilty was described and limited, in the verdict, as consisting of the *bare fact of the use* of language of a mischievous tendency, abstracted from all mental guilt,—as it might have been used by a lunatic, and was actually used by the clerk of the court when he read the indictment; that we must not be misled by the detached words *guilty of sedition;* but must take these words with their limitation, and this limitation makes it *no sedition in law;* that, unless by holding criminality of mind to be immaterial, no effect, if the verdict be sustained, is given either to the positive acquittal from all evil intention, or to the virtual acquittal from all other wickedness; and that, on the whole, the case is nearly the same with that of the *Dean of St. Asaph,* in which a verdict of "*publishing only*" was determined to be defective. (*State Trials,* vol. xxi. pp. 950 and 1044.)

The answer to this was, in substance, that though an intention to effect the particular mischief for which the words were calculated be the usual state of the fact, yet there was no legal necessity for always establishing this exact design in all cases of sedition; that any *malus animus,* including under this a criminal disregard of consequences, is sufficient; that some *malus animus* is necessary, not in virtue of the usage of indictments, in which the imputation of evil intention has not been usual, and in which the phrases "*wickedly and feloniously*" are mere words of style; but in virtue of the legal principle which makes some guiltiness of mind, positive or negative, essential in the composition of any crime; that though the jury had negatived the

evil intention libelled, they had not negatived all *malus animus*, for they had convicted the prisoners of *sedition*; that the words "in so far," etc., were not a limitation of the nature, but only an explanation of the extent, of the guilt; and that the plain meaning, and the only correct construction, was, that in so far as the prisoners had used language calculated to excite popular disaffection and resistance to lawful authority, they had incurred all the guilt, whatever it may be, that is essential to the commission of sedition.

This answer was satisfactory to the whole court, except to myself.

It is very material to observe that neither the prosecutor nor any judge adopted Baron Hume's principle in the case of *Robertson and Berry*, namely, that it was competent *for the court to supplement verdicts by its inferences.* They all went on the ground that the *verdict*, properly construed, *did by itself*, and without judicial addition, find the guilt. Lord Moncreiff founded on the case of *Robertson and Berry* (Shaw's *Justiciary Reports*, vol. i. p. 104); but only to show that the court gave effect to a verdict which did not contain a finding of guilty intention. Of the reasoning by which the court held itself empowered to *add* to the verdict what the court deemed inferences of fact, he said nothing.

The prisoners were sentenced by the three judges who had tried them to four months' imprisonment—a lightness of punishment which was probably owing, in part, to the general impression that the verdict was questionable.

The prosecution, though to a great extent it failed, was useful. It implied and proclaimed that

to form, or to attempt to form, or to recommend a National Guard, or any military organisation, was criminal; the proceedings were conducted, both by the prosecutor and the court, most liberally towards the prisoners; and the mildness of the sentence deprived them of all sympathy.

The prisoners were all respectable men, and, except as politicians, sensible.

If any one who had heard the trials of 1793 and 1794, and had then left this country, had come back, and been present at this trial, it would not have been easy to have convinced him that he was again among the same people. He would probably not have observed much difference either in the kind or in the degree of the mistimed political extravagance with which the prisoners were charged, and which they represented. Its phrases and some of its particular objects might have struck him as new; but, on the whole, he would have seen one of the common struggles between order and disorder which are apt to break out where the real freedom that the people enjoy excites the ambitious and discontented to seek more than the subsistence of society can allow. But the total change in the tone and air of the public, and far more of the court, would have amazed and pleased him. The people had gained great reforms, and a vast increase of power. Proscription, consequently, for political offences was at an end. A far better instructed attachment to the Constitution, including even its monarchy, was combined with infinitely greater political toleration. An improved mode of returning the whole sixty-five jurors by the sheriff made them consist of all varieties of opinion. The presiding judge no longer picked. It was a trial.

The convict ship did not darken its close. No part of the scene would have impressed him so much with the feeling of novelty as the speeches; each of which, including the judge's charge, seemed determined to exceed the other in popularity of doctrine.[1]

[1] Before the sufficiency of the verdict was decided, I wrote to Lord Campbell, asking him what he thought of the point. He declined giving any opinion, plainly because he (who was one of the Cabinet) thought it possible that there might be an application to the Crown by the prisoners, and that this might be referred to its legal advisers, or to certain judges, and that he had better not commit himself. But I was a good deal with him last week, and as the imprisonment was long over I again consulted him. *His own opinion is that it ought to have been considered as a verdict of acquittal*, and that he understood this to be the opinion of the English lawyers to whom the question, had it been necessary, would probably have been referred. He thought that on principle it was just the English abortive verdict of "*guilty of publishing* only."

27th August 1849.

XXV.—Case of James Cumming, 9th and 15th November 1849.

This person, a shoemaker, was another of the Chartists; and his case was very much involved with the matter of the preceding one.

His indictment charged the three offences of conspiracy, violation of the recent statute of the 11th Vict. chap. 12, and sedition. With the two first I have nothing to do.

No special words are set forth as having been spoken; but the sedition is said to have consisted, 1st, in the transmission through the Post-office of a seditious letter; and 2dly, in the fact of his having, while chairman of a Chartist meeting, recommended the use of pikes and the formation of a National Guard. It is in this virtual encouragement to arm that the sedition (if any) of the letter consists.

It is needless to enter into any particulars, for the case was not tried. The Lord Advocate abandoned the prosecution, assigning as his reasons that it was a much lighter case than that of the three preceding prisoners, and that after one of these had been entirely acquitted, and the court had judged four months' imprisonment to be a sufficient punishment for the other two, it was not worth while to proceed further with it.

APPENDIX.

APPENDIX.

On the 3d of February 1837, the Town Council of Edinburgh was persuaded by certain persons in London to agree to give a site on the Calton Hill for a monument in honour of those who were transported in 1793 and 1794.

In the last week of February 1837, these persons held a meeting in London for the furtherance of this object. About a dozen of Members of Parliament were present.

On the 23d of March 1837, a meeting was held in Edinburgh, where the following resolutions were passed:—

"*Edinburgh, Monday, March* 27, 1837.

"POLITICAL MARTYRS OF SCOTLAND.

"At a public meeting of the reformers of Edinburgh, held on Thursday the 23d March, in the Waterloo Rooms—Bailie Millar in the Chair, it was

"Moved by James Browne, Esq., LL.D., Advocate,

"Seconded by Robt. Phillip, Esq., Leith,

"I. That the solemn expression of reverence and gratitude to the memory of those enlightened and patriotic individuals, who have resisted oppression and suffered in spreading the principles of liberty, is the duty of every freeman, and is especially incumbent upon the reformers of Scotland in relation to those distinguished sufferers for freedom—Thomas Muir, Joseph Gerrald, Thomas Fyshe Palmer, William Skirving, and Maurice Margarot.

"II. That the real offence committed by these unfortunate victims of judicial iniquity consisted in their having combined to obtain, by constitutional means, a reform in the representation of the people, which Mr. Pitt had strenuously advocated in the early part of his career, and which has, in our time, been triumphantly carried into effect.

"Moved by J. H. Burton, Esq., Advocate,

"Seconded by Sidney Smith, Esq., Solicitor,

"III. That while we express the strongest disapprobation of the shameless injustice by which the early reformers were sacri-

ficed, and of the servility which, for a season, degraded the tribunals of Scotland into the ready tools of an unscrupulous faction, we exult in the universal recognition of the justice of the cause so boldly advocated by *Muir*, *Palmer*, *Gerrald*, and their associates, and the proofs now multiplying around us, that sacrifices for the good of mankind are never made in vain, nor the memory of the true benefactors of the human race ever left to perish.

"Moved by Councillor Howden,

"Seconded by Adam Black, Esq.,

"IV. That to mark the profound sense we entertain of the patriotic zeal of those self-devoted friends of the people, who, in 1793 and 1794, became the victims of rancorous tory persecution, under the abused name of justice, it is proposed to dedicate to their memories a national monument, which shall form an enduring record of their deeds, and an encouragement to the men of future times to emulate their heroic example.

"Moved by Thomas Muir Moffat, Esq., Solicitor,

"Seconded by William Muir, Esq., Leith,

"V. That, in furtherance of the main object of the present meeting, a subscription be immediately entered into, in connection with the subscriptions already begun in London and other places; and that, without attempting to dictate to other communities, it is our opinion, that no locality is so well adapted for the site of a public monument to the First Martyrs of Political Liberty in Scotland, as the scene of their persecution, and of the short-lived triumph of their oppressors.

"Moved by William Tait, Esq.,

"Seconded by Councillor Falkner,

"VI. That our warm thanks be given to the meeting lately held at the Crown and Anchor Tavern, London, and to those noblemen and gentlemen who have since co-operated in its objects—and especially to Mr. Hume, for his indefatigable and unwearied zeal at all times in the cause of the people—and for his efforts to do justice to the memory of the early champions of the people's rights.

"Which resolutions having been severally put from the chair, were carried unanimously. It was also resolved, that the Committee already appointed be continued for carrying the object of the meeting into effect, with power to add to their number.

"ANDW. MILLAR, *Chairman.*

"THOMAS MUIR MOFFAT, *Secretary.*

"Subscriptions received by the Treasurer, William Tait, No. 78 Princes Street."

And in July 1842, the Town Council fulfilled its engagement, by doing all that it could to grant the site. This resolution was not unanimous, and several good whigs were in the minority. The consent of those who act for the city creditors, and, I believe, of some other parties, is necessary, and there is little likelihood that they will agree. So that probably the proposed grant will fail.

But though this obstacle were removed, there are two reasons against placing the monument on the Calton Hill, and a third against placing it anywhere.

In the *first* place, the design is abominable; and no design, fit for this situation, can ever be got for the money that has been, or can be, raised.

In the *second* place, this noble eminence ought to be left sacred to such structures as all may sympathise with. The Astronomical Institution, and the monuments of Stewart, Playfair, and Burns, are edifices that can create no pain, or division of opinion. All may enjoy that splendid terrace, with their associations only elevated by beautiful works of art,—reminding them of science and of great men. There are few merely political characters whose shrines will ever be visited with such unanimous reverence. But even when they deserve to be so, still if they be not, this dissent is of itself a sufficient reason against obtruding their monuments on those public walks, which it is useful that all should be in the habit of resorting to, and with worthy thoughts. There should be nothing discordant in such a situation; unless indeed the structure were such as that all other feelings should be absorbed in the contemplation of its beauty or grandeur.

In the *third* place, no public monument is due to these men. Private friendship may mourn over Muir, Palmer, and Gerrald, and may erect some memorial of their virtues and sufferings; but on public grounds, they have no claim to any pillar. Except Muir, none of them were guiltless. But supposing them to have all been so; and making the additional, and surely very large assumption, that the reform in prosecution of which chiefly they fell was rational, still they have a heavy account to settle with posterity.

They are said to merit public gratitude by their wisdom as reformers, and their courage and sufferings as martyrs. But these cannot be separated. Apart from the wisdom, there is no merit in the courage or suffering. If the reform was bad, the martyrdom was foolish. We may admire honesty and firmness even in a useless or a bad cause; but we erect no public monuments for mere personal virtues unconnected with public objects.

Now the man least entitled to the gratitude even of his own

party, is he who, approving of their leading principle, obstructs its success by conceited and obstinate rashness. Whatever independence may be allowed to mere speculation, with practical reformers disregard of practicable reason is the worst of all follies; and it is the less excusable that it commonly proceeds from the vanity of being first, or solely, right. No adherent of a party, and no member of any community which can only do good by union is entitled to precipitate the concerns of the society by insisting on practical experiments recommended by his solitary wisdom. He may possibly be right; and if so, he may secure the honour of his superiority in other ways; and the world may at last find out that it has been a loser by its mind not having been so early ripened as his was. But whatever may be the case with such truths as are equally destined for all ages, present practical liberty is never advanced by the disclosure of measures which only alarm; by attempts which only provoke power to crush them; by martyrdoms which, while they attest the enthusiasm of the sufferers, were not necessary for their honour, and tended to defeat their objects. I am confident, from actual observation, that the broaching of the doctrines of universal suffrage and annual parliaments—absurd at any period, but worse than absurd in 1794—very greatly retarded the progress of all liberal opinion in Scotland. It brought the whole question of the representation into discredit. The intentions of these reformers may have been good, but in effect they were the enemies of liberty. And it would not have required any unusual portion of modesty to have enabled them to see the tendencies of what they were doing; for the brother reformers who refused to join the convention did so, and warned them.

The truth is, that if they had only been properly tried, and properly punished, the idea of raising a monument to their memory would never have occurred. *It is not to them that the Memorial is erected.*

The London Committee applied to old William Adam, the Lord Chief Commissioner, for a subscription, thinking it certain that he who had espoused the cases in parliament in 1794 must necessarily promote the monument in 1837. But the difference was explained to them between admiration of these men's conduct and anxiety for justice.

22D NOVEMBER 1844.—But in spite of all this, the foundation-stone of the monument was actually laid on the 21st of last August, and in a style which I should have thought would have made Braxfield start from his grave. There was a procession, a dinner, and a supper. The stone was laid in the Calton Hill burial-ground by Joseph Hume. Lord Dunfermline, the nephew of Lord Abercromby, who, since he could not prevent the monu-

ment, wished his uncle and the other judges to be dealt with as tenderly as possible, prevailed on Sir James Gibson Craig to preside at the dinner; and the manly Baronet, who himself acted in the scenes of 1793-4, though he distinctly denounced the trials and the court, was as moderate as was decent. About 200 persons, *including the Lord Provost of Edinburgh*, were present. This aristocracy assembled in a tavern and paid 10s. 6d. each for their dinner. But the supper, being reduced to a shilling, the great room in the Waterloo Hotel was crowded, under the chairmanship of John Dunlop, Esq. of Brockloch, a famous radical. Whatever decency there was, there was certainly no excessive moderation there.

This monument is to be placed (as I understand) very near that of the two David Humes. I wonder what either the historian or the lawyer, alike at least in their toryism, will think of their new associates.

The names of all the judges will, no doubt, be perpetuated on the column. So visible a condemnation of judges is not to be found elsewhere in Europe. Would that their conduct had made it contemptible!

31ST MARCH 1845.—The monument, which is exciting great horror among all of those who approve of the trials, has been objected to on an alleged illegality in its position, and this point has been litigated in two bills of suspension and interdict. Lord Murray, the second son of Lord Henderland, and lately Lord Advocate, refused the first application for an interdict. Lord Robertson granted the second one. And, on the 4th inst., the First Division of the Court altered this judgment, and rejected the application. The Lord President (Boyle) dissented from this opinion, against Lord Mackenzie, Lord Fullerton, and Lord Jeffrey. The question, *as formally exhibited*, depended on what were the legal uses of the particular place of sepulture; which, it was pleaded, could not be converted into sites for the erection of monuments, but more particularly of offensive party monuments, in honour of men convicted of crimes, and not buried there. But though this was the legal question, it was not disguised that it was a question devised merely for the purpose of obstructing this special erection on *political feelings*. And fairly so. It was a party struggle on both sides. But nothing could be more strict than the exclusion of all this matter from the judicial discussion. A stranger would have thought that it was really a dispute about a burying-ground. The report explains the case. Jeffrey's opinion (which he read) was singularly beautiful. It remains to be seen whether the baffled complainers will appeal. Lord Brougham, I am told, is one of the subscribers to the monument.

MAY 1846.—They did not appeal, and the monument is now actually finished, and I don't think it looks ill at all. *It is said* to be a copy of Cleopatra's needle. But I doubt this. And, at any rate, copies, even when quite exact, are not necessarily as good as originals. However, nothing that sticks up without smoking seems to me ever to look ill in Edinburgh. This pillar adds to the general picturesqueness of the mass of which it is a part.

16TH AUGUST 1846.—But even yet there is no inscription. It is fortunate for surviving friends that they have the delicacy to pause.

31ST DECEMBER 1846.—I have just read the following passage in the grave work of a grave Ex-Chancellor: "The Martyrs' Monument on the Calton Hill, erected to the memory of Muir and his companions, is a striking proof of the servitude of a former generation, and of the freedom of the present." (Campbell's *Lives of the Chancellors*, vol. v. p. 612, *note*.)

MAY 1847.—There have been many proposed inscriptions. The most moderate that I ever heard suggested was by Lord Dunfermline, the nephew of the Justiciary Lord Abercromby. He wished that the Monumental Committee would be contented with recording the names of the martyrs, and the exposition of two facts which marked the change of times. One of these was to be exhibited by stating that these men had suffered, partly for advocating parliamentary reform, and then by giving the date and title of the Reform Bill; the other, by mentioning their sentences, by giving the date and title of the statute abolishing transportation as a punishment for sedition. But the Committee has exceeded even this moderation. The stone is engraven on one side with these words: "To the memory of Thomas Muir, Thomas Fyshe Palmer, William Skirving, Maurice Margarot, and Joseph Gerrald. Erected by the friends of Parliamentary Reform in England and Scotland, 1844." And on another side are these words: "I have devoted myself to the cause of the People; it is a good cause; it shall ultimately prevail; it shall finally triumph."—Speech of Thomas Muir in the Court of Justiciary on the 30th of August 1793. "I know that what has been done these two days will be rejudged!"—Speech of William Skirving in the Court of Justiciary on the 7th of January 1794." This is all.

A sparing inscription. How the judges' names are omitted I cannot understand. For it is, in truth, *their* monument.

FINIS.

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