

A
REPORT
OF THE
T R I A L
OF
Mr. HUGH FITZPATRICK,
FOR
A LIBEL
UPON
HIS GRACE THE DUKE OF RICHMOND,
LORD LIEUTENANT OF IRELAND.

By WILLIAM RIDGEWAY, Esq.
BARRISTER AT LAW.

DUBLIN:
GRAISBERRY AND CAMPBELL, PRINTERS, 10, BACK-LANE,
AND SOLD BY
C. P. ARCHER, 44, DAME-STREET.

1813.

Houses of the Oireachtas

A

REPORT, &c.

KING'S BENCH,

Saturday, 6th February, 1813.

The KING *against* HUGH FITZPATRICK.

This was an Information *ex officio*, filed by the ATTORNEY GENERAL, and came on to be tried this day at the Bar of the Court of King's Bench.—It was as follows :

County of the City of Dublin, to wit.—Be it remembered that the Right Honorable WM. SAURIN Attorney General of our Lord the King, who for our said Lord the King in this behalf, prosecutes in his proper person, comes into the court of our said Lord the King, before the King himself, at *Dublin* in the County of the City of *Dublin*, on the sixth day of *November* in the same term, and for our said Lord the King gives

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the court here to understand and be informed that *Hugh Fitzpatrick*, late of Capel-street in the County of the City of Dublin, Printer, being a wicked, malicious, and ill disposed person, and wickedly and maliciously contriving and intending to scandalize, traduce, and vilify his Grace the Duke of RICHMOND, Lord Lieutenant of *Ireland*, and his Majesty's Ministers in *Ireland*, acting under the authority of the said Lord Lieutenant, and to stir up and excite discontent amongst his Majesty's subjects, professing the Roman Catholic Religion in *Ireland*, on the nineteenth day of June in the year of our Lord 1812 at Capel-street aforesaid in the County of the City of Dublin aforesaid in order to fulfill and bring to effect his most wicked and malicious intentions aforesaid, wickedly and maliciously did publish, and did cause to be published in a certain book or pamphlet entitled, "A Statement of the Penal Laws which aggrieve the Catholics of *Ireland*, with commentaries, in two parts, part II," a certain false, seditious, and malicious libel of and concerning his Grace the said Duke of RICHMOND, Lord Lieutenant of *Ireland* and his Majesty's Ministers in *Ireland*, acting under the authority of the said Lord Lieutenant, of the tenor and effect here following, (that is to say), "At the Summer Assizes of Kilkenny, 1810, one Barry "was convicted of a capital offence, for which, he was "afterwards executed. This man's case was truly tragic, he was wholly innocent, was a respectable Catholic "farmer, (meaning a farmer professing the Roman "Catholic religion) in the County of Waterford in good "circumstances, his innocence was *clearly established* "in the interval between his conviction and execution, "yet he was hanged publicly avowing his innocence!!! "There were some shocking circumstances attending "this case, which the Duke of Richmonds administration, (meaning the *administration* of the said Duke of "Richmond Lord Lieutenant of *Ireland*, and his Majesty's Ministers in *Ireland*, acting under the authority of "the said Lord Lieutenant may yet be invited to explain

“to parliament,” meaning to insinuate and cause it to be believed that because the said Barry was a person professing the Roman Catholic religion, the said Duke of Richmond, Lord Lieutenant of Ireland, with the advice of his Majesty’s Ministers in Ireland, acting under the authority of the said Lord Lieutenant, *had determined that the said Barry should not obtain his Majesty’s Pardon* and had accordingly suffered the said Barry to be executed as a felon, though the innocence of said Barry was established to the knowledge of the said Lord Lieutenant and Ministers. In contempt of our said Lord the King, and his laws, to the evil example of all others in like cases offending and against the peace of our said Lord the King his Crown and Dignity.

And the said Attorney General for our said Lord the King further gives the court here to understand and be informed that the said *Hugh Fitzpatrick* being such person as aforesaid and wickedly and maliciously contriving and intending and to scandalize, traduce, and vilify his Grace the Duke of Richmond, Lord Lieutenant of Ireland and his Majesty’s Ministers in Ireland acting under the authority of the said Lord Lieutenant, and to stir up and excite discontents amongst his Majesty’s subjects professing the Roman Catholic religion in Ireland on the 19th day of June, in the said year of our Lord 1812 at Capel-Street aforesaid, in the County of the City of Dublin aforesaid, in order to fulfil and bring to effect his most wicked and malicious intentions last aforesaid, wickedly and maliciously did publish and did cause to be published in a certain book or pamphlet, entitled “A Statement of the Penal Laws which aggrieve the Catholics of Ireland, with commentaries in two parts ; Part II.” a certain false, seditious, and malicious libel of and concerning his Grace the said Duke of RICHMOND, Lord Lieutenant of Ireland, and his Majesty’s ministers in Ireland, acting under the authority of the said Lord Lieutenant of the purport and effect here following, that is to say, “At the summer assizes of Kilkenny, 1810,

“ one Barry was convicted of a capital offence, for
 “ which he was afterwards executed. This man’s case
 “ was truly tragical, he was wholly innocent, was a
 “ respectable catholic (meaning a farmer professing
 “ the Roman catholic religion) in the county of Water-
 “ ford, in good circumstances, his innocence was clearly
 “ established in the interval between his conviction and
 “ execution, yet he was hanged publicly avowing his
 “ innocence! There were some shocking circumstances
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 blished to the knowledge of the said Lord Lieutenant
 and ministers,) in contempt of our said lord the king
 and his laws, to the evil example of all others in like
 cases offending, and against the peace of our said
 lord the king, his crown and dignity. Whereupon the
 said Attorney General for our said lord the king, who
 in this behalf prosecuteth, prays the consideration of
 the court here in the premises and that due process
 of law may be awarded against him the said Hugh
 Fitzpatrick in this behalf to make him answer to our
 said lord the king, touching and concerning the pre-
 mises aforesaid.

And the said Hugh Fitzpatrick, by James Hughes
 his attorney, comes and defends the wrong and injury
 when and soforth, and says he is not guilty of the
 premises in manner and form as the said William
 Saurin hath above thereof informed against him, and
 of this he puts himself upon the country.

The *Sheriffs* of the City of Dublin delivered in a Panel of the Jury, which was called over.

John Lindsay—set by on the part of the crown.

Alexander Jaffray—

Mr. *O'Connell*—My lord, I beg to ask this gentleman whether he has declared any opinion upon the subject of this trial.

Mr. *Jaffray* answered that he did not think he had : he was thereupon sworn.

Peter Roe—

Mr. *Burrowes*—I must ask this gentleman the same question ; although I personally know him, and consider him highly respectable, and to whom I would willingly submit any case for his decision, as a juror, but in discharge of my present duty, I am not to know any individual on the pannel. I ask you, Mr. *Roe*, have you ever declared any opinion upon the subject of this trial.

Mr. *Roe*—I do not know what the subject of the trial is, I thought I had been summoned on a special jury.

Mr. *Burrowes*—It is a prosecution for a libel, alleged to be contained in a Book entitled “ a Statement of the Penal Laws, which aggrieve the Catholics of Ireland, with Commentaries.”

Mr. *Roe*—I have never seen it, nor given any opinion about it.

Mr. *Roe* was thereupon sworn.

Mr. *Justice DAY*—These objections ought not to be made to the Jurors upon conjecture.

Lord Chief Justice *DOWNES*—The party taking them ought to be prepared with some evidence to support them.

Mr. *Burrowes*—My lords, counsel do not act from their own knowledge; they follow the instructions given them; and with respect to evidence, I know no better witness than the juror himself.

William Sparrow—

Mr. *Burrowes*—My lords, I am instructed, that this gentleman has expressed an opinion upon the subject.

Mr. *Justice* OSBORNE—Perhaps it may save time to permit you to ask the question, as if the gentleman denies the fact, you may not proceed further.

Mr. *Justice* DALY—That may produce some inconvenience, as a juror who wished to avoid being sworn, had only to say, he had given an opinion.

Mr. *Burrowes*—Permit me to ask you, Mr. Sparrow, have you ever expressed any opinion upon the subject of this trial.

Mr. *Sparrow*—I do not know what the subject of the trial is.

Mr. *Burrowes*—It relates to a passage in a book, "Entitled a Statement of the Penal Laws, &c."

Mr. *Sparrow*—I have never declared any opinion in respect of it.

Edward Clibborn—set by on the part of the crown.

Richard Litton—sworn.

Thomas Rochfort—sworn.

Thomas Prentice—

Mr. *Burrowes*—Have you, Sir, ever declared any opinion respecting this book.

Mr. *Prentice*—I never read the book, nor ever had it in my hand.

Edward Rice—sworn

James Chambers—sworn

Richard Darling—set by on the part of the crown.

William Colville, Junr.—sworn.

Charles Pentland—sworn,

John Handcock Stanley—sworn.

Francis Tempest Brady—set by on the part of the crown.

John Fox—set by on the part of the crown.

Bladen Swinny—sworn.

THE JURY.

Alexander Jaffray,

Peter Roe,

Wm. Sparrow,

Edward Rice,

James Chambers,
 Wm. Colville, Junr.
 Richard Litton,
 Thomas Rochfort,
 Thomas Prentice,
 Charles Pentland,
 John Handcock Stanley.
 Bladen Swinny.

Mr. *Kemmis*, stated the information and plea.

Mr. ATTORNEY GENERAL.—My lords and gentlemen of the jury, This is an information filed by me, *ex officio*, as Attorney General, against the Defendant, *Hugh Fitzpatrick*, as the printer of a Libel, which has been stated to you from the pleading. It is a Libel upon his Grace the Duke of RICHMOND, and the government of *Ireland*; and I am sorry to be obliged to state, that it appears to me, and I am sure, will appear to you, to be one of the most mischievous and malignant Libels, that ever disgraced the Irish Press.

Gentlemen, This Libel is not an ordinary Libel: it is not a sudden effusion of faction, and malignity, sent in a hurry to a Daily Newspaper; but it is a Libel contained in a very elaborate work, prepared with extreme art and deliberation. It is contained in the second part of that work, which came out at a considerable distance of time after the first part of the same had been published. It is entitled "A Statement of the Penal Laws, which aggrieve the Catholics of Ireland, with Commentaries." The number of grievances, which are alleged, in this book, to exist, are found sufficient to fill two volumes *octavo*. Gentlemen, with the particulars of this statement of alleged grievances, I do not mean to trouble you, at this day. If there be any part of it, which can be of advantage to the Defendant in explaining the publication, he will have liberty to resort to it—But I shall call your attention more particularly to that part in which the Libel, upon which you are to decide, is contained, and I shall do that for the purpose of removing any

cavil or doubt, as to the meaning and intent—the evil and mischievous purpose for which this Libel was calculated. Gentlemen, it forms part of what is stated to be the 9th Chapter of the second part of this Statement of the Penal Code, entitled, “*Of the Laws, which ag-
“grieve the Catholics, touching the administration of
“Justice and Trials by Jury.*”—No doubt, to us all the most important branch of civil government. If the laws be not duly and equally and impartially administered to the high and low—to the poor and to the rich—the Catholic and to the Protestant, I will admit, that the great ends and purposes of Government—indeed of civil society itself—are not answered, or fulfilled. This book, however, has the audacity to represent, without any regard to truth or decency, that the administration of justice by Judges and Juries is partial; and the object of it is to impress upon the mind of the Roman Catholic population of Ireland, that they have not the benefit of the laws, and cannot obtain justice, under the present constitution and Government of the Empire.

Gentlemen, this is so grossly and abominably false, that it carries with it—to every candid mind, its own refutation, and I should willingly consign it to the refutation, which it carries with itself—There is no man in this country so ignorant, or so liable to be misled, as not to know, that law and justice are equally administered to every man, and of every religious persuasion. I have been a long time an attendant upon courts of Justice—I have seen a long succession of Judges, and I am proud to bear testimony, upon such credit as I may have with the public, that until the publication of this infamous Libel, I never had cause to suspect, nor ever heard it insinuated, with respect to any one of all these Judges, that his judgment had in the remotest degree been influenced by the religion of the parties before him.

Gentlemen, I believe, your own experience teaches you the same lesson, with respect to the conduct of

Juries. It is a question which is never asked, or a matter even known, in the administration of Justice whether the plaintiff, or defendant—prosecutor, or prosecuted—be of this religion, or of that—God forbid it should! And therefore, with regard to this part of the work which treats of—and endeavours to calumniate and bring, into discredit—the administration of Justice, I would leave it to the refutation, which it carries with itself, and the conviction of every candid man, that it is a wicked and mischievous slander.

But, Gentlemen, there is a branch of the administration of Justice, of great and vital importance indeed, which does not fall—from the nature of the mode in which it is exercised—immediately under the eye and observation of the public. I speak, my Lords and Gentlemen, of that branch of justice, which consists in the exercise of the prerogative of *mercy*—entrusted to the Crown for the benefit of the People—in this Country, delegated to the representative of Majesty. It is one of the most serious and awful responsibilities, with which the Executive Magistrate is invested. Let him have to exercise it in which way he may—whether by stopping the ordinary course of the law, by granting a pardon—or by refusing the application for its interference.—In either case, the duty imposed upon the Executive Magistrate is of the most painful and awful responsibility.—The Libel in question relates to this branch of the administration of justice. If that be lightly and inconsiderately, but above all, if it be corruptly and wickedly administered—if there be an executive Magistrate capable of abusing such a trust, no punishment can be too severe for his crime. It is, therefore, no light imputation, to charge the Representative of Majesty and those, who advise him, with the abuse of so solemn and sacred a trust.

Gentlemen, The Libel upon which you are to decide, relates to this branch of the administration of justice, and I shall call your attention, now, to that part of the chapter, in which the author enters upon this distinct branch of the administration of Justice. He introduces it with a libel upon the Lord Lieutenant,

for the time being:—whoever he may be, he applies this calumny in succession to every Lord Lieutenant. The Governors may change, but the libel applies equally to every one, who may hold the situation; upon the principle, that as the Government is now constituted by law, he must be of the Protestant religion: “In cases where the Protestant murderer or robber has happened to be convicted, his *protestantism* has secured his pardon.”—Where a *Protestant* has committed a murder, or a robbery, his professing a religion, which he disgraces, is a sufficient recommendation to the Lord Lieutenant for mercy!—could we, Gentlemen, have supposed, that any man in this country would have been found base enough to assert so infamous a libel, that the murderer, and the robber finds a sanctuary in the religion which he has disgraced, from the sentence of the Law:—it proceeds: “All the local *soi-disant* loyalists fall to work: memorials and petitions are prepared and subscribed: vouchers of excellent character are easily procured: even Catholics dare not withhold their signatures (lest they should be stigmatized as sanguinary and merciless). Thus the testimony appears *unanimous*; and the Lord Lieutenant readily pardons—perhaps promotes the convict, who, in some instances, becomes henceforth a cherished object of favour.”

Good God! Must not the author of this abomination have known, that in the exercise of this painful and responsible duty, no applications—come from what quarter they may, have any influence with him, who exercises it, if the guilt be clear? The author could not be ignorant, that in such a case, vouchers of character have no weight. If ever a libel came forward with a peculiar bad grace against a Lord Lieutenant, it is that against that Governor, who, I can say, without flattery, if more eminent in any one part of his administration, than in another, it is, in the exercise of this prerogative, for which the virtue of firmness and humanity, which distinguish his character so peculiarly qualify him. Every instance in which he has been called on to exercise that awful and anxious duty, has been marked by caution, the

soundest judgment, and the most inflexible firmness. I need not say, that his amiable nature never would fail to incline him to mercy.

But, Gentlemen, I will not put the case upon the merits of him whose government we now enjoy. It is equally a libel, false and unfounded, with regard to every Representative of Majesty, who has ever been known in this land. That is the libel, with which this part of the chapter commences, equal in point of falsehood and slander with the libel in question, although inferior in the heinous nature of the imputation; it being less heinous, to grant a pardon, where it ought to be refused, than to refuse it, where it ought to be granted. Accordingly, in this climax of wickedness, the author rises upon himself, he proceeds to contrast the *unfortunate Catholics* with the too *fortunate Protestants*. On the one hand, he says, and would thereby convey, that whereas the Protestant is pardoned, though he be guilty, and when pardon should be refused: where the wretched convict is a Roman Catholic, and has a claim to the mercy of the Crown, it is denied to him by the Representative of Majesty in Ireland, only because he is a Roman Catholic! If the credulity of the Roman Catholics can be induced to believe this infernal slander—that they have not the benefit of the law, or justice, or mercy, when they are entitled to it,—I say, that *Insurrection* would become, a *Duty*, and *Rebellion*, a *Virtue*!

Gentlemen, it is impossible to dwell upon this, without feeling emotions which cannot be suppressed. It is a call upon the people to break out into civil and religious war: such topics would not be used and urged with such Jesuitical art, labour and perseverance, as exist in every part of this work, if the object of the author was not to effect a *revolution*, by the means of a civil and religious war. If I did not prosecute for this crime, I would not deserve to hold the situation with which I am invested.

I beg to impress upon your minds, that this is no unnatural or forced construction. The contrasted situation of the Roman Catholic convict is not stated in the broad language of the former proposition, be-

cause it would be too monstrous :—but you will find the insinuation is equally broad.

“ On the other hand, where the prisoner is a Catholic, he is destitute of this powerful agency and interference. His witnesses, as may be expected, are usually persons of his own condition and family. It is true, they may swear positively to an effectual and legal defence, wholly uncontradicted ; but, *not* being protestant (i. e. *respectable*, the epithet attached affectedly to *every thing* Protestant) they commonly fail to meet with credit.”

Gentlemen, I appeal to your own experience, do you ever hear the counsel, or the jury, or the party ask a witness, what his religion is, or attempt to discredit him on that account ? It is a tissue of libelling, the most shocking, and mischievous, that could be invented.

“ Should he be convicted, a thousand rumours are immediately circulated to the prejudice of his general character, he is proscribed as a dangerous man, a leader of a faction : no grand jury interferes in his behalf : and he suffers death, *publicly protesting his innocence*, fortified by the testimony of his confessor’s belief of his veracity, and exciting the sympathy, and regrets of the people.”

This is a representation of a general conspiracy among the Protestant community to destroy a Catholic, who has been convicted in a court of justice ; insinuating to the Catholic population, that they are denied mercy upon idle rumours, without even ascertaining from what source they proceed, representing the exercise of this important trust, as a subject of continued and abominable abuse ; yielding to the vouchers of character, in *favour* of the *guilty Protestant*, and to idle rumour *against* the *innocent Catholic* :—

“ And he suffers death, *publicly protesting his innocence*, exciting the sympathy and regrets of the people.” This passage, you see, is addressed to lowest order of the community, assuming it, as a proof of his innocence, that the convict declared he is so—and that he suffers death, being an innocent man, because he is a *Roman Catholic*.

Gentlemen, This is the import of the chapter, to which the particular libel in question, refers. It commenced with a general libel upon the office of the Lord Lieutenant—by charging him with two crimes—pardoning the murderer, and the robber, if *Protestant*—and suffering the innocent man to be executed, merely, because he is a Catholic:—The writer then concludes this part, by a *note*, to illustrate and prove by a fact and an example, the imputation, which he throws upon the government, and sufficient to inflame the Roman Catholic mind to madness.

It is entitled in the margin—"Tragical instance." The note is referred to, from the text by an asterisk.—Having stated, that the guilty Protestant was pardoned because of his Protestantism, and the innocent Roman Catholic suffered because of his Religion—he calls the reader's attention to a *note*, which is the subject of the present prosecution.

"At the summer assizes of Kilkenny, 1810, (*) one Barry was convicted of a capital offence, for which he was afterwards executed."—So far it is a statement of ordinary intelligence, and forms no ground of accusation.—But the writer proceeds—"This man's case was truly tragical.—He was wholly innocent—was a respectable Catholic farmer in the county of Waterford; in good circumstances.—His innocence was clearly established, in the interval between his conviction and execution—yet he was hanged; publicly avowing his innocence !!!"—With three notes of admiration.—"There were some shocking circumstances, attending this case—which the Duke of Richmond's administration may yet be invited to explain to Parliament."

Gentlemen, Here, in this note, a charge is contained against the *Duke* of RICHMOND, and his administration.—In what respect? evidently, in respect of the exercise of the prerogative of mercy, which the writer proceeds to illustrate by this "tragical instance." How is it done? It is done, with regard to one *Barry*:—In

(*) This is a mistake in the publication, as to the year.—The trial of Barry was in 1809.

what way?—By suffering him to be executed, “when he was wholly innocent”—And why?—The reason assigned is—because he was a *Roman Catholic*!—It is impossible to read it, and misunderstand it.—No complaint is made of the executive government, but upon this point—the exercise of the prerogative of mercy.—This relates to the exercise of it, with regard to a convict of the name of *Barry*, “who was wholly “innocent.”—“His innocence was clearly established “in the interval between his conviction and execution—yet he was hanged, publicly avowing his “innocence”—and he was refused mercy, because he was a *Catholic*!—The title of the preceding paragraph in the text is—“Catholic prisoners, how treated”—and then the case of *Barry* is referred to, as a “tragic instance”—His innocence was established, between his conviction and execution,—and therefore there is no imputation upon the Judge, who tried, or the Jury, who convicted him—but the imputation is flung upon him, in whom the prerogative of pardon is vested, and who refused to exercise it in favour of a man, who was perfectly innocent; and whose innocence was established; because he happened to profess the Roman Catholic religion.

My Lords, I think it proper, in this stage of my statement, to mention, that I was last night served with a crown summons, on the part of the defendant, to attend as a witness in this cause, together with the Right Honorable Lord NORBURY, Sir CHARLES SEXTON and Wm. GREGORY, Esq. requiring me to produce and give in evidence, the affidavits of *James Rogers*, *Maurice Macartney*, *Thomas Hackett*, sen. and *Thomas Hackett*, jun. and *David Barry*, and all other papers relating to *Philip Barry*, who was tried for highway robbery and executed for the same, as I should answer the contrary at my peril.

I confess, that my indignation was not a little excited at this attempt to pervert the trial of a culprit for a libel into an engine of faction to furnish fresh matter for libels upon the administration of justice, and the government of the country. They who advised the service of this summons, I am sure, could not but know,

that your Lordships would not permit them to convert the court of *King's Bench* into a court of Parliament, to try the King's government on the arraignment of the publisher of an infamous libel. They knew, that it is impossible, according to the rules of law, and the ordinary course of proceedings, to go into an examination of the matter pointed at in the summons. They knew, that neither This Court—nor I, as ATTORNEY GENERAL, would suffer the course of the law to be so abused and inverted.

It belongs to my office alone to put the subject on his defence for an imputed crime. It is not for the libeller to arrogate that privilege.

But the artifice of this base attempt,—is too palpable not to be seen through.—I trust that learned Counsel will not so lend themselves to faction, as to forget their duty to their profession, to the administration of justice, and to the King's government, as to endeavour to make this trial an instrument to furnish materials for the slander and sedition of the daily newspapers, by affecting to go into a case, which does not exist:—because they know, it is a subject that the law, and the court cannot permit, in such a prosecution, to be investigated.

I have no doubt of the firmness of the court.—I have in myself sufficient to hold in contempt whatever false and slanderous matters the seditious papers of the day may publish of me,—I value not the praise, or panegyric of such papers—as little do I regard their censure. Should Counsel for the defendant embarrass the case, by calling upon the Court to order, or upon me to produce papers, in order to try the Government for a matter, of which, if guilty, they should long since have been impeached; I apprize them that—Tho' I hold the papers in my hand—I will not produce them—and if they should ask me a question touching the transaction, I will not answer them. But I am ready to take all responsibility upon myself in the matter—I am ready to meet any charge, in its proper place, but will not indulge the spirit of faction, by inverting the order of all judicial proceeding.

If for the purposes of justice,—not of mischief, or

slander—or to satisfy an honest mind, any man wishes to see the papers, with regard to this case of *Barry*, he shall have access to them—when he pleases.

But, My Lord, and Gentlemen, I will, under the leave of the Court, for the sake of informing that part of the public, who may wish to be satisfied—but not those who are seeking materials for slander and sedition and abuse—read the papers, to which I have alluded.

I received a very civil letter from a gentleman of the profession, in the following words:—

“ August 18th, 2 o'clock, P. M.

“ Sir,

“ I have been called upon, as having
“ been concerned for the petitioner, *Barry*, by the
“ gentleman, who will deliver the inclosed to you, to
“ authenticate the statements contained in it.

“ Immediately on being applied to, I deemed it my
“ duty to inform the learned judge of it. I did so by
“ letter, in which I inclosed the affidavit mentioned in
“ the petition.—His lordship has not honored me with
“ an answer, and as I have been informed by Mr. Ro-
“ gers, retains the affidavit and has declined to inter-
“ fere.

“ I have only to state that the circumstances relative
“ to the motion to postpone the trial of this unfortunate
“ man are, to the best of my recollection, strictly true.

“ I am certain it will not require any further apology
“ for this trouble, than to say, that I am actuated, both
“ by a sense of professional duty, as well as by motives
“ of common humanity, in the part I have thus taken.

“ I am,

“ Sir, with every feeling of the most perfect
“ respect, your most obedient, humble
servant,

“ *Burrowes Campbell.*”

This was the first intimation, which I had of the subject.—This letter was accompanied by a memorial from the unfortunate man—it is in the office, it was addressed to me, and is in these words:—

“ To the Right Honorable William Saurin, His
 “ Majesty’s attorney general.

“ The humble petition of Philip Barry, now
 “ a convict under sentence of death at Kil-
 “ kenny.

“ Sheweth,

“ That your petitioner was confined
 “ in the gaol of Clonmell under a sentence of trans-
 “ portation, prior to the 5th day of August instant,
 “ when your petitioner had it first intimated to him that
 “ he was to be removed to Kilkenny, to be tried on a
 “ charge of highway robbery.

“ Your petitioner sheweth, that on his being so called
 “ on his trial, petitioner made an affidavit to postpone
 “ his trial, stating the short notice petitioner had of his
 “ intended trial, and that five persons in his said affida-
 “ vit named who were most material witnesses to your
 “ petitioner, and without whose testimony he could not
 “ with safety abide his trial, were then resident at a
 “ place called Kilcannon, in the county of Waterford,
 “ a distance of near 50 miles from the city of Kilkenny,
 “ and that from the shortness of the time which had
 “ elapsed since he had notice of his intended trial, he
 “ could not procure the attendance of such witnesses,
 “ as by his affidavit filed with the clerk of the crown
 “ will more fully appear.

“ Your petitioner sheweth, that Lord Norbury decla-
 “ red, that notwithstanding such affidavit, that from what
 “ appeared on the face of the informations, he would
 “ proceed with the trial next morning.

“ Petitioner sheweth that next morning the trial
 “ was called on, when your petitioner’s counsel, Mr.
 “ Campbell, addressed the court, on petitioner’s behalf,
 “ upon the facts stated in said affidavit, and in the course
 “ of his address to the court, appealed to a magistrate
 “ then in court, whether he did not know some of the
 “ persons named in said affidavit, and whether they did
 “ not reside at the place mentioned in said affidavit,
 “ to which such magistrate having replied in affirma-
 “ tive, your petitioner’s counsel offered to have said

“magistrate examined on his oath as to such facts which however was not done.”

“Your petitioner further sheweth, that although there was ample time for the crown solicitor to procure affidavits in answer to that made by your petitioner, yet no affidavit was made, although several of the statements, if false, could be easily contradicted.

“Your petitioner sheweth, that the counsel for the crown did not press the trial, yet his lordship called it on, and your petitioner’s counsel not having had any instructions; and your petitioner’s witnesses being absent,—he declined defending your petitioner, and left court immediately; on which the trial was called on, and your petitioner in a short time was convicted, and is now under sentence of death, to be executed either to-morrow or to-morrow week.

“Your petitioner sheweth, that on the persons named in said affidavit hearing what passed, they voluntarily went before Morgan Kennedy, Esquire, a Magistrate, and made affidavit of the facts they could prove,—which facts, if believed by the jury, must have acquitted your petitioner, as by said affidavit in possession of Lord Norbury, will most clearly appear.

“Your petitioner therefore humbly submits to you, that he has not been fairly tried, that he had not an opportunity of producing his witnesses and manifesting his innocence, accordingly throws himself upon the mercy of the crown, thro’ your just and humane interference,—he would gladly accept a pardon on the terms of transportation for life, and humbly hopes, that as the prosecution was conducted under your authority, you will be pleased to direct an enquiry into the facts here stated.”

No mention whatever was made of the *religion* of Barry—or that Mr. *Campbell* bore testimony to his innocence, that gentleman having confined himself to the motion for postponing the trial.—This naturally induced me to go directly to the government and have a letter written, which your lordships know is the constant course, to the learned judge, before whom the case of the con-

vict had been : accordingly a letter was written by Sir CHARLES SAXTON, to Lord NORBURY, and his lordship's answer---was the following :---

" *August 18th, 1809.---6 o'clock.*

" My dear Sir,

" I have at this moment received by your messenger the memorial of Philip Barry, upon whose case I had conference with Baron GEORGE, both before, and after his trial, which under the existing circumstances, we were of opinion should not be postponed on the affidavit alluded to.

" The robbery tried at Clonmell, and at Kilkenny were on the same road, and within a few miles, (about 7) of each other, in the mail coach line to Cork. ---Upon receiving a letter from Mr. Campbell of the bar, on a similar application, I again further conferred with Baron GEORGE, whose note of the trial before him, I send you. It further appeared to me, from the examination annexed to the bill of indictment, and from what happened on the arrest of the prisoner, that he was fully apprized, at that time, of the charge of the *Kilkenny* robbery, and on the trial at Clonmell, the witness, *Rogers*, alluded to, attended and gave evidence, and was apprized of the order of transmittal. The robbery in *Kilkenny*, was in open day light, of a gentleman of the name of *Keefe*, whom prisoner detained in custody a considerable time, and he and his servant so positively identified the prisoner, with whom he was confronted at Mr. *Elliott's*, the magistrate's immediately after being taken, that there could not remain a single particle of doubt of the guilt, and it was merely from the accident of arrest on the confine being in Tipperary, that he was first transmittted to Clonmell on similar charges."

" It is remarkable that in the memorial you send, the prisoner is stated as having been under sentence of transportation, confined in Clonmell previous to the 5th of August, without alluding to the connected matter of the charges in each county.

" Upon the whole, had I thought the case such as stated in the memorial, you should have had instant notice, as in other cases in which you have been troubled."

This letter was accompanied by the report of Baron GEORGE, before whom the same man had been tried at *Clonmel*.

17th, August, 1809.

" *My Dear Lord,*

" At the last assizes at Clonmell, Philip
" Barry was indicted before me in No. 82, for having
" on the 4th of July last, maliciously fired a pistol
" at *Patrick Codd*, with intent to murder him, against
" stat. at Clonbower, and in No. 83, for feloniously
" demanding money from *Patrick Codd*, with intent
" to rob him, against stat. at Clonbower in the county
" of Tipperary; both of these facts were proved in
" the fullest manner against prisoner, who was taken
" on the spot, being in a struggle disarmed of the
" pistols, and with them, he was directly brought
" before *J. B. Elliot*, the magistrate, who committed
" him."

" The prisoner, in his defence, produced Mr. *James Rogers* who swore that prisoner was once his servant,
" latterly his workman; witness had borrowed a case
" of pistols from a Mr. *Heron*, who lived in the county
" of Tipperary, his brother-in-law, to protect himself
" with them, as he lived in a disturbed country, and
" had been attacked once or twice; Mr. *Heron* wrote
" to him to return the pistols, and witness sent them
" back to him by the prisoner, he gave them to pri-
" soner unloaded, and gave him no ammunition, and
" prisoner had 28 or 30 miles to go from his house
" to Mr. *Heron*. The prisoner had the arms in his
" possession four or five days before he was taken up
" as aforesaid "

" I charged the jury to find him guilty on both the
" indictments, telling them, that one of them was a
" capital, and the other a transportable felony; in both
" of which they who prosecuted for the crown had
" him given in charge together, and the jury, from
" a merciful principle, doubtless, found him guilty

"of the transportable offence only:—at the foot of my
 "note of the evidence, I find this order, (to be
 "transmitted to Kilkenny to be tried for highway
 "robbery)."

"The above is the note of the case of Philip
 "Barry, which your Lordship this day wished me to
 "furnish; I have the honour to be.

"My dear Lord, yours very sincerely,

COLDBLOW,

"D. GEORGE."

This was the *respectable* farmer, who was "wholly
 "innocent." There was also transmitted a letter
 from Mr. *Elliot*, a magistrate.

23rd, August, 1809.

"My Dear Lord,

"I had the honor yesterday of your letter
 "of the 20th, and had written to you yesterday
 "morning partly on the subject of your letter, but
 "will now state more fully. *Barry* was taken near my
 "house, and was brought by Mr. *Codd* and the country
 "people, in a few moments after to me, when I saw
 "*Barry*, it struck me, it might be the same person
 "who robbed Mr. *Keefe* and so charged him
 "with the transaction. He did confess he did com-
 "mit the robbery, and gave me some account of the
 "half notes and debenture of *Keefe's*, with other
 "things which were in a valise, the straps of which
 "I found on *Barry*. I have the strongest ground
 "to believe that this man was employed by ———
 "and ——— both distressed men, and that ———
 "had *Keefe* set for the purpose: the pistols which
 "were found on *Barry* belonged to———, and *Barry*
 "told me he had them when he robbed *Keefe*. I
 "have nearly forgot to state that I sent for Mr. *Keefe*
 "who came here with the person who was in company
 "with him when he was robbed, and both of them
 "identified *Barry*, and they appeared to have a great

“effect on Barry, for he, before their arrival had
 “promised me some information, but when Keefe
 “told him he would prosecute him, he never opened
 “his lips to me after.

“I have the honour to be, &c.

“J. B. ELLIOT.”

I need not here dwell upon the circumstances of the case. The man was convicted, and pardon would only be extended to him upon a presumption of his innocence. He was convicted by two juries and by two Judges, without any doubt of his guilt—there was never any doubt of or an allegation of his innocence.—But as to his *religion*—nothing was ever mentioned, until this book appeared. Nor to this moment do I know, nor have I any reason to believe that he was a Catholic, certainly not, the more so because it is so stated in the “Statement of the Penal Code.”

Gentlemen, I shall say very little more upon the subject.—But I cannot avoid taking notice, that this work is reported to be the production of a Barrister. I have no authority or evidence to warrant me to say it is so.—I would to God, I had authority to say it is *not* so.—But if it be the work of a Barrister, I must take leave to say that I am sorry for it—because I should be sorry that there should be a Barrister such a disgrace to his profession, as the author of this mischievous and malignant Libel—if he be a Barrister, I trust that he will learn from the verdict of that Jury, and the judgment of the court, to appreciate the magnitude of the crime, of which he has been guilty. Sheltered as he may be under the anonymous character—in which he has issued forth his poison to the public, from the sentence of the law, he will yet stand convicted in the mind of every honest man, who loves the constitution, and the peace of the country, as a great criminal and malefactor; and that the remainder of his life cannot be so well employed as in making the best atonement possible, for this violation of the law,

and the wicked attempt which he has made to disturb the peace and happiness of his Country.

Mr. *Scully*.—My lords, I have an observation to make upon the subject. If the ATTORNEY GENERAL will undertake to put the truth of "the Statement" into a proper course of candid investigation, I can inform him, who the Author is, and I throw out that challenge to him.

Mr. ATTORNEY GENERAL. I did presume, and had anticipated that such an attempt would be made, and I am now confirmed in my opinion. The gentleman knows right well, as he takes this matter upon himself, how and where to bring the acts of the government into question. I have been already drawn before parliament upon this subject,—for having *ex gratia* and according to the usage of my predecessors—served a notice on the defendant before I filed the information against him—they are not ignorant of the mode, and have no difficulty in the way. There are disorders incident to the political, as well as to the natural body, but in my opinion and experience—there is no disorder incident to the political body so acute or so inveterate for which a temperate application of the law, will not prove an efficacious remedy—it is to the principles of *Jacobinism*, to which all these proceedings may be traced—the consequence of those mischiefs which burst upon us from the French Revolution—which ruined *France* and endangered the constitution of England,—which almost produced a rebellion there, and actually produced a rebellion in Ireland—the dregs still remain, but are wearing away, under a firm and an honest government, which must prove too strong for faction—the political health will be restored—and before long, faction will not dare to raise itself against the law of the land—the dignity of the Courts of justice, and the King's Government.

I am here prosecuting for a Libel, and would not stoop even if the law would permit in such a case, to defend the government on the arraignment of the libellous Author of the "Statement of the Penal Code."

Bernard Higgins, Sworn.—Examined by the SOLICITOR GENERAL.

2. Where did you get that book which you have in your hand.

A. I bought it at *Fitzpatrick's* in Capel-Street.

2. Does he keep a Shop.

A. He does.

2. What kind of a Shop.

A. A Printer and Book-seller's Shop.

2. When did you buy that book.

A. On the 19th of *June* last.

2. Did you make a memorandum in the book to that effect.

A. I did.

2. What is the Title of it.

A. "A Statement of the Penal Laws, which ag-
grieve the Catholics of *Ireland*, with Commentaries,
"in two parts—Part II."

2. Who purports to be the printer.

A. *H. Fitzpatrick*.

Cross-examined by Mr. O'CONNELL.

2. Who sent you to purchase this Book?

A. Mr. *Kemmis*.

2. You are a clerk of his?

A. I am.

2. You are aware of the part which relates to this trial?

A. I am.

2. You have read it?

A. I looked into a few pages, after I bought it.

2. Do you ever go to the Castle?

A. Sometimes I do, with letters.

2. Who is the Chief Secretary at present?

A. I believe, Mr. *Gregory*;—I am not certain.

2. Try again:—Can you mention any other?

A. I believe, Mr. *Peele* is.

2. About how long has he been Secretary?

A. I cannot say, it is not very long.

2. Was he Secretary when you bought that book?

A. I do not know.

2. Is it not since June last, that he became Secretary?

A. I cannot tell.

2. Do you recollect, whether it was since June, that Mr. GREGORY got his employment.

A. No, sir.

2. Do you happen to know who are King's Ministers in *Ireland*;—did you ever hear of them before?

A. No, I did not.

2. It is part of the subject here;—Do you know what is meant by the King's Ministers in *Ireland*?

A. I do not. I suppose the Lord Lieutenant is.

2. He is not the King's Minister:—Can you not tell me, who are the King's Minister's here?

A. I cannot.

Mr. O'Connell.—Then you cannot give me an attested copy of the King's Ministers in *Ireland*.

Here the note, stated by the ATTORNEY GENERAL in the publication entitled, "A Statement of the Penal Laws, &c." respecting Barry, was read by the Officer of the Court to the Jury.

Mr. O'Connell—That note is the only part, which is contained in the information. and there is a variance between the paper as read, and as it is stated in the second count in the information:—for in the latter the word "*Farmer*" is omitted, by a clerical mistake, which puts the second count out of the present case.

The counsel for the crown then desired, that the Officer might read other passages from the Publication.

Mr. Burrowes.—My lords, I beg to know, whether the court be of opinion, that without any averment, respecting other passages in the book, the counsel for the crown are entitled to read them.

Mr. Justice DAY.—In order to shew the *Quo Animo*, they may read those other passages.

Mr. Justice OSBORNE.—I think, they have such right as evidence of the intention.

Lord Chief Justice DOWNES—And the defendant if he thinks fit, may read all the rest of the book.

The Officer of the Court then read the passages from the book, pages, 227, 228, and 229, as stated by the ATTORNEY GENERAL.

Mr *O'Connell*.—We did not object to the counsel for the crown reading that book, or any paper they please, but there is no fact proved to bring that book home to the defendant. The witness stated, that he bought the book at the Shop of *H. Fitzpatrick*. ;—but whether *H. Fitzpatrick* be the defendant does not appear.

SOLICITOR GENERAL.—My lords, it is very true;—the witness was not so particularly interrogated, not supposing the defence to rest upon any such objection, and the witness being in a bad state of health, was permitted to leave Court. We will therefore call another witness.

Mr. *Watson*, sworn—Examined by Mr. SERJEANT MOORE

2. Do you live in this City ?

A. I do.

2. Where ?

A. In Capel-street.

2. At what Number ?

A. No. 7.

2. Do you know any person of the name of *Fitzpatrick*, a Book Seller ?

A. I do.

2. Do you know *Hugh Fitzpatrick*, who is the defendant here ?

A. I do.

2. At what Number does he live at in Capel-Street ?

A. At No. 4.

2. Is he a Book Seller ?

A. He is.

2. Do you know any other Book Seller of the name of *Hugh Fitzpatrick* in Capel-Street ?

A. I do not.

2. There is no other Book-Seller of the name in that Street ?

A. There is not.

Cross-examined by Mr. WALLACE.

2. Do you swear, positively, that there is no other person of the name of *Fitzpatrick*, keeping an Office, or house in Capel-Street.

A. There is no Book Seller of the name.

2. I did not ask you that—Do you undertake to swear positively, that there is no other person of the name of *Fitzpatrick*, keeping an Office or a Shop in that Street?

A. I do not.

Mr. *Serjeant Moore*.—Is there any other Book Seller's Shop, in Capel-street, kept by a person of the name of *Hugh Fitzpatrick*, but the one which you mention at No. 4?

A. There is not.

Mr. *Wallace*.—Do you know, who are the Kings Ministers in Ireland, acting under the Duke of Richmond?

A. Some of them, I believe, I do—if you mean, whether I know them, personally, or by name, I do not know them personally.

2. Do you know them either way?

A. Yes, some of them by name.

2. Do you know the King's Ministers?

A. Yes.

2. Whom do you understand by the King's Ministers?

A. The superior persons in the executive Government.

2. Do you apprehend, that a Sheriff is the King's Minister for any purpose?

A. I do not consider him to be the King's Minister; but that he is the King's Officer.

2. Let us know, whom you understand to be the King's Ministers?

A. The LORD CHANCELLOR, the CHIEF SECRETARY, the ATTORNEY GENERAL, and SOLICITOR GENERAL.

2. Is that your Catalogue of the King's Ministers in Ireland?

A. I cannot say;—The Under Secretary is one of the Ministers, I should think.

Q. Do you think it well ascertained who they are?

A. I do not know that it is.

Q. Who is the Chief Secretary now?

A. Mr. PEELE, as I understand.

Q. How long as he been so?

A. Within six months, I believe.

Q. Who was the King's Minister in that capacity, in the month of June last?

A. I cannot say.

Q. Is your knowledge confined to the present Minister?—Who was the Secretary, immediately preceding the present?

A. Mr. POLE.

Q. Was he Secretary in the month of June last?

A. I cannot say.

Q. How many months, or years, was he in office?

A. I cannot say.

Q. Was he not in office in the month of June last?

A. I believe he was.

Q. Do you know when Mr. GREGORY came into office?

A. I do not.

Case closed on behalf of the Crown.

Mr. BURROWES.

My Lords, and Gentlemen of the Jury. I am Counsel in this cause for the defendant, Mr. Hugh Fitzpatrick, who is upon his trial for the publication upon which so much invective, in so feeling a manner, has been lavished. Gentlemen, I hope that the tenor of my life has protected me from the suspicion of lending my professional, or other aid, to forward the purposes of sedition; or under the mask of making a legal defence, administering to the seditious views of incendiary libellers. The Attorney General, whether he called to recollection in his own experience of me, or considered the character which I hope I universally bear, should in candour have concluded, that it was very little necessary to give me any caution on that subject; and he should have equally known, that no inti-

midation could ever prevent me from defending my client with that freedom and boldness, which our laws warrant, and from which the administration of justice derives its greatest lustre, and perhaps its best security.—I will not deny *him* the merit of not being deterred from the discharge of his duty by any fear of obloquy, and am ready to bear testimony to the courage and zeal, with which he conducts their Crown prosecution; but I will tell him, that the Irish Bar never has failed, and never I hope will fail, in supplying advocates, as firm and as zealous in the discharge of their duty, as any Attorney General can be in the discharge of his—and I will for myself add, that my own reason and my own conscience shall be the sole guides of my own conduct.

Gentlemen, This old man, Hugh Fitzpatrick, the defendant in the present case, has been a shopkeeper and citizen of Dublin, carrying on the business of a bookseller and printer for near forty years, and is now for the first time arraigned at the bar of his country for publishing a scandalous and seditious libel; and it will be for you, Gentlemen, to decide whether he is to be immolated upon the altar of the offended laws, or offered up as a victim to appease the feelings of, as we are told, a brave and amiable Viceroy.—If the defendant has not offended the law, there is, I hope no fear of his suffering such immolation; and although the prosecution goes to impeach the work, entitled, “A Statement of the Penal Laws,” and written to expose the severities which they inflict; and although upon such a subject, I address a Jury, exclusively Protestant, in a city where many Catholics of wealth and rank might easily be found, yet I know some of you, and I am convinced that if I satisfy your judgments that my client (abused and reviled as he is) is not guilty of the criminal intention imputed to him, whatever your feelings may be upon the general subject, you will not justify future charges of partiality, by proving that the advocate of Catholic rights cannot have any chance before a Protestant Jury, selected by the emissaries and instruments of the Castle.

Gentlemen of the Jury, You are about to act in one of the most interesting causes of alleged libel that ever has been discussed in this, or any other country. You are called upon on an information, such as I shall state, supported by evidence that goes to a certain extent, and no further, to pronounce a verdict of guilty against the traverser.—Gentlemen, let not my eloquent and long attached friend, when he comes to reply, mislead your judgments.—He will not misrepresent me, as making an appeal to your feelings to induce you to violate your consciences. No, Gentlemen, I appeal to your sense of right, to your conscientious feelings.—My appeal to you is, to discuss this subject without prejudice or byas of any kind—although I cannot call in aid of my defence, the circumstance that the defendant is not himself the author of this work, yet whoever he may be, if I can discover in the pamphlet, which has been given in evidence, any justification for the author, that will be a justification of the publisher, and I desire no more. You will not find the publisher guilty, if you would not find the author guilty, because the former has exhibited an example of fidelity, which in itself is not to be reprehended, when he comes forward and braves the consequences of a Government prosecution.

Gentlemen, There is no subject so trite, yet important; so vulgar, and yet so vital, as that subject upon which I must address you.—The liberty of the press, which is as necessary to the health and vigour of our constitution, as the air which we breathe is to human life, has been so familiarized, I would almost say, vulgarised by frequent discussion, that its value is not duly appreciated—and I am afraid we have lost much of the reverence which we owe this paramount protection of our constitutional liberties.

Gentlemen of the Jury, a free press has ever been an object of hatred to arbitrary power.—It is natural that it should be so.—It is the most formidable impediment to the advance of lawless ambition—It is a control vested in the people to stop the excesses of inordinate power. It curbs and cures the excesses and defects of the law of the land, by the law of re-

putation.—It enables the people to pronounce a judgment which cannot be resisted or reversed—and is one of those reserved rights which no free people can relinquish.—If it does exist, there can be no permanent tyranny in the land;—If it does not, there can be no secure freedom.—It is the organ through which the censorial power of the people is exerted, and if it be silenced, further opinion never can speak or be respected.—Gentlemen, it is not only necessary to have this freedom of communication upon public subjects sanctioned, but it should be cherished.—It should be free from the apprehension of danger.—If it be coerced it perishes—from its effervescent nature it cannot exist in any energy or be of any value, if it be confined within narrow limits, or subjected to rigid regulations. There cannot be fulness, if there may not be overflowing.—I know not, gentlemen, what you may feel upon those *ex officio* informations, which are growing into the regular practice of the Crown, and which fill me with dismay.—I know that there is a propensity in power to put down whatever may animadvert upon its excesses, and I am equally certain that the liberty of the press will be effectually undermined, and that those who dare not attack it at once and by assault, may yet gradually deprive it of all its energy and all its usefulness.—Gentlemen, the language of crown lawyers upon this subject is equally ridiculous and alarming. Juries are told that the people of these countries ought to enjoy all the advantages of legitimate discussion, but that public men and public measures ought not to be reproached—their feelings must not be wounded, or their reputation blemished—discontent must not be excited, or the affections of the subject alienated from the Ministers of the crown. Good God, gentlemen, what a delusion is attempted to be practised upon our understandings by such sentiments. How can the press at all act against the machinations of bad ministers, but by exposing their measures and themselves to public odium? How can this be done without aspersing their characters and hurting their feelings? How can bad

laws be repealed, or a bad administration of them restrained, but by exciting discontent towards such laws, and reprobation of such ministers? Are not all abuses removed, and all reforms effected through the very operation of that discontent, which is relied upon as the criterion of sedition?

Gentlemen, in respect of the freedom of the press, I am happy to live in an age, in which the early attempts of this reign to extinguish it have been frustrated by one great constitutional Act of Parliament, which places it, where alone it can be safe, in the Jury Box. I mean the Libel Act, which will immortalize the memory of that great man, Charles Fox. A libel is now no longer a matter of law, cognizable by the Court only and by the Jury never.—Every effort to control the press must now fail, unless juries shall become servile instruments of ministers,—unless they can be culled and packed, willing and obsequious instruments of whoever chances to be in power. The Libel Act has enacted, that in every trial it shall be competent for the Jury to find a verdict of guilty, or not guilty, upon the whole matter submitted to them, that is, they are to exercise their own judgment, and to decide upon the whole matter generally, not restricted by technical rules, or by the opinion even of the Judges, who preside upon the trial. Here jurymen are presented with an opportunity of for ever securing to their countrymen the advantages of free discussion,—they are restricted by nothing which can control their opinions—by no directions from the Court. Their own conscience is to be their safe guide, and if they believe a work to be well intended, they never ought, and, I trust, never will subject its author to punishment. This is simple, plain, and practicable doctrine.—You are to decide, and to decide with indulgence, upon the motives which actuated the author. If you believe him to be actuated by a malignant spirit of detraction, or by a desire to wound the feelings of an enemy,—if you believe his motive to be personal and malicious, and not public and generous, you ought, without hesitation, to consign him to punishment; but if in looking through the whole work, you see that it

is the production of a mind intent upon public improvement, that the author is indignant at the misconduct of others, that he is actuated by a pure and honest design to promote the general welfare of any portion of the community, and, with a manly daring, proclaims public abuses, you will judge liberally and candidly of his intention, and indulge even his failings, when they are the excesses of good feeling.—Gentlemen, give me leave further to remark, that if you are to try the author of a long work, who directs his lucubrations to some justifiable or laudable end, the freedom of the press vanishes, if you condemn him because, in some one page you find an isolated passage in which he may have been mistaken, or in which his animadversion may have been disproportioned to the object of his censure. You should view the context of the whole work, and decide upon the whole. The *quo animo* it was written—whether the author was striving to sever the affections of the people from the constitution, or whether he was labouring to have the people adopted into the constitution, in order to prevent that very effect.

Gentlemen, having laid down these general and preliminary observations, I will turn your attention to the real source from which this work has originated—You are apprised that it purports to be “A Statement of the Penal Laws which aggrieve the Roman Catholics of Ireland,” and the object is, by exposing to public view the nature, magnitude and extent of the restrictions upon the Catholic body, and by demonstrating their unconstitutional tendency, to induce a repeal of them. Gentlemen, it was written and published, in consequence of its being giddily and rashly asserted, by very high authority, that the restraints under which Roman Catholics labored were slight, few, and trivial. That statement was followed by another, which was published in a government paper, and which was four or five times re-printed, giving but a partial statement of the disabilities under which the Catholics labored, and inviting any man on the other side to shew that they extended further, or deprived the subject of any fair enjoyment. Was it criminal in

the author to obey the summons, and take up his pen to disabuse the public and shew, that however high the authority was, which asserted that the Catholic grievances were few, slight, and trivial, he was mistaken? Gentlemen, I conceive it was not only not criminal, but was laudable—it was a work which a proud man might bequeath to his posterity, as the best legacy he could leave them; but while it was a laudable undertaking, I can scarcely conceive any more hazardous; because I defy any man to publish his sentiments upon that subject without hurting the feelings of some who think that the Roman Catholics are too much indulged, and our free constitution endangered by the privileges which they already enjoy. It is not an easy task to argue down inveterate prejudices connected with imagined interest, and he must encounter much hazard, who is to be tried by the very men, upon whose errors he animadvert.

Gentlemen, the author of this work has certainly written with warm and indignant feelings,—he felt strongly the grievances which he has depicted forcibly;—he has spoken with the feelings of calumniated integrity, and has fully evinced his title to that liberty which he seeks for himself and his brethren;—his sentiments and his language are constitutional, and manifestly designed to promote final harmony amongst the people, and give permanent strength to the empire. But the Gentlemen on the other side say, the work is calculated to excite alarm and discontent among the people. When did you ever hear of any appeal made to the people, complaining of particular laws or measures, and requiring redress, which was not liable to this objection? The very assertion, that the Roman Catholics are deprived of rights which they ought to enjoy, is calculated to create some degree of discontent, and could it be considered as a crime, that the work had that tendency, without which any remedy would be impossible? When we were looking for the repeal of the 6th of Geo. I. it was not thought treasonable to write upon that subject warmly and boldly, and to call upon the people to assert the independance of the land.—Were not such

appeals calculated to excite alarm and create discontent. Will you tell me how I could write, speak, or so much as articulate upon a subject of complaint, and endeavour to interest others in the cause, without exciting discontent?—all discussion upon public subjects excites discontent,—Why? Because the diffusion of knowledge lets the people know the state in which they are, and ascribes their sufferings to causes which they did not understand to exist.—It must be the effect of discussion upon such subjects, to render a number of the subjects dissatisfied with the state of the law or the government. Such is always the process, when improvement is sought through the medium of the press.—Grievances exist, either in the law, or in the administration of it,—the matter is canvassed,—facts are stated,—the people are dissatisfied, and to some degree, perhaps inflamed; but the ATTORNEY GENERAL, who only thinks of one side of the subject, is all amazement, that there should be any complaint, and that the tranquillity of government should be invaded; and, he talks, of the insulted feelings of a brave and amiable nobleman, who, perhaps, was very little, if at all, in the contemplation of the author, while his mind was filled with the sufferings of millions, and occupied in reviewing the past, and anticipating the future.

Gentlemen, this book does state, with great minuteness, an infinite variety of ways in which the Roman Catholics of Ireland suffer and are inferior to the Protestants of the country,—it canvasses the causes and the effects of this distinction, and it introduces topics, without which it would be lame and impotent indeed: namely, the malignant and hostile spirit of the very principle of this distinction,—it states truly, the foundation upon which it stands, and upon which it is justified.—It says that this principle goes to hurt the character of the Roman Catholics, and to withhold patronage and protection from them in a thousand ways. What is it upon which the exclusion of this class of men from the benefit of equal rights is justified? It is by an imputation, which marks them out as morally tainted—as professing doctrines and opinions,

which render them bad men, in private life, and as public men, dangerous and bad citizens. It imputes to them, that they hold no faith with persons of a different religion,—that they bear no allegiance to a protestant power,—that an oath has no obligation upon them, as living under a church, the head of which wields a dominion over right and wrong, which it would perhaps be impious to ascribe even to the Deity;—that it can pardon any act done for the promotion of the Roman Catholic religion and power, and alter and modify the very nature of virtue and vice. In vain have the Catholics disclaimed, upon oath, these imputations; colleges and universities of high and established reputation have denied them, and expressed indignant sorrow that such opinions should still be ascribed to them, and that this injurious calumny should be made the foundation of precluding persons of that religion from that political equality, without which it is impossible to pretend to the enjoyment of the British Constitution.

Gentleman, I am not over stating what is represented in this Book, as the effects of these restrictive laws, and set forth in detail.—The Author felt, that the Catholic body was more injured by the spirit of the laws, than by the laws themselves—Can any man doubt the truth of the assertion?

Is it false and malicious to say, that generally speaking, the effect of those laws is to degrade and keep down the Catholic body?—to deprive them of their natural situation in Society, and destroy the effect of character, which is the most valuable property, which any man can enjoy; perhaps the author has exposed these prejudices too strongly. I do not adopt the sentiments of every part of his Work. There may be a few, and but a very few passages, which I would have advised the author not to have written, or have softened down: this is an acknowledgment which I would be compelled to make of every book ably and ardently written, which I have ever met. But there is no man, whose mind is not heated with prejudice upon this subject, can examine this book without feeling a sympathy with the author, and without ascribing to

him a *bona fide* good wish to amalgamate all the people of the Empire and to render the constitution strong and impregnable, by uniting every sect in its defence.

I never knew a cold hearted man do a noble act— This Work is written with the ardour and spirit of a man who felt what he described; and the intent and bearing of the entire work is to be taken into your consideration.—Read the text, with care and impartiality, and you will find that the object of the Writer was---a condemnation of the Penal Code---Reading it with that view, you cannot consider it as dangerous or criminal---it is not calculated so much to alarm, as to make an impression upon the Protestant heart, favorable to the Catholic cause, relying upon and appealing to the benignity of their nature and their enlightened feelings.---It is not imputed to any individual that he is influenced by an unjust, oppressive or illiberal spirit. But the author complains, that the Anti-Catholic Code of laws created and prolongs an hostile disposition--- That they constitute an engine of power, which is not to be trusted with safety to any body of men--that this power being founded on jealousy and distrust will probably be exercised with harshness in whatever hands it may be placed---is not this a fair consideration of the subject. Does it reflect upon the Protestant creed---the Protestant people. Listen to the author himself---in the first Part, page 67, he says—

“ This Statement extorted from our sufferings, may
 “ possibly be termed an invective against our Protes-
 “ tant fellow subjects. Far be such an intention from
 “ our thoughts. We solemnly disclaim it. We know
 “ the benignity of nature, the generous and enlighten-
 “ ed feelings which belong to our estimable fellow
 “ countrymen. We impute *to them* no innate hostility,
 “ no injustice, no oppression, no illiberal principles.
 “ But we complain of the Anti Catholic Code of Laws,
 “ which necessarily produce a hostile disposition. We
 “ complain only of the injustice and oppression which
 “ those intolerant Laws continually create and prolong
 “ —Laws which invest the ruling class in Ireland with
 “ a monopoly of power, not to be trusted with safety to
 “ any body of men whatsoever.—Laws which taint the

“early thought, vitiate the education, pervert the heart,
 “mislead and darken the understanding.—Such a
 “Code, in our opinion, must necessarily corrupt the
 “practice of those, whether Catholics or Protestants,
 “whom it would profess to exalt; and must debase
 “whom it would distinguish with excessive privileges
 “and power.”

[Again hear him in page 237].

“The Anti-Catholic Code of Laws, is the sole source
 “of all the injustice which we have stated. It inspires
 “early sentiments of aversion and contempt: it nurses
 “those vicious sentiments to maturity,—holds out re-
 “wards and honours for their cultivation and exercise:
 “and diffuses intollerance and persecution, through eve-
 “ry stage and department of life. How can we arraign
 “Protestants, if they merely obey the spirit of the Laws,
 “and conform to principles sanctioned by the state?
 “How shall we condemn the Sheriff and Jury, whose
 “mal-practices flow not from malignity or wilful injus-
 “tice, but from false principles of education, prejudiced
 “habits of thinking, and above all from the slanderous
 “imputations which the Penal Code cruelly affixes to
 “the morals and integrity of the Catholic fellow citizens.

“It cannot be denied, that the Intollerant principle of
 “this code, must produce the same effect upon the mem-
 “bers of one religion as upon those of any other,—that
 “the Protestants would have equally just grounds of
 “complaint, were they debased to the present condition
 “of the Catholics,—that the latter would naturally be as
 “likely to abuse excessive power, as the former. No
 “doubt they would. It cannot be otherwise.”

I have met many enlightened Protestants, whose
 opinions have been entirely changed with regard to
 the Catholics of this country, who at this day believe
 that to be wisdom and philosophy, which once they
 denounced as treason.—We cannot hope an universal
 and instantaneons change of mind—but we cannot
 reasonably doubt, but that it will finally take place up-
 on this subject, and I have no doubt but that the Book
 under prosecution will *hasten* the crisis of universal
 toleration.

Gentlemen, There are men, who deem it seditiou

and libellous, and in some measure treasonable, that any man should attempt to shake or disturb the established system, by virtue of which the Protestants exercise a monopoly of civil rights.—This sect is in a state of rapid decay—and I indulge enlivening presages that the succeeding generation will scarcely know that such a sect ever existed.

It is said, that the Catholic is in the full enjoyment of the right of property—of most other civil rights—that they may cultivate trade—may enter into professions—purchase estates, with little or no control. If this be so, as unquestionably it is to a great degree, why should there be any distinction as to civil qualifications, the natural and necessary result of such acquisitions? Is it not absurd, that a community, consisting of four fifths of the people, should have unbounded rights as to the acquisition of property, and be limited and manacled as to the privileges constitutionally inherent to property? It is a disfranchisement injurious to them and to the State—inconsistent with the vital principles of our Constitution—which cannot be tolerated—which cannot last—which the Protestants themselves must put down—and which while it exists, must impair the strength of the community—and put the Constitution and the Empire at hazard.

Gentlemen, Did the ATTORNEY GENERAL shew any passage in this so much censured book, which tended to create in the Catholic Community of *Ireland* any general spirit of insurrection against the laws—any insubordination to the Government of the country—any tendency to invite, or to harbour a foreign invader?—Let the passage be shewn, and pointed out.—If I am told, in answer, that in *general*, it goes to dissatisfy and discontent, I must sit down, and never rise to justify it—because, from the nature of every complaint, it must, more or less, excite discontent.—There is no candid mind can read the work, without seeing a burning zeal to extinguish all those disabilities, in order to a perfect enjoyment of civil rights, and to enlist in defence of the Constitution every individual in the land.

I shall now call your attention to the passage for which the publisher is prosecuted, and which is to be found in a Note, page 229.—It is as follows:—

* “ At the Summer assizes of Kilkenny, 1810, “ one Barry was convicted of a capital offence, for “ which he was afterwards executed. This man’s case “ was truly tragical;—he was wholly innocent—was a “ respectable Catholic farmer in the county of Wa- “ terford, in good circumstances.—His innocence was “ clearly established in the interval between his con- “ viction and execution.—Yet he was hanged, pub- “ licly avowing his innocence!!! There were some “ shocking circumstances attending this case,—which “ the Duke of Richmond’s administration may yet be “ invited to explain to Parliament.”

This is the matter charged to be a libel upon the Lord Lieutenant, and his Majesty’s Government; and it is now contended, that the work conveys this imputation, that the Lord Lieutenant, with full knowledge of his innocence—refused to pardon the man, because he was a Catholic. Possibly an ingenious special pleader, with proper averments, to be afterwards proved, might shew this ground of imputation, to be conveyed, and no doubt it would be an heavy charge.—But I assert that this passage does not necessarily import any such charge, and as there is not any averment to extend its meaning, no such meaning ought to be ascribed to it.—The ATTORNEY GENERAL will not suffer the Traverser to prove the truth in his vindication, and therefore ought himself to be coerced within the limits of the law in ascribing a criminal meaning.

I call for the opinion of your Lordships upon this subject, that the passage, set forth in the information, is not libellous *per se*, and cannot be made so by additional, extrinsic evidence;—there being no averment in the record to let in such evidence. This doctrine is laid down expressly, in the case of *Hawes v. Hawkey*, 8. East, 429, and in the *King v. Horne*, Cowp. 684.—There must be a distinct charge of a necessary criminal import made against the person

alleged to be libelled, or it must be distinctly *averred* and shewn by legal pleading, that a crime has been so imputed to that individual, in its nature, libellous.

Now Gentlemen, I, at once, admit, that if it could be proved to your satisfaction, that the author of this book did impute to the *Lord Lieutenant of Ireland*, the base, and foul act of refusing pardon to an innocent man, because he professed the Roman Catholic Religion—as it would be one of the most base and abominable acts, which a chief Governor could commit, so it would be a most atrocious libel, if it were mis-imputed to him. But I do say, that there is no legal ground for such a charge---that there is not a *scintilla* of evidence to support it, without trampling down the rules of pleading, and the security of the subject. I have already stated, that there is an averment in this information, that the publication was of and concerning the *Lord Lieutenant*, but not of and concerning the exercise of the prerogative of pardoning.

Mr. JUSTICE DAY. The statement in the information is not so strong. The allegation is, that it is a libel of and concerning the *Lord Lieutenant* and the Ministers acting under him.

Mr. BURROWES. Your Lordships will therefore have to determine, whether it be a Libel *per se*, or not, and for that purpose, I beg leave to read it again---(which Mr. B. did).

Gentlemen, Give me leave to say, that a man may be convicted and executed; and although he be innocent, such an event casts no necessary imputation upon the Court, or the Jury;--the Counsel for the prosecution, or the Government. It is only saying, that human nature is fallible, and that the laws are not perfect. I know it is a benignant principle of our law, that it is better that nineteen guilty persons should escape, than that one innocent person should suffer. I have no doubt, that five hundred guilty persons do escape, for one innocent man who suffers. The judge and Jury must receive the evidence from the testimony of Witnesses,--who may be corrupt, prejudiced, or mistaken.

Mr. Justice DAY. Do you remember the case of a man, who was tried before *Lord Chief Justice HALE*, for murder?

Mr. BURROWES. My Lord, I do, and there are many cases of a similar nature. The matter charged to be libellous, is a mere statement, that a man was convicted of a capital offence, and executed---that he was innocent, and that there were some shocking circumstances attending his case, which the *Lord Lieutenant's* Government may be invited to explain in Parliament. This cannot be libellous, *per se*, except in imagination, and fancy---the morbid feelings of an *Attorney General* or the delicacy of a Viceroy.---The Jury cannot act upon such grounds, and when the investigation is before Parliament, which is challenged, it will appear, who are the transgressors---But that event is sought to be anticipated by this information, and except the present Jury be called for that purpose, I cannot see for what purpose they are now impannelled. The Officers of the Crown *know* that they can have no judgment upon this information :---They *know* it is impossible to sustain the innuendos by proof;---and that there are no averments to which any evidence given, can apply.---This trial, therefore, can have no other object, but to influence an inquiry, which may hereafter take place;—and whenever it does, the ATTORNEY GENERAL will stand exculpated. No human testimony will satisfy me, that he would suffer an innocent man to be executed, knowing, or believing him to be innocent. But there may be blame, in which he does not participate; and there may be inquiry, in which he may assist,—not as affecting himself, but which may attach upon others. It is ridiculous, to suppose, that the documents which have been read by him, and which have not been proved, should have any influence upon the present case. They should have been reserved for that investigation which is challenged before another tribunal. But, Gentlemen, if it shall go before that tribunal, let it not be accompanied by the verdict of a Jury to shelter the guilty. Upon this information, you are not warranted in finding a verdict against the Defendant

The matter contained in that information is no libel *per se*; and there is no averment warranting a finding, which imputes a guilty intention. I will read it distinctly to you, and I will ask you, whether you *must* understand that this passage meant to convey a positive allegation,—that upon an application to the Lord Lieutenant for pardon, he refused to grant it, although he knew that the man for whom it was sought was innocent,—and that he refused it, because the man was a Roman Catholic. That is the violent extension of the meaning, which is necessary to be given to this passage, to constitute it a libel. I might grant, for argument sake, that by reference to other matter, you might think it was so meant. But there not being any averment to authorize such a reference, you must take it from the words themselves, that their meaning was unambiguously such as is contended for. [Here Mr. Burrowes read the passage.]

What, Gentlemen, can we infer from this, that the Lord Lieutenant is charged with having executed the man, because he was a Roman Catholic, knowing that he was guilty? What does Lord ELLENBOROUGH say, in the case of *Hawkes. v. Hawkey*, 8. *East*, 431? He says, “That nothing can be more clear, than the “rule laid down in the books, and which has been constantly adopted in practice, not only where the “words spoken do not, in themselves, naturally convey the meaning imputed by the innuendo, but also “where they are ambiguous, or equivocal, and require “explanation, by reference to some extrinsic matter, “to make them actionable; it *must not only be predicted, that such matter existed*, but, *also*, that the “words were spoken of and concerning that matter.” And as there was not any colloquium averred, it was decided, that the *innuendo* did not enlarge the sense of the words, or supply the want of a colloquium.

Now, in this case, there is neither colloquium, averment, nor evidence. I would have objected to evidence, if it had been offered, because there is no averment in the record, to which the evidence would have applied. It is not averred, that any application was

made for pardon, or that the Viceroy was apprized of the man's innocence, or that he was apprized of his religion.

In the case of the *King. a. Horne, Cowp. 672.* it is determined, that, "as to the matter to be charged, "whatever circumstances are necessary to constitute "the crime imputed must be set out."—Now, where are the words here, importing, that an application was made to the Lord Lieutenant for pardon, and that he refused it, because the convict was a Roman Catholic?—The Attorney General says, he does not know, to this hour, what the man's religion was.—I am persuaded of it, and if it were mentioned to him, as a motive to influence his conduct, he would have spurned at it.—Why, then, should this imputation be inferred? It is stated, that he was in good circumstances, and might it not be suggested from thence, that he was hanged because he was wealthy,—or because he was a farmer, or because he resided in *Waterford*?—for all these circumstances are stated in the publication; and it would be absurd to admit of any such inference. But, Gentlemen, I really feel this to be a waste of time, and will not dwell longer upon the topic, which is brought forward for the purpose of procuring a Jury to act upon the allegation of a crime, with respect to which no judgment can be pronounced, for the manifest purpose of stating such verdict in another trial, and not with a view to punish the Defendant;—for the Attorney General will not seriously say, that he can call for judgment, in case of a conviction, nor will he squander the treasure of a well earned reputation, by such an assertion.

Gentlemen, if I am right in what I have been urging, and the Court shall agree with me, I shall be relieved from another part of this case, into which I must enter with much reluctance, to which I have been challenged, and from which I will not fly.—If I state any thing unpleasant, it will sting no man more, than the man, who is bound by his duty to make the statement. If the Attorney General had referred it to your opinion, whether the matter contained in the informations constituted a libel, without further evidence

or explanation, which must be the final issue of the prosecution, I conceive, that he would have discharged his duty.—I would have joined issue with him.—I am ready to stand by that opinion now, and to relieve the Jury from an unpleasant and irksome duty. We will argue this case, as upon a demurrer to the information,—we will withdraw the plea of not guilty for the purpose,—thus we will admit the fact, and avoid all painful and invidious statement and language.—If that be not acceded to, as, I perceive, it shall not, I must discharge my duty also. Every man, of every rank, even though not an Attorney General, has a conscience of his own; and there is no man fit to hold his rank in society, who will not boldly follow the sanctions of his own conscience.

Mr. JUSTICE DAY. I do not know, whether the Solicitor General will think proper to answer now, or reserve himself for a final reply. But, in my opinion, it will be necessary for him to answer you.

Mr. BURROWES, My Lords, it is with unfeigned reluctance, that I shall state any thing of an unpleasant nature. I should hope that I am freed from it, there being nothing offered to the Court, or the Jury, to justify a finding, that this particular passage was published in the criminal sense which has been imputed to it. If such be the case, I am warranted in sitting down, governed by a feeling, with which I am always affected, a repugnance to introduce any thing, in public or in private, which is of a disagreeable nature. I hope, it may be quite unnecessary and superfluous to go into evidence of any kind: and I would not state it, if there were not precedents of high authority for it.

Mr. SOLICITOR GENERAL. My Lords, What I shall offer to the consideration of your Lordships and the Jury, will be, after Mr. *Burrowes* has closed his defence.

Mr. BURROWES. Are we not entitled to the opinion of the Court, whether the information be supported?

Lord Chief Justice DOWNES. We can give no

opinion, until we hear both sides, and you had better go on, with your case, in the ordinary case.

Mr. BURROWES. My Lords, I again offer, if we be allowed to withdraw the plea of the general issue—we will now demur generally, and argue the demurrer *instantly*.—If that be not acceded to, I must, however unpleasant, proceed in my statement.

Gentlemen of the Jury, Let it not be said, that I have affected an unwillingness to press an invidious topic, which I would not be justified in animadverting upon, after the introduction of it by the ATTORNEY GENERAL.—I have shewn, that this information fails in imputing the crime, and that there is no evidence, and cannot under the pleading be any evidence, to establish it. There is, I admit, an averment that the Book, and consequently the Note selected for prosecution, was written of, and concerning the Lord Lieutenant—It will be an additional defence for my client to prove, that the censure meant to be conveyed applied to another person. I have, now, therefore, a case to state, which will satisfy the Jury, that this matter was not published with reference to the Lord Lieutenant—Really, my Lords, it is with reluctance I proceed, and wish I could be relieved by the Court deciding upon the objection.

Lord Chief Justice DOWNES. This trial must proceed in the usual course.

Mr. WALLACE. My Lords, I am Counsel for the defendant, and will say a few words in support of the objection.

Mr. SOLICITOR GENERAL. My Lords, I object to Mr. Wallace speaking to this case, before Mr. Burrowes has concluded. If Mr. Burrowes had made his objection in the beginning, and relied upon it, there might be some reason for debating it. But he has addressed the Jury for a considerable time, and he now wants to take breath.—Another Learned Gentleman intervenes, and the object is, that after I shall reply, Mr. Burrowes may be at liberty to address the Jury again.

Mr. WALLACE. Surely, my Lord, I am entitled to address the Court upon matter of law.

Lord Chief Justice DOWNES. This mode of proceeding is unexampled. If the Counsel will among themselves arrange the matter, we may submit to it—but if they do not, the usual course must be pursued.

Mr. BURROWES. -My Lord, If there be any question for the Jury whether, the meaning imputed to the publication be supported by evidence, I must state something further: and painful as it is, I must discharge my duty. In addition to the failure of supporting the imputed crime, no evidence has been offered to prove, that the criminal passage in the information was published of the Lord Lieutenant, and the fact and the truth of the case warrant me to state evidence, which we are ready to offer, admissible and legal—to contradict any such imputation. It is averred that this matter was published *of and concerning the Lord Lieutenant* of Ireland—and it seems to be considered to have some allusion to him. No evidence is offered to prove it; and I have evidence to produce, which would put it down, if any such had been offered.

The ATTORNEY GENERAL has diminished very much the pain which I must feel in stating the facts, which I am going to state.—He has, by way of anticipation, stated much, which he says would be inadmissible in evidence, and which he would not condescend to prove, if it were allowable.—Can it be censurable in me to state what is admissible—what will be fully established in evidence—and what no ingenuity can explain away, or palliate! We shall state facts, and lay evidence before the Jury, tending to shew that the matter complained of was not written and published of the *Lord Lieutenant*, but of the Judge who tried the man, who was executed.—What I have to state upon this part of the present case, I shall state with little commentary.

In fact, all commentary would be superfluous—There cannot be any diversity of opinion or feeling upon the transaction, which I am compelled to disclose. The case was this—On *Saturday* the 5th of *August*,

1809, the Assizes of *Clonmell* were to end, and on the *Monday* following the Assizes of *Kilkenny* were to commence. *Kilkenny* is 25 miles distant from *Clonmell*.

Barry, who was confined in *Clonmell* Gaol, received a notice on *Saturday*, that he would be put upon his Trial on *Monday*, for an highway robbery, alleged to have been committed by him some months previous to that time, in the *County of Kilkenny*—No man had been committed for that crime to *Kilkenny* Gaol, or received any notice, certainly not, any regular notice, that he was accused of the crime. On *Sunday* he was marched to *Kilkenny*.

His counsel came into Court, and produced an affidavit swearing, that there were five persons, who resided in the *County of Waterford* between forty and fifty miles distant from *Kilkenny*, who would prove his innocence, by establishing an *alibi*.—One of these men, I am instructed to say, was a man of character, and opulence in the country. It was stated by a magistrate of *Waterford*, then present, that there did exist such people as were named in the affidavit, and they resided in the alleged place; and therefore it could not be a fabrication. The application to postpone the trial was refused. He was tried on *Tuesday*. His counsel stated, that he would not go through the mockery of defending a man, who had not an opportunity of producing his witnesses. His counsel quit the court. The noble Judge tried him upon *Tuesday*, and he was found guilty and executed.

I shall read the affidavit in *hæc verba* (which Mr. B. did. Vid. post, p. 53). Why do I state this and how am I to bring it to bear upon this case? It will bear upon it most distinctly, by establishing that the Judge, whose conduct was so revolting, was probably the object of the passage under enquiry, and that the shocking circumstances alluded to were those which I have stated.

The *Attorney General* has made a statement, which as far as I can collect it, goes to shew, that the noble Judge had made enquiries, private enquiries, by which he was satisfied as to the guilt of the man, the infamy

of the witnesses alleged to be absent, and the falsehood of the affidavit. Be it so? I do really wish that it could satisfactorily appear, that the noble Judge had sufficient ground for refusing the application. But it is not stated, that he refused to give credit to that affidavit by reason of any thing, which was openly stated in the court, but from something communicated by a person, who was not sworn, and which was not made known to the counsel for the prisoner. I do not state, because I would not be allowed to prove, several affidavits briefed to me to establish the innocence of the man: but I confidently assert, that if he was not duly tried, he is still to be deemed innocent, according to the humane spirit of our law, notwithstanding his conviction; and that he cannot be considered, as duly tried, if he had not sufficient notice of trial.

Now, I say that this evidence would go more forcibly to prove, that the passage in question, alluded to the noble Judge, than what has been read, from the part to which it is a note can, to refer it to the *Lord Lieutenant*. If that whole passage be duly considered and weighed, it will not be found, that the difficulty which a Roman Catholic finds in partaking of the prerogative of mercy is ascribed to bigotry or cruelty in the viceroy, but to his ignorance of his claim to mercy from want of that patronage and estimation of which the spirit of the Penal Code deprives the Roman Catholic.

Gentlemen, this statement established, as it will be in evidence, will do much to prove, that the *Lord Lieutenant* was not the object of censure in this note. But it will do every thing to satisfy a candid and impartial Jury, that it was not actuated by a malignant spirit: Can it be imagined, that it would be the same thing, if all this had been stated, without any ground or colour for it? but that it emanated from fancy and invention. In what light must the conduct of the noble Judge in forcing on this trial, have appeared to a bye-stander, who knew nothing of these salving circumstances, which were stated here this day and which privately, as is alleged, influenced his conduct?

It appeared that a man was called upon his trial, on a *Monday*—he had notice of it on *Saturday*—he was travelling all *Sunday*, and his witnesses were forty five miles off. In civil cases, property of £.10 value cannot be put into jeopardy, without eight days notice.—What must have been the feeling of the thousands who witnessed this conduct? With what emotions would the most impartial historian of any feeling animadvert upon it? Could he be too indignant! Should any force or extent of reprehension render him an object of punishment?

Gentlemen, I shall not state more upon this part of the case.—I should not have stated so much, if it had not been rendered necessary;—if it were possible, by demurring to the information, and trying the question of law, without inquiring into the facts, I would gladly have done so. We are confident, that there cannot be any judgment in this case; but the same ground of argument shews, that there ought to be no verdict.

The Judges who try this case, with an anxiety that justice may be done, will probably state their opinion upon it. You will, by your verdict, tell the world what you think. I appeal not to your feelings; my only hope is in your justice. I call upon you, and I require it from you, to stand fairly between the different classes of the community,—to recollect, that this book was written for the purpose of doing away a monopoly, of which you possess the exclusive enjoyment. You ought not to condemn the author.—The object of the pursuit is laudable in the individual; and it is justifiable to discuss every public subject, with latitude. It cannot be expected, that such subjects should be discussed with more calmness than human nature can command.

Gentlemen, as to the general complexion of the work, you see it is unobjectionable. The prosecutors have selected only one solitary passage, which is put forward as exemplifying one mischievous effect of the penal code; but it is not stated in relation to the *Lord Lieutenant* of Ireland, and this is all which has been discussed in a work of three or four hundred pages. They fasten upon a speck on the disk of a

luminous work, without touching the body itself; and you are now called upon to punish, at worst, a trifling excess, by a verdict, which is sought for, and will be made use of as a general condemnation of the spirit of the book, and of the object, in support of which it was written.

The liberty of the press cannot exist under such rigour. You are to judge by the whole work, as you are to be judged yourselves upon the last day, by the conduct of your lives,—not for a singular, or a particular act. No man can say, that his past life has been free from error. Upon similar principles, you will decide upon this book. Notwithstanding what has been said in traduction of it, you must, if you read it, see it to be a valuable work. It will go down the stream of time, and posterity will applaud the man, who was able, to give a bold, a candid, philosophical and enlightened view of this penal code. Although some passages may be over-wrought, and warm feelings are not sufficiently restrained, yet you cannot consider it as a bad work, and I am not afraid of your verdict, if you peruse the whole. I conclude, by calling upon you to stand equally between the Crown and the Publisher of the Catholic grievances, and if you do so, I am confident, that you will find a verdict for the Defendant.

BURROWES CAMPBELL, Esq. called.

MR. ATTORNEY GENERAL. My Lords, I understand, that this Gentleman is called, as witness to prove what has been so candidly stated by the Counsel for the Defendant. It will, therefore, be for your Lordships to consider, whether consistent with the Rules of Law, and established precedents, you will admit such evidence.

MR. O'CONNELL. The objection is premature, until an illegal Question shall be put to the witness. The Counsel for the Crown are sufficiently numerous, and vigilant to make their objection in such case.

MR. JUSTICE DALY. I understand, that this witness is called, for the purpose of disproving the averment,

that the publication in Question, was of and concerning the Lord Lieutenant.

Mr. CAMPBELL was then Sworn, and Examined by Mr. O'CONNELL.

Q. Do you recollect any thing of a person of the name of *Barry*, who was tried at *Kilkenny*, in the year 1809?

A. I do.

Q. You are aware, that he is the person alluded to in the publication in Question?

A. I understand so.

Q. Were you Counsel for him?

A. I was.

Q. Upon what day of the week, Do you recollect was he called upon, first, to take his trial?

A. On Monday.

Q. What day of the assizes was that?

A. It was the first day.

Q. Did the trial occur upon that day?

A. No.

Q. Was any application made to postpone his trial?

A. There was on *Monday*.

Q. Was that application made by Counsel?

A. It was.

Q. You were Counsel?

A. I was.

Q. Was the application made upon Affidavit?

A. It was.

Q. Have you a copy of it?

A. From the matter communicated to me, I Drafted an affidavit, which was to be engrossed by an Attorney, that Draft I have in my hand, I think there was some alteration in it, and cannot say, that this is an exact copy of what was sworn.

Mr. O'CONNELL.—My Lord, we will prevent any objection in this respect. We have summoned the proper officer to attend and produce the original affidavit which was sworn.

Mr. JOHN BOURNE, Sworn, examined by Mr. O'CONNELL.

Q, You are Clerk of the Crown for the Leinster Circuit?

A. I am Deputy Clerk for three towns in that circuit.

Q. Have you any affidavit sworn by a person of the name of *Barry*?

A. I have.

Q. Was it filed in your office?

A. It was,

Q. When?

A. On the 7th of August, 1809.

Q. And has it remained in your office ever since?

A. Yes, until it was removed for the purpose of being produced here. I was served with notice on Thursday last, to produce it, and I have got it here this morning.

Here the affidavit was read as follows:

“The King against Patrick Barry.”*

“Patrick Barry maketh oath and saith on Saturday last, in the gaol at Clonmell, deponent had first notice of the charge upon which it is intended to try him at the present assizes. Deponent saith, that *James Rogers, Thomas Hacket, Senior, Thomas Hacket, Junior, and David Barry and Maurice Macartney*, are material and necessary witnesses, for Deponent, without the benefit of whose testimony, Deponent cannot with safety abide his trial,—Deponent saith, that said witnesses reside at *Kilcannon*, in the County of *Waterford*, a distance of near fifty miles from this City, where deponent hath resided for three years, previous to his apprehension in the County of *Tipperary*. Deponent saith, that from the shortness of time, which has elapsed, since he came to this City, he is utterly unable to procure the attendance of such witnesses, during the present assizes; and Deponent positively saith he does not make the present application, for the purpose of wilful delay, but solely on account of the absence of said witnesses, whose presence, he

* It is observable that this affidavit is in the name of *Patrick Barry*.—The indictments and his memorial were in the name of *Philip Barry*.

"hopes and believes, he will be able to procure at the
"next assizes."

his
"Patrick X Barry,
mark

Sworn before me, this 7th
day of August, 1809.
Norbury."

"Truly read by me,
Patt. Brophy."

Mr. CAMPBELL'S examination was then resumed.

Q. You then applied to the Court to postpone the prisoner's trial upon that affidavit?

A. I did; and upon hearing it read, I find there is only a difference of one word between it and the copy which I have. But I first applied to the Judge without affidavit.

Q. Upon what ground?

A. Upon what I conceived was judicially known to the Judge; the late period of time at which the prisoner was transmitted from one county to the other; and the impracticability of procuring his witnesses on such short notice.

Q. Was your application resisted by the Counsel for the Crown?

A. Not that I recollect.

Q. Was there any affidavit made in answer to that of the prisoner?

A. No:—Mr. W. KEMMIS was in Court; he made no affidavit. Upon the first application, which I made on *Monday*, the Judge asked the Clerk of the Crown, whether there was sufficient business to occupy the Court that day; and being answered, that there was, he then directed the trial to stand over, until the next day; when the affidavit was sworn, and as I was beginning to address the Court, and stating the affidavit, some Gentleman of the bar mentioned that Mr. *Elliott*, a Magistrate, who was then in the bar box, knew three of the persons who were named in affidavit, as witnesses; I asked Mr. *Elliott* did he know them; he answered that he did; which I mentioned to the Court, as a ground of removing any difficulty.

Q. This was not Mr. *Bradstreet Elliott*.

A. No.

Q. Was he there?

A. He was not, to my recollection: he was a Magistrate of the County of *Tipperary*, and I do not recollect to have seen him in *Kilkenny*.

Q. Was your motion, grounded upon the affidavit, complied with?

A. It was not.

Q. Upon what grounds was it refused?

A. I cannot pretend to state them all;—some things passed, which I do not wish to speak of; and therefore, I request you will not ask me. I recollect, I told his Lordship, that he must defend the man himself.

Q. However unpleasant, Sir, it may be to you to answer, I feel myself bound to insist upon it.

A. His Lordship said, he had communicated with the Magistrates, and that if a trial was to be postponed, upon an affidavit drawn in so perfect a manner, the public business could not be proceeded upon, as prisoners would only have to employ Counsel to draw an affidavit, when they would wish to put off their trials,—I replied, what would his Lordship say if the affidavit were imperfect?

Q. Did you defend the man?

A. I did not, because I expressly stipulated with the Gentleman, who employed me, that if the trial should be proceeded on, I would not defend the man, in the absence of his witnesses, and upon the motion being refused, I threw up my Brief, and left the Court.

Q. Was there any thing like a mandate held out to you, to remain in Court, to defend the man?

A. There was something like a mandate.

Q. From whom?

A. The Judge, which I felt it my duty to reject contemptuously.—I would rather you would not ask me any thing, that is not absolutely necessary.

Q. I will not.—Did you make any application afterwards to the Judge, upon the subject?

A. I did.—The man having been tried, and sentenced to be executed, I wrote a letter to Lord NORBURY, enclosing the affidavits of those persons who would have

been witnesses for the prisoner stating what they could prove;—that he was in their company at a distance of forty-five miles, when the robbery was committed.

Q. Did you get any answer?

A. There was a verbal answer delivered to me, but I cannot say, it was sent by the Judge. I enclosed him the affidavit in a respectful letter.

Q. And did you not receive a written answer?

A. I did not.

Cross Examined by Mr. Solicitor General.

Q. Had you been Counsel for this man at *Clonmell*?

A. I had, in the middle of the former week.

Q. Upon the trial there, he was found guilty of a transportable offence, and acquitted of a capital one?

A. Yes; I think one indictment was for robbery in the high way; and the other for appearing in arms, under the white boy act; it was one transaction.

Q. You are mistaken in your recollection; for one indictment was for shooting at the prosecutor, with intent to murder him;—and the other for forcibly demanding his goods and money.

A. One indictment was of a capital nature, and the other for a transportable offence;—it cannot be expected, that I should remember the exact forms of the indictments upon a matter, respecting which, I did not think I should be examined as a witness.

Q. Do you remember, whether there was an order made by Baron GEORGE, to transmit this man from *Clonmell* to *Kilkenny*?

A. I take for granted there must have been an order to transmit him; but I do not recollect it.

Q. Can you say, upon what day of the week preceding, this man was tried at *Clonmell*?

A. I cannot, I have so many of these people's Cases upon my hands, that I cannot recollect the particulars of each;—but I should suppose, it was in the middle, or the latter end of the week.

2. Were not some of those witnesses, whose names

were mentioned in the affidavit, sworn in *Kilkenny*, produced upon the trial at *Clonmell*?

A. One of them was; a man of the name of *Rogers*.

Q. Did that person give evidence for the prisoner at *Clonmell*?

A. Yes.

Q. You drew up a Memorial, for the man, addressed to the ATTORNEY GENERAL?

A. I sent a letter to the ATTORNEY GENERAL; but whether I prepared a Memorial or not, I do not recollect.

Q. Your object was to save the man's life?

A. It was, as I conceived that the trial was not regularly had.

Q. His life could not be saved, without the King's Pardon, and to obtain it from the LORD LIEUTENANT, you applied to the ATTORNEY GENERAL?

A. Yes.

Q. And the ground of your application was, that the man's trial had been hurried?

A. I thought he was tried contrary to law; and I never knew an instance of a trial brought on, under such circumstance.

Q. Upon the statement which you made to the ATTORNEY GENERAL, you hoped to get the Duke of RICHMOND's pardon for the man?

A. I did.

Q. And you addressed yourself to the ATTORNEY GENERAL, knowing that he would apply to the Duke of RICHMOND?

A. I considered the prosecution had been directed by the ATTORNEY GENERAL, and of course, when the Judge, to whom I respectfully applied, had refused, I thought the ATTORNEY GENERAL was the proper person to apply to.

Q. Then it was a government prosecution?

A. It was:—Mr. PRENDERGAST attended as Counsel for the Crown.

Q. During all the discussion which took place respecting this man, in court and elsewhere, did it appear of what religion he was.

A. It did not, nor did I hear, what his religion was, or enquire about it.

Mr. Justice DAY—Did the ATTORNEY GENERAL ask you of what religion the man was?

A. He did not.

Q. You received an answer from the ATTORNEY GENERAL.

A. Rogers brought a letter from the ATTORNEY GENERAL, who told him to lose no time in delivering it at the Castle.

Q. You have no doubt, that the ATTORNEY GENERAL interfered immediately?

A. I never heard until this day, that the ATTORNEY GENERAL had applied to the Judge,—but he did send a letter, which I conceived, did contain some recommendation respecting the man, and I considered, that there was a great contrast between the conduct of the ATTORNEY GENERAL and that of the Judge.

2. You did not blame either the ATTORNEY GENERAL, or the LORD LIEUTENANT, in the transaction?

A. I never did; my sentiments are well known upon the subject,—I never concealed them from any one.

2. Did you ever represent, that foul play was given to this man, because he was a Roman Catholic?

A. I never did, nor do I believe it was; although I love the Roman Catholics, and wish them emancipation, I do not believe they are treated so bad as that.

Examined again by Mr. O'CONNELL.

2. Was the application which you made in town, founded upon the affidavit which had been sworn in Kilkenny?

A. No, there was a distinct affidavit brought up by Rogers.

2. An affidavit stating the innocence of Barry?

A. No, but an affidavit stating, that he was in the company of the person making it, and others, at a place 45 miles distant from the place, in which, and at the time, the offence was charged to be committed.

2. Were the same names mentioned in both affidavits?

A. Some of them were, but I do not think all of them were mentioned.

2. You never concealed your sentiments upon this subject?

A. Never, I talked of it publicly in the Hall of the Four Courts, and told it to every one I met.

Q. You did not impute any blame to the *Lord Lieutenant* or the *Attorney General*?

A. I never did.

2. But you did impute blame to a different person?

A. I did.

Q. I will not now ask you, who that person was, but did you speak of it, as an ordinary occurrence or otherwise?

Witness shook his head.

JUDGE DAY. That shake of the head is a sufficient intimation of the witnesses sentiments.

Q. It was perfectly public before the publication in question?

A. It was.

Mr. JUSTICE DAY---And you did not think there was any thing imputable to the Government of the country?

A. Certainly not.

Mr. O'CONNELL---Was it your idea that this was a fit subject for parliamentary enquiry?

A. I said at the time, I thought so.

Mr. SOLICITOR GENERAL---Against whom?

A. Not either against the *Attorney General* or the *Lord Lieutenant*.*

Here it was admitted, upon the application of the Defendant's counsel, that Mr. *Pole* was Chief Secretary, in the month of *June* last, at the time of the Publication, and that Sir *Charles Saxton* was Under Secretary, and that in the month of *November*, when the information was filed, Mr. *Peele* was Chief Secretary, and Mr. *Gregory* under Secretary.

Then the Case was closed on the part of the Defendant.

* Vid. Appendix.

Mr. O'CONNELL---There being evidence on both sides, in this Case, I claim a right to speak to the evidence. The practice is different in both countries; in England I admit, such a right is not allowed, but it has been decided otherwise here. The last Case upon the subject is that of the *King* and *Finnerty*, which was a prosecution for a Libel, in which case Mr. *Fletcher*, now a judge of the Common Pleas, stated the Defendant's case, and Mr. *Curran*, now the Master of the Rolls, observed upon the evidence.

Lord Chief Justice DOWNES. I take the course in both countries to be the same; there may be exceptions from it under particular circumstances; but both in *England* and here: I take the course to be this, the prosecutor states his case, and examines his witnesses; the defendant's counsel, then states his case, observes upon the evidence which has been given and the prosecutor replies; this, I consider to be the general course, there may be exceptions, or the counsel for the crown may consent.

Mr. O'CONNELL. My Lords in the present there is matter of law to be observed upon.

Lord Chief Justice DOWNES. Unless there be a consent, there is nothing here to induce us to vary from the ordinary course.

Mr. O'CONNELL. I do not expect any consent from them.

Mr. Justice DALY. There was a meeting of the Judges upon this subject in which it was debated and fully settled.

Mr. O'CONNELL. Then I will confine myself to the matter of law.

Mr. Justice OSBORNE. The matter of the law has been observed upon already by the counsel for the defendant. We will hear the other side, and if there be any necessity you will not be precluded.

Mr. O'CONNELL. I am content.

Mr. SOLICITOR GENERAL. My Lords, I must beg leave to object to this mode of proceeding; the crown has the right to the final reply; if Mr. O'Connell shall be

heard in answer to me, there then must be another reply on the part of the crown.

Mr. *Justice* OSBORNE. I think the *Solicitor General* has a good deal to answer, if he is successful in combating the objections, we may then call upon the defendant's Counsel.

Lord *Chief Justice* DOWNES. I think this is the proper time for the Defendant's Counsel to apply, if they are to be further heard.

Mr. O'CONNELL. My Lords I merely intend to mention a matter of variance, which has not been hitherto observed upon. The information states that the publication in question, is of and concerning the *Lord Lieutenant*, and the persons acting under the *Lord Lieutenant*, not of those who had acted under him; the charge therefore is predicated of Mr. *Peele* and Mr. *Gregory* and it is clear upon the evidence, if any meaning can be attributed to the present ministers acting under the *Lord Lieutenant*, it applies to different persons; the charge is in the present participle, and is not true in point of fact, for it applies not to persons acting under the *Lord Lieutenant*, but who had acted, and the Jury, to warrant a conviction of the defendant, must find that the publication was of, and concerning Mr. *Peele* and Mr. *Gregory*; whereas it related to their predecessors.

Mr. *Justice* DAY. I understand your objection to be this, that the information speaks in the participle present; whereas the persons in office are not the same who held the office at the time of the publication.

MR. SOLICITOR GENERAL.

Gentlemen of the Jury, It would be now for me, at once to address you upon the subject of that libel, upon the construction and tendency of which, it is your exclusive province to decide; but that the Counsel for the Traverser, have imposed another and a previous duty upon me. I am called on, at this mo-

ment, to observe upon, what is said to be a question of law, to which, I understand it to be their Lordship's pleasure, that I should first apply myself. It is alleged, that the offence, which we impute to the Traverser, is not legally and technically described in the information now before the Court; and I have been challenged, in the middle of a trial, and in the face of a Jury, to defend the Crown pleading, as if upon a demurrer, or in arrest of judgment. This appears to be an extraordinary demand, and one which, if complied with, would establish a most preposterous precedent:—it is neither more or less, than to call upon the Crown to shew cause why his Majesty should not be non-suited; a proceeding heretofore unheard of in a court of criminal justice. As that cannot be done, in what other way shall the case be disposed of? Are your Lordships to desire the Jury to acquit in point of fact, because you entertain doubts in point of law?—The Traverser says, that our pleading is bad;—we say that it is good. If your Lordships were to be of opinion against us, how can you at present assert that opinion?—You cannot put us out of Court, and, in order to give effect to your judgment, would be obliged to transfer your jurisdiction to the Jury, and call upon them to pronounce upon the law, in the shape of a verdict upon the fact. If the Traverser questions our pleading, he ought to have demurred to it, but by pleading issuably, he has generated a Jury question, which it is impossible to elude. It is not denied, that there is a question for the Jury, it is only asserted, that it is ill made, in point of form, and that a better pleader would have framed it otherwise; but, if that be true, the party is not without his remedy. He may move in arrest of judgment, with the advantage of every argument he might have had on a demurrer, and if he should succeed, the verdict will go for nothing. What the result of such an argument may be, I shall not here anticipate, but if your Lordships should rule it now against the Crown, without the opportunity of consulting authorities, and that your Lordships should happen to be mistaken, the mischief would be irremediable, and justice would be defeated by a hasty

decision, at an improper time, and in an improper place, upon a question in no manner under the consideration of the Court: Without going into such a question here, suffer me only to remind your Lordships, that by this pleading we charge, that a certain publication is a libel upon the Lord Lieutenant and Government, published with an intention to excite the King's Roman Catholic subjects to discontent.—The Defendant pleads, not guilty, and by so doing, controverts the publication which we allege, and the construction and tendency which we impute—A Jury is sworn to try that issue between us.—Witnesses are examined at both sides, and then it is insisted, that the publication is not a libel *per se*, but requires averments to introduce, and innuendoes to impute its occult meaning. Whenever that question shall be properly arguable, we have not the least doubt of persuading the Court, that the publication speaks for itself, and is a libel *per se*, according to the common sense of mankind in expounding ordinary language, which is the standard of construction both for Judges and for Juries; but that if any doubt should remain of that proposition, there are, on the face of the information, averments and innuendoes abundantly sufficient for every purpose,—that according to every authority, from the *King* against *Horne* to the latest decision, it is enough, if to a common intent, the pleading states such circumstances as supply, substantially, any obscurity in the libel, and that it is little material in what precise words, and still less in what precise spot of the information such averments may be found. This is a mere outline of what we confidently expect to be able to support, should occasion require it, but, at present, we only deprecate the anomalous and extravagant proceeding which has been called for this day, and implore your Lordships not to sanction by your authority the exhibition of that legal monster, which has never been seen in a Court of Justice, the argument of a demurrer upon an issuable plea pleaded, and after evidence given, or the argument of an arrest of judgment, before a verdict pronounced. [The

Court having conferred and acquiesced in what the SOLICITOR GENERAL said, he proceeded.]

Gentlemen of the Jury, having now their Lordships' sanction for dismissing such a consideration, I call your attention, at once, to what it is your duty to try. I most fully acquiesce in what has been urged by Mr. Burrowes, that not only the fact of publication, but the construction and tendency of the alleged libel, are matters exclusively for your decision, and that it is your province, and yours alone, to decide upon them. I wish not to draw them to any other tribunal. I ask for nothing but your conscientious answer to this question.—Is this publication a libel upon the *Duke of Richmond* and his government, and is its tendency to excite the Roman Catholics of Ireland to discontent, by charging him with having refused a pardon to a Roman Catholic convict, because he was a Catholic, although his innocence was established? You will observe, that the defence relied upon is, that the publication was intended, and, according to its obvious meaning, can only be interpreted, to convey a censure upon the judicial conduct of Lord *Norbury*, in a particular instance,; and I am free to admit, that if such be the fair construction of this work, however base, unmanly, and unjustifiable it may be to attack the character of a Judge, through the medium of anonymous slander, however unfounded the aspersion may be, thus brought against the noble Lord, still as the Traverser is not prosecuted for a libel upon Lord *Norbury*, he is entitled to an acquittal.—If you can bring yourselves to believe, that such was the intention of the author, you must acquit the publisher, and Mr. Fitzpatrick must leave this Court, triumphing in the success of that accommodating defence, which may enable him, upon a future day, when he shall be prosecuted by Lord *Norbury*, to elude justice, by alleging that he only intended to libel the *Duke of Richmond*.

Before I call your attention to the work itself, in order to see how far this strange assertion can be supported, let me remind you of the extraordinary occurrence which distinguished the opening of this Trial. You all recollect that the ATTORNEY GENE-

RAL, in opening the Case, strenuously relied upon this publication, as conveying the meaning imputed to it by the information, dwelt most forcibly upon the heinousness of the charges brought forward against the Lord Lieutenant, and their mischevious tendency, and never once anticipated in his speech the possibility of that other construction, which until Mr. Burrowes had far advanced in his speech, we never had heard of. You must remember, that immediately upon his sitting down, before a witness was produced, or another word had been said, Mr. Scully, one of the Traverser's Counsel, got up and offered——

Mr. O'CONNEL then said, My Lords, Mr. Scully is not Counsel for the Traverser, and as the Traverser cannot be affected by any thing which he has said, the SOLICITOR GENERAL is not warranted to use any observations made by Mr. Scully.—Whatever he said was as *amicus curiæ*.

——SOLICITOR GENERAL again.

If Mr. Scully be not Counsel for the Traverser, what he has said ought certainly not to affect the Traverser ; but I must say, that those who are his Counsel, ought to have disclaimed Mr. Scully's interference at the time when he spoke, and not have disowned him for the first time, by interrupting me, while I was in the discharge of my duty.—And surely I may well be excused for my mistake, in supposing that a Gentleman of the Bar, who took so active a part in the defence, was acting as Counsel, especially as his interference so little resembled, what we understand by that of an *amicus curiæ* ;—I have always understood, that the interference of an *amicus curiæ* was to supply some authority, or suggest some defect, which the Court were likely to overlook ; that an *amicus curiæ*——

Mr. SCULLY then rose, and said, that he was sure, though the SOLICITOR GENERAL was warm, he did not wish to misrepresent him, and that he could assure him, that he had not by any thing he had said, at all acquiesced in, or submitted to, the construction put by the ATTORNEY GENERAL upon the book in question.

Mr. SOLICITOR GENERAL.—I was interrupted, before I had time to make the observation I had intended, and which was certainly to the effect which Mr. SCULLY has anticipated; but from what Mr. SCULLY has now said, I must suppose, that I had misunderstood him, and was as much mistaken, as in conceiving him to be Counsel in the cause.—I shall therefore abandon a topic, which I do not feel myself at liberty to pursue;—And, Gentlemen of the Jury, I shall call your attention to the book itself.—The title is, “*A Statement of the Penal Laws, which aggrieve the Catholics of Ireland.*” The Chapter, which contains the Libel, is stiled “*Administration of Justice.*” The libel is a note upon a passage, relating exclusively to the exercise of mercy by the Lord Lieutenant.—In other parts of the book are to be found severe and cruel imputations upon the Judges of the land,—unfounded slanders, I verily believe,—but at present not the subject of enquiry. In that part of the book where the libel is found, there is no mention either of the judicial character, in general, or of the name of any individual Judge. The whole passage, to which the alleged libel is a note, treats of the Lord Lieutenant, and of him alone. I shall now read it to you, and you will judge, whether the DUKE of RICHMOND, or LORD NORBURY, has the best claim to its application. After descanting upon the circumstances, which the author alleges render it impossible for a Roman Catholic to have a fair trial in this country, he proceeds to describe the manner in which the Royal prerogative of mercy is exercised towards those unfortunate persons, who have been convicted of crimes. “In cases where the Protestant murderer, or robber, has happened to be convicted, his *Protestantism* has secured his pardon.—All the local *soi disant* loyalists fall to work: Memorials and petitions are prepared and subscribed; Vouchers of excellent character are easily procured: Even Catholics dare not withhold their signatures, lest they should be stigmatized as sanguinary and merciless.—Thus the testimony appears *unanimous*; and the Lord Lieutenant readily pardons, perhaps promotes the con-

" vict, who in some instances becomes thenceforth a
 " cherished object of favour.—On the other hand
 " where the prisoner is a Catholic, he is generally
 " destitute of this powerful agency and interference.
 " His witnesses, as may be expected, are usually
 " persons of his own condition, and family: It
 " is true, they may swear positively to an effectual,
 " and legal defence, wholly uncontradicted; but not
 " being Protestant, (i. e. *respectable*, the epithet at-
 " tached affectedly to every thing Protestant) they
 " commonly fail to meet with credit. The least ap-
 " parent inconsistency, or ambiguity of phrase, is
 " triumphantly seized as an indication of falsehood,
 " although the error may only exist in the miscon-
 " ception of the hearer. The prisoner, when called
 " upon for his character, never presumes to resort to
 " the testimony of any neighbouring farmer, or per-
 " son of humble degree, *unless a Protestant*.—He
 " appeals, perhaps, to some Grand Juror, or other
 " man of note, or to the Parson, under the impres-
 " sion that they alone will meet with credit.—The
 " personage thus appealed to, perhaps, forgets the
 " prisoner, or has barely heard his name—of course,
 " his testimony proves of more prejudice than advan-
 " tage; and thus the ill fated prisoner loses the bene-
 " fit of his best, and most natural evidence, that of
 " his honest, industrious neighbours, from the cruel
 " injustice and hostile influence of those penal
 " laws."

In this last passage, the author has for a moment di-
 gressed from his immediate subject, and returns to the
 situation of Catholics upon trial; and I must be for-
 given, if I digress also, to express my astonishment, at
 the malignity or infatuation, which could prompt any
 man, to hazard the assertions of the paragraph, which
 I have last read, contradicted as they are by the direct
 knowledge, and experience of every man, who hears
 them.—Is it in the face of this Court — of that learn-
 ed Bench—and of this crowded bar—Is it in the
 presence of you, Gentlemen of the Jury, and of so ma-
 ny others around me, who daily witness the adminis-

tration of justice, that I shall condescend to rescue from this vile slander the insulted laws of our country?—There scarcely exists a wretch, so ignorant, and mean in this land, who could be made to believe, contrary to the evidence of his own senses; that witnesses are rejected on the score of their religion; and that Catholics are afraid to appeal to the testimony of Catholics—that persons of that persuasion are scouted from our courts, as witnesses, and that the Catholic prisoner remains undefended, because he is Catholic.—The author of this work cannot expect so monstrous a misrepresentation to be received in *Ireland*; and it is impossible to account for the audacity of the assertion, except by supposing, that it was intended for other countries, where the ignorance, which prevails on the subject of our law, and our characters, might give currency to the slander.—The pamphlet then resumes the subject of the exercise of mercy, and continuing the description of the Catholic proceeds thus:—"Should he be convicted, a thousand rumours are immediately circulated to the prejudice of his general character: he is proscribed as a dangerous man, a leader of a faction; no Grand Jury interferes in his behalf, and he suffers death, publicly protesting his innocence, fortified by the testimony of his confessor's belief of his veracity, and exciting the sympathy and regrets of the people."

Thus, he contrasts the two Convicts, and as it were says—Look here upon this picture, and on this—here is the *promotion* of the *Protestant* convict,—there the *execution* of the *Catholic*.—The fate of each is decided by his religion. There is here an asterisk, and the note, to which it refers, is the particular libel, now under prosecution.—It is introduced by these words, "*Tragical Instance*."—Instance of what?—In the text, there is not a syllable upon the subject of a Judge refusing to postpone a trial; the only topic is a Catholic being executed after conviction, notwithstanding his innocence.—The word "*Instance*" therefore, if a word were wanting, decides the application of the following passage:—

“ At the Summer Assizes of *Kilkenny*, 1810, one Barry was convicted of a capital offence, for which he was afterwards executed.—This man’s case was truly tragical.—He was wholly innocent ; was a respectable Catholic Farmer, in the county of Waterford ; in good circumstances.—His innocence was clearly established in the interval between his conviction and execution ; yet he was hanged, publicly avowing his innocence !!! There were some shocking circumstances, attending this case, which the Duke of Richmond’s administration may yet be invited to explain to Parliament.”

The learned Counsel for the Traverser has not disdained to special-plead upon this libel ; and has argued, that it does not bear the construction imputed to it, and that if it conveys any censure, it is upon the Judge who tried Barry and not upon the LORD LIEUTENANT, who refused to pardon him.—He has said, that it might as well be inferred from this note, that the man was hanged, because he was *respectable*,—or because he was a *Farmer*,—or because he was a *Waterford man*,—or because he was in *good circumstances*,—as that he suffered death, because he was a Catholic.—The simple answer is anticipated by every man’s understanding —In the text, there is nothing on the subject of men suffering death, because they are respectable, or rich, or farmers, or Waterford men, but there is a direct assertion, that Protestants are pardoned, and Catholics are executed, on account of their religion ; and the amount of the argument is, that the only word in the note, which is applicable to the text, is to be rejected, and every other is to be adopted ; and the whole passage is to be held inapplicable to the execution of a Catholic, on account of his religion ; because the author has introduced the narrative in the note, as a “ tragical instance” of the truth of the text, which it is not pretended, alludes to any thing else.

It is next argued, that be the meaning what it may, the charge applies to Lord *Norbury*.—Look at those pregnant and significant words, “ His innocence was clearly established *between his conviction and execution* ;—yet he was hanged.”—The guilt of executing this man is stated to depend upon his inno-

cence having been clearly establised—but when?—*between his conviction and execution.*—If Lord *Norbury* deserves the dreadful censure, which the defence of Mr. *Fitzpatrick* implies;—If he was rash, or intemperate, or cruel, as a Judge, his criminality ended with the man's conviction.—The office of the Judge ends there, and the responsibility of the executive Government begins; and if between the conviction, and the execution, injustice has been done to the unfortunate man, the grievous weight of that charge rests with the executive Government alone.—The libeller has been studious to exclude any other conclusion; for he adds, that there were other shocking circumstances in the case, which the Duke of *Richmond's* administration may yet be invited to explain to Parliament.—I pause not to reply to the verbal criticism upon the word “invite,” to which, Mr. *Burrowes* has descended; but I call upon you, at once, to say, if the object of this libeller were merely to express his indignation at the supposed misconduct of the noble Judge, what can be the meaning of saying that the Duke of *Richmond's* administration might be invited to explain it?—If a Judge misconducts himself, he is answerable to Parliament, and amenable to justice; but who has ever heard, until now, that the executive Government was responsible for the conduct of a Judge, and may be brought before Parliament to account for it?—Is such monstrous and absurd ignorance consistent with all that learning, and and talent imputed to the author of this publication?—and do I not owe an apology to the Court, and the Jury, for wasting so much time, in refuting that, which refutes itself?—Let me not be supposed for a moment to compromise the character of Lord *Norbury*, or intimate a suspicion, that the foul accusation now preferred against him, has any foundation in truth.—He is not here to defend himself—he has no notice of the charge;—it is for the first time brought forward.—His name is not mentioned in the libel, and that slander, which the common sense of mankind has applied to another, the author this day, unexpectedly, transfers to him.—He is, I make no doubt, ready to confront his defamer, and meet him before that tribunal, to which he is

amenable, if his accuser should dare to bring him there, instead of assailing his character, by anonymous defamation. But, I cannot but admire the novelty, and decorum of the defence; which insists upon the author having libelled one of the King's Judges, in order to protect him from the consequence of defaming his Representative.—To some persons, it may appear venial, to trample upon the Judicial Character, and bring the administration of justice into contempt;—and our familiarity with that crime, may have suggested in this case, the voluntary confession of it, as a protection against the charge of having committed another:—But the innocence of the Traverser, as to the offence, which he claims, is not more clear, than that he is guilty of that, which he denies; although the testimony of Mr. *Campbell* has been resorted to, for the purpose of discharging him of the one, and fastening the other upon him.—I request your consideration of that evidence,—Mr. *Campbell* defended the unfortunate subject of the libel, at the assizes of *Clonmell*, and failed in an application to postpone his trial at *Kilkenny*.—He considered, that his client had been hardly dealt with, in as much as his trial was not postponed, and he is brought here to vent, as a witness, that indignation, which, for the last three years would seem, if we may judge by his manner this day, to have been hermetically sealed in his breast, and now to boil over. He evinces no small warmth, even at this moment, and his mind, if we may judge by appearances, is not yet quite calm, or free from fermentation. —This, perhaps, is on his part, however he may be mistaken, an honest zeal, and a laudable indignation; but certainly, it is no smothered feeling.—He states strongly, what he feels strongly, and without much management conveys his sentiments upon Lord *Norbury's* judicial character.—He goes farther, and says, that originally, he was clamorous in his complaints, and inveighed against the conduct of the Judge.—He says, that he made an application to the *Attorney General*, in order to procure the *Lord Lieutenant's* pardon;—that though the application was not successful, he never, at any time, imputed, and does not now impute, the smallest blame to the *Lord Lieutenant*,

or his advisers; that the conduct of the *Attorney General* was most humane, and praise worthy, and that he confined and does confine all his censures to the Judge, who tried *Barry*.—Has this Gentleman been produced to prove, that he understands this printed libel in a sense, different from that, which the Crown imputes to it?—If so, why was he not desired to read it, and why was he not asked, how he understands it?—No such question was proposed, and he must be, therefore, considered, as produced to prove, that neither the real facts of the case, or his statement warranted the publication in question, and that proposition indeed he has succeeded in establishing.—He has sworn, that his animadversions were confined to Lord *Norbury*, and yet Lord *Norbury's* conduct, name, or office, are not even alluded to in the libel before you; and he has sworn, that he never intimated a censure upon the *Lord Lieutenant*, or his advisers, and considered the conduct of the executive Government as praise worthy.—No other authority for the story, than his, is suggested, or pretended; and yet this libel attacks the Duke of *Richmond*, and his administration, by name: states nothing which Mr. *Campbell* had authorized, and much which he had not;—and confines the entire of its vituperation to the executive Government, of which, in the whole transaction, Mr. *Campbell* had not formed, even an unfavourable opinion.—In short, Mr. *Campbell* has proved, that if the author wrote upon his information, he has stated what is false; or that if he intended only to convey, what he had learned from Mr. *Campbell*, he has used language, the very opposite of what was calculated for such a purpose; and that, meaning one thing, and expressing another, his defence must consist in proving this libel to be nonsensical, in the hopes of protecting him from the consequences of his defamation.

Gentlemen of the Jury, the testimony of Mr. *Campbell* furnishes a still more afflicting observation, equally applicable to this work, whether the *Lord Lieutenant*, or Lord *Norbury* be the subject of it:—that Gentleman had the fullest opportunity of knowing every thing about his unfortunate Client:—he in-

terested himself for the unfortunate man, until interference could be no longer useful.—He stood by him to the last; and when his fate was decided, trumpeted his wrongs to the profession, and the public, indignantly and without reserve.—When I asked him, whether in all that intercourse, at his first trial, or in consultation with him afterwards when moving to put off his second trial, or when drawing his memorial, and preparing his affidavit,—whether, either in public, or private, it had ever appeared, what religion he professed, or whether that circumstance constituted any part of his case?—you must remember the astonishment expressed by Mr. *Campbell*, at such a question being proposed to him, and his solemn assertion, that during the whole of his communications with *Barry*, the man's religion was unknown to him:—that at this instant, it is still unknown to him, that it had nothing to do with his case, and that if he had not, within this year, seen a statement of his being a Catholic, in a newspaper report of a debate in Parliament, on a subject connected with this libel, he should not have been able, even now, to form any belief upon the subject.—Let me ask you, Gentlemen of the Jury, what connection has the story told by Mr. CAMPBELL with the title of the book, in which the libel is contained?—What has his fate to do, as a highway robber, executed in 1809, whose religion no man knows, with “a Statement of the Penal Laws which aggrieve the Catholics of Ireland,” published in 1812?—Let me call upon you to figure to yourselves, the author of this book receiving from Mr. *Campbell*, or catching from the throb of public feeling which Mr. *Campbell* had excited, the statement, which Mr. *Campbell* has this day given to you, and retiring to his closet to embody that statement in a commentary upon the penal laws, with which it is no more connected than with a history of the Russian campaign, or any essay on history, or criticism, or any work of fiction, with which he might have thought proper to edify the publick.—Conceive to yourselves, the state of that man's heart, when he deliberately sat down, and stated *Philip Barry's* fate, as an instance of an honest man, to whom the mercy of the crown

was denied, because he was a Catholic,—and suffering death on account of his religion!—What excuse for such a perversion is suggested by the eloquent Counsel,—I must not say, it seems, for this author, but for Mr. *Fitzpatrick*?—Mr. *Fitzpatrick*, it seems, is eulogized this day, for his fidelity to the author, and his constancy in keeping his secret.—He forsooth is, only the publisher; while the heroism of securing the greater delinquent, is put forward in extenuation of his guilt;—in vending, and circulating the poison, which another had compounded.—Be it so; let him have the glory of his self devotion.—But, what has he to say for himself, or his friend? Has he nothing to allege, but that defence, under which his eloquent advocate has laboured this day, and does he hope to account for this monstrous distortion of truth, by pleading—as Mr. *Burrowes* has done,—the exasperation of an irritated heart, brooding over its grievances?—the ardour of hasty composition, and the heat of an inflamed mind?—What is the nature of that heat which puts out light?—What perturbation of the feelings can justify the obscuring of facts?—Such a state of mind may account for intemperance,—nay for exaggeration; but never for fabrication.—I repeat it, what had the story of *Philip Barry*, as told by Mr. Campbell, to do with a commentary upon the Penal Laws?—What had the fact of his being convicted, because the trial was not postponed, to do with the allegation, that mercy is not extended to Catholics, on account of their religion, and that his fate was an instance of it? What had Mr. *Campbell's* story to do with the defamation of the Duke of RICHMOND, whose name he had not mentioned? Mr. *Burrowes* felt, that the state of the Author's mind afforded but an imperfect answer to such questions, and he was obliged to change his ground, and intercede with the Jury, in behalf of those casual and accidental omissions and mistakes to which the greatest writers are liable;—those slips, as he called them, *Quas aut incuria fudit, aut humana parum cavit natura*—a careless, perhaps an indiscreet, effusion of honest zeal,—a solitary instance of something incorrect, in a great work—a mere mar-

ginal note, actually no part of the text,—nothing but a postscript ; in smaller type, scarcely belonging to the work ; in short, as he crowned his climax, a speck upon the disk of a great luminary. I must call upon my learned friend to reconcile such a description, with the eulogy, which he has pronounced upon the work in question. It is, according to him, the production of a cultivated mind, and of distinguished talent, the result of profound knowledge, and philosophical investigation, a classic commentary, which the stream of time, as Mr. *Burrowes* says, is to carry down to the admiration of posterity. I have the authority of Mr. *Burrowes* for saying, that such is his opinion of this work. I have the authority of my own judgment for saying, that it is written by an able man, of much information, laborious in collecting his materials, systematic in dividing, and precise and methodical in arranging them—a man of cultivated intellect, not likely to be hurried away by intemperance, so to misrepresent, and travestie a story, as to make it appear every thing, but what it is.—But, I ask Mr. *Burrowes*, and I ask you, Gentlemen of the Jury, is an author of this description, the person to whom you will extend the privilege of the only defence made for him this day ? Is he the person who shall persuade you, that he has only blundered, and if you find his Book explicitly libelling one man, and his Counsel asserting that he intended to libel another, will you, in his case, (whatever you might think of an inferior writer) attribute his conduct to the confusion of the head, or the deliberation of the heart ?—I called upon you before, Gentlemen of the Jury, to imagine any man,—I now call upon you,—to imagine this particular author, so eulogized for intellectual endowments, hearing Mr. *Campbell's* story in the morning, and sitting down in the evening, to give vent to that virtuous indignation, which Mr. *Burrowes* supposes capable of overpowering the judgment, and distempering the mind.—Mr. *Campbell* had said nothing, and knew nothing, on the subject of *Barry's* religion.—The author states him to have suffered death, *because he was*

a Catholic.—Mr. *Campbell* felt disgust and indignation against Lord *Norbury*, and endeavoured to communicate it to others. The author says nothing of Lord *Norbury*, and libels the Duke of *Richmond*, and his advisers, of whom Mr. *Campbell* had not spoken, except with respect. If this cannot be traced to folly, in such an author, shall it be compensated by his celebrity? And shall the public mischief, and the private slander, with which the libel teems, be considered the less criminal, because it is not, as we are told—the perishable effusion of a common libeller,—but embodied in a work, for which Mr. *Burrowes* claims the applause of after ages? Shall the fame of the slandered man be borne down by the reputation of him, who assails it? Is the evil tendency of the work, in promoting public danger, extenuated by its popularity, and wide spreading circulation?

How does it happen, that no other passage, in two volumes octavo, has been produced, in which a similar mistake is discoverable? Mr. *Burrowes* has read two paragraphs from the book, to shew, that the author's general opinions upon politics are creditable to him; but has he been able to point out another instance, in which such an extraordinary perversion of facts is to be found, as that, what is intended for one man is said of another? Mr. *Burrowes* will not pretend, that either in the general character of this work, or in any particular part of it, he can find the traces of careless and hasty writing, or the features of an ordinary author. On the contrary, every thing is measured, finished, and cautious; there is classical taste, and studied purity in the style, and every thing which shews the gentleman and the scholar, *as far as composition goes*: But as to the substance and matter of the work itself, let me put it to Mr. *Burrowes*, as a man of honor and sensibility, if he were grossly and cruelly aspersed in such a treatise as this,—if his feelings were harrowed up, by his being exhibited to his native country as capable of committing an imputed crime, and if an exaggerated description of that crime were made instrumental in exasperating the people, and endangering the public peace, would his mind be satisfied by

the defence, which he has this day made for his client? a defence which admits, that the libel is as unfounded in fact, as it is mischievous in tendency,—but under the pretence of a mistake, which no rational man could commit, would screen from the consequences of his guilt, an author, whom at the same time he celebrates for his ability. Let me put it to the fairness and the candour of Mr. *Burrowes*, if I were to sit down, and instead of “A Statement upon the Penal Laws, which aggrieve the Catholics,” should indulge my feelings in composing an eulogy upon those laws, and that constitution, which bless, and protect my fellow subjects of all religions. Suppose I were by my text, in a certain chapter upon the administration of justice, to enlarge upon the *theoretical* excellence of the laws, but lament, that *practically* the corrupt practitioner defeated their object, and perverted their advantages.—Suppose, I should descant upon the wiles, and frauds, and baseness of the common barretter, and fomentor of suits, the pettifogging disgrace to his profession, and pest to society; and then, by a marginal note, should state as “a tragical instance” that Mr. *Burrowes*, or some other man, the whole tenor of whose life would give the lie to such an assertion, had been retained by one party, and taken a bribe to betray him to another:—that he had manufactured the litigation in a cause, in order to acquire to himself the property in dispute;—that he had acquired the confidence of a female client, and under the pretence of defending her rights, had debauched her principles, and seduced her from the paths of virtue! I ask him not, what would be his indignation at such calumny,---but what would be his greater indignation, if Counsel employed to defend me, should rely upon it, that all this slander was mere mistake, intended for some other man?—A mere marginal note,—an excrescence on a fair form,—a speck upon the disk of a great luminary, diffusing light, and heat, and animation, not only amongst my contemporaries, but ushering in the dawn of brighter days to ages yet unborn?—I ask him, would he feel, in the brilliancy of that luminary, a compensation for the character, which it had consumed? Or let me put to

him the more probable case, that the author of the libel now before you, had selected him as the object of his malignity, and that the shaft, which was levelled at the *Duke of Richmond*, and has now, for the first time glanced at Lord *Norbury*, had been pointed at his reputation.—Suppose, that after detailing the fate of *Philip Barry*, and pathetically bewailing the treatment which he had experienced, the libeller had, by a note inveighed against my learned friend, as Counsel for the Crown, upon that circuit, and stated, that he and his colleagues, in the cold blooded and phlegmatic discharge of their duty, had sat by, and connived at the mistake, or intemperance of the Judge, and had seen an innocent man hurried to trial, and to death, without raising a voice, or an arm to arrest the course of injustice!—Were the libeller to have so stated, the unanimous voice of the profession and the public would cry, “shame upon the slander.”—Never did there exist a man, of whom such a statement could be less truly made—Never was there a man entrusted with a prosecution or a defence, who brought into the discharge of public duty more integrity, talent, spirit, generosity, more worth, moral and intellectual.—The consciousness of virtue might sustain him against his base defamer,—but what would he think of that defamer’s advocate, should he defend him by alleging this complicated falsehood to be a mere accidental, trivial error, in a great work, floating down to posterity upon the stream of time; and offer to mitigate the anguish of his feelings, by insisting upon the celebrity of the libeller?

I have said enough, perhaps more than enough, upon the construction of this libel. What shall I say of its tendency? Is it necessary upon that topic to address fair and reasonable men? The information alleges, that its object is to excite discontent amongst his Majesty’s Roman Catholic subjects. How can I add to the emphatic, manly, and eloquent language of the *Attorney General* upon this subject? Any feeble paraphrase of mine might weaken the impressions which he has made. Let me simply repeat his words, and declare my unequivocal adoption of his sentiment,—that if the statements

of this work were true, that the Roman Catholics of this county were deprived, on account of their religion, of the benefits of law, and mercy,—they would stand absolved from their Allegiance, and Rebellion would become a Duty, the obligations of which, nothing, but prudence ought to restrain.

If ever there was a country, in which the promulgation of such a doctrine was more particularly fraught with danger than in all others, it is this.—A large proportion of our people, imperfectly educated, and slowly advancing to civilization, quick and mercurial in their character, of susceptible temper, and of ardent spirit : How often have your Lordships upon common, and upon special occasions, witnessed the afflicting spectacle of the peasantry of Ireland dragged to the bar of a court of justice, and forfeiting their lives to the offended laws, for crimes connected with insurrection, which, contemplating their brutal ignorance, it was almost impossible to account for :—But, if a missionary of sedition should go amongst the infatuated people, with this book in his hand, and preach to them rebellion against the laws, which neither offered to them protection, justice, or mercy ; should assure them on the authority of this highly praised commentary, that if brought to trial, they would be convicted against law, and afterwards, could entertain no hopes of pardon ;—should follow up this representation, by imputing their miserable condition to their adherence to the religion of their ancestors, by virtue of which such heavy curses were entailed upon them. —What outrage, what crimes, what horrors must not be expected ? Who could bear to bring to punishment this deluded rabble ? What government could stand justified in letting loose the vengeance of the laws upon the miserable and devoted populace, if, by a criminal apathy, the libellous author of such mischief should be suffered to escape with impunity ?

I shall not say,—indeed, it is difficult to conceive, that the author could have intended all the complicated mischief with which it is the obvious tendency of this work to threaten his native country.—He cannot have contemplated the possibility of any man in *Ireland* of ordinary information, or experience, swallowing the monstrous misrepresentations, with which

this libel abounds.—Nay, he could scarcely have reckoned upon the credulity of the lowest vulgar.—I rather think he had a different object.—This fabric was made up for the English market:—In that country, our laws and habits, and characters, are but imperfectly known, and have often been misrepresented, too successfully: It is the seat of empire, and legislation, and the author may have had his views, in disgusting the Protestant mind in England with this monstrous libel upon the Protestant Government of *Ireland*.—What must be the opinion of the inhabitants of that country, of the gloomy and sanguinary bigotry, imputed to their fellow subjects here-- represented as persecuting the wretched natives on account of their religious opinions, and exercising the most galling tyranny of invaders and conquerors over a hapless people, whose conscientious adherence to their religion affords the only pretence for withholding from them the common blessings of law and justice, and mercy?—But let us look further for the tendency of this work, and suppose it finding its way to *France*—What a document would it not be in the cabinet of the sworn enemy of our Empire, the Tyrant of his own Country,—the disturber of all others—now, thank God!—the discomfited fugitive from *Russia*—but who even in his misfortunes threatens the repose of mankind.—What a manifesto would this Book furnish to him, if hereafter he should be able to accomplish that long meditated invasion, which perhaps he may now be the more disposed to attempt, in consequence of the failure of those greater objects, which hitherto have retarded it.—With what confidence might he not call upon his armies to follow him to the Rescue of a gallant and suffering people, —of four millions of men, groaning under an abject and torturing despotism,—not because they are unworthy—not because they want spirit and character—but because they profess a religion, which under a bigotted Government, deprives them of the ordinary protection of law, and subjects them to be tried without justice, and executed without mercy.

Shall I only speak of the public mischief of this libel? And is it no aggravation of the libeller's guilt,

that he has made an attack upon the peace of his country, the vehicle of foul slander against the reputation of an honourable and virtuous man?—I feel, that I am not anticipated, or encountered upon this topic by the levity with which Mr. *Burrowes* conveyed the sneers and sarcasms in which he spoke of the fastidious sensibility of an irritated and wounded mind.—The Duke of *Richmond* is charged by this libel with such a crime, as perhaps was never before urged against a public man,—a crime, of which if he were guilty, he ought to be brought to the Bar of Parliament, and from that to the block.—If he were capable of the hardness of heart, and depravity of mind, which, when he had the life of an innocent fellow creature in his hands, and could have saved him from an ignominious death, by a word from his lips, prompted him to consign the wretched victim to destruction.—If he has frustrated the prayers of the people.—If the Sword, which our Lord the King has put into his hands, has not been used with justice and mercy;—and, if above all, he has shut the gates of mercy upon the people whom he governs,—not from the ordinary impulse of a cruel disposition, but from the detestable suggestions of a gloomy bigotry—on account of the religion which they profess.—What is the punishment adequate to such guilt?—What is the infamy proportioned to such baseness? The execration of his contemporaries, and of future ages, must accompany his name, and that posterity, to which the author of this libel looks for celebrity, must brand his memory, as the basest despot that ever tyrannized over a prostrate country.

If this applauded work goes down the stream of time, as Mr. *Burrowes* predicts, what materials will it furnish to the future historian? How can he, in a distant age, reject the authority of such a contemporary document, and in what terms will he write the administration of the Duke of *Richmond*? Well might Sir *Robert Walpole*, at the close of a long and anxious public life, lament that nothing is so false as history. Contemporary slander is too often its only support,

and he, who hereafter undertakes to record the history of *Ireland* at the present day, may borrow his only lights from this detestable libel, and hold forth to after ages this slandered Nobleman, as a bigot or a murderer:—and not alone a bigot, or a murderer;—Aggravated guilt belongs to the crime imputed to him:—No common rank in the scale of infamy awaits him—The crimes of *Nero*, and of *Commodus*, and of *Charles* the 9th, though thousands were their victims, can only be traced to the ordinary suggestions of cruelty, and persecution;—but the more refined enormity, charged against the Duke of *Richmond* by this libel, holds him up as the wretch, who prostituted the forms of law to the gratification of bigotry and vengeance,—who at one blow stabbed to the heart the victim of his malignity, and the Constitution of his country, and hid his dagger in the very folds of the mantle of justice!—But, I trust in God, if this poison is to be carried down to our posterity by the stream of time, that it will not go down alone;—that a wholesome antidote, correcting and neutralizing its influence will accompany it, in the record of this high Court,—the verdict of that Jury,—and the judgment of that Bench;—and that those who live after us, may not be able to reproach our age with the double guilt of producing this libel, and suffering it to escape with impunity.

Mr. *Burrowes* has condescended, in this case, to enlarge upon what he so justly calls the trite, and worn-out topic of the liberty of the Press.—No topic is so trite, that he may not adorn it, and I perfectly concur with him in stating, that this high privilege, peculiar to our countries, is not the less valuable, because the praises of it have become a common place.—But if ever a subject has been misrepresented, and misunderstood, it is the Liberty of the Press.—One would suppose, from the daily declamation, and school-boy rants upon this exhausted theme, that the Liberty of the Press consisted in the uncontrolled license to write and publish whatever each man pleases.—The true distinction is this;—In other Countries, where this blessing

is unknown. not only the permission to write, but the Work when written, is subject to the previous review, and controul of a public licenser ; and if any man transgresses the bounds, so prescribed to him, the summary vengeance of arbitrary power overtakes, and crushes the delinquent. But in our countries no previous restraint is known---Every man is free, as air, to publish what he pleases, and the liberty of the press is to his mind what the liberty of the subject is to his person ; the one liberty is not greater than the other---In this free land, no man can bind the arm of a free subject, but if he raises that arm for the commission of a crime he is responsible ; if he raises it to rob or murder his neighbour, he must answer to the laws : so with the liberty of the Press : No man can restrain it, but he who avails himself of it must publish at his peril. If he robs another of his fair fame, if he assassinates reputation, he must be amenable, and the laws have not only decided upon his responsibility, but established his tribunal ; a Jury of his country, and a Jury alone can pronounce upon his guilt. This lesson has been taught to the despot of modern Europe, and it is the boast of Great Britain, that even he, the murderer of *Palm*, the tyrant who has gone beyond all others, in enchaining the very liberty of thought, has sought protection when defamed, and found it in the genius of the British Constitution. During the short interval of our peace with *France*, the First Consul was libelled by a London Newspaper : his Ambassador called for that summary vengeance upon his defamer, which his master had been used to inflict, but he called in vain, the sacred principle of our laws was explained to him, that no man could be restrained from publishing what he pleased, and that if he transgressed, he could only be tried by his country. To the laws of that Country, was the first Consul of *France* obliged to resort. At his prosecution, the *Attorney General* of *England* filed an information against the libeller, and a British Jury convicted the delinquent, and did justice even to an enemy. Such is the true character of

the liberty of the Press, I admit, with Mr. Burrowes, that in restraining its licentiousness, Juries ought not to be over critical, or endanger its liberty by rigid, and strict constructions of that inestimable privilege, which every free subject enjoys of discussing public affairs, and the characters of public men: but this case affords no such opportunity, and admits no fear of such a danger. The plain limits between the freedom and the outrage of the Press, have been transgressed. Private reputation has been wantonly slandered, the public peace endangered, and under pretence of enlightening the people, a fire brand has been thrown amongst them. Let Mr. *Fitzpatrick* then compare his situation, with that of the unfortunate *Palm* of Nurembergh. No haughty interdict prescribed to him a previous rule for his publication; and when he has transgressed the laws of the land, no Serjeants guard has invaded his Printing House, and dragged him to the summary Court martial, and military execution. Let him not suppose, that because he is free to publish, he has a right to slander, and that the liberty of the Press protects him from that punishment which is due to its licentiousness.

I should hope, that I had misunderstood Mr. *Burrowes*, in supposing, that in the defence of this libel, he has arraigned the prosecution as an attack upon the Roman Catholics of *Ireland*, but I certainly cannot be deceived in my recollection, that he has occupied the greater part of the time in which he addressed you this day, by discussing the political question of Catholic emancipation: this is the third time, that I have been challenged to a parliamentary debate, in the face of a Jury and a Court of Justice. What connection can subsist between such a question and a prosecution for a libel; it is for his ingenuity to discover; but above all, it is difficult to understand how the claims of the Roman Catholics can be brought into contact with the libel now before you. I never can believe, even from him, that he can be authorized in representing the Roman

Catholic body of Ireland, as identifying themselves with such shameful defamation. Such an insinuation is neither the suggestion of his own sound judgment, nor has he the authority of any one who is himself authorized to speak the sentiments of that body. He must be misled by the instructions of a desperate case, and I must attribute to Mr. Fitzpatrick, or to the gangrene of the corroded heart of the libeller, an insinuation so improbable, as that the Catholics of Ireland will stand by this production as the organ of their opinions; that they are content to be represented in the attitude of approaching the bar of parliament, presenting their petition in one hand, and brandishing this libel in the other; and that they concur in the infamous slander upon the laws of their country, which alleges that they are not administered to persons of their religion; and in the foul calumny upon a high character, which represents the *Duke of Richmond* as murdering a man, because he was a Catholic. Neither can I accede to the argument of Mr. *Burrowes*, that because the Catholic question is under discussion, this libel has a claim to indulgence, on account of the irritated feelings of those, who lament the constitutional privations from which they seek to be relieved. The pendency of that question, can afford no pretence for such license, or extenuation for the foul libel before you. No man is warranted, because he thinks himself aggrieved, to defame his neighbour, and disturb his country; and the Catholics, when they seek to be emancipated from the laws which affect them particularly, cannot claim the privilege of violating those, which bind them, in common, with all their fellow subjects. The principles of truth, and the suggestions of that honor, which forbids one man to state of another, that which is false, must not be said to sleep, because the Catholic question is under discussion. Important as that question is, which now awaits the decision of parliament, (and of its importance, no man is more persuaded than myself), it cannot claim a right to paralyze all the duties, and charities, and obligations of social life, and to overturn those laws which enforce and maintain them. It is, I admit, a question of a most anxious nature, and deeply interests the feelings and the passions of the Catholics; but I cannot

concede, that because their question remains in suspense, the principles of justice are to be suspended too; that because their feelings are excited, foul calumny is to be licensed, or unpunished; and that the law of the land is to be arrested in its course, and like the sun of old, to stand still in the firmament, while their battle is fought, and "until they shall have avenged themselves upon their enemies."

LORD CHIEF JUSTICE DOWNES.

Gentlemen of the Jury, This Trial, which has so long occupied your attention, is now drawing to a conclusion, and the evidence has been so ably observed upon by Counsel on both sides, that it will not be necessary for me to trespass much further on your time. However, I shall say a few words, to direct your attention to the object of your enquiry, which is, whether the charge, as stated in this Record, be sustained by sufficient evidence. Whether the charges, which are spread upon the Record, be sufficiently direct, in point of law—Whether they are stated with the technical accuracy, which the law requires, are matters which I shall not embarrass you with; those matters will still be open to the party for discussion, if he shall see occasion for investigation hereafter. For the present, it is enough for me to say, that here is a charge brought before you upon a plea of *Not Guilty*.—The Prosecutor states an offence by the Information.—The Defendant says, he is not guilty, and you are now to try that issue.

Gentlemen, I am far from telling you, that you are to limit your view of this case to one or two objects.—By the law of the land, you are to ascertain, whether the matter charged be a Libel, or not—as well as whether it were published by the Defendant, and with what intent:—whether the Information be well founded in imputing to the defendant the publication of this matter as containing a charge against the *Duke of Richmond*, and the Ministers acting under him.

In this part of the case, you will observe what evidence has been given, respecting another person—one of the Judges of the land. Because I have no hesitation in telling you, that however atrocious the imputation may be—however false, or malicious—if it is not intended against the *Duke of Richmond*, and those acting under his authority—If the guilty conduct, represented by the publication, be imputed to another—I mean Lord *Norbury*—if it be, as is contended for the defendant, solely an attack upon Lord *Norbury*—it is not the offence charged upon this record, and it will be your duty to acquit the defendant.

Gentlemen, you have further to see, whether the averments and inuendoes in this Information are true and properly applied, whether the sense, which this pub-

fication bears, be the same which the Information imputes to it, and whether it was published with the intent stated by the Information, and containing the charge of abominable misconduct alleged. The Information states, that the defendant, "intending to scandalize, traduce and vilify his Grace the *Duke of RICHMOND*, *Lord Lieutenant of Ireland*, and his Majesty's Ministers acting under the authority of the said *Lord Lieutenant*, and to excite discontent amongst his Majesty's subjects, professing the Roman Catholic religion in *Ireland*, did publish a certain false and seditious libel, of and concerning his Grace the said *Duke of RICHMOND*, and his Majestys Ministers in *Ireland*", &c. Then the matter is set forth, and it is followed by an *innuendo*, attributing a particular meaning to it.—With regard to the sufficiency of these averments, and innuendoes to put the matter properly on the record; a question may arise for discussion hereafter.—But you will direct your attention to the question, whether the charge made against the defendant be true or not—"that he meant to insinuate and cause it to be believed, that because the said *Barry* was a person professing the Roman Catholic Religion, the said *Duke of RICHMOND* with the advice of his Majesty's Ministers in *Ireland*, acting under the authority of the said *Lord Lieutenant* had determined, that the said *Barry* should not obtain his Majesty's pardon, and had accordingly suffered the said *Barry* to be executed, as a felon, though the innocence of the said *Barry* was established to the knowledge of the said *Lord Lieutenant* and Ministers."

With respect to the proofs of the publication, no question is made by the Counsel, who so ably argued on behalf of the defendant.—You have had evidence that it was published at a shop kept by a person of the defendant's name, and that there is no other person of the same name, keeping a shop in the same street.—In truth, no question is made upon the fact of publication.—But the import, intent, and meaning is matter for your consideration; and it is also for you to say, if it does contain the charge of atrocious misconduct alleged, whether it was intended to be applied to the *Duke of RICHMOND*—or to another person.—With respect to that fact, you have heard a great deal of argument on both sides, expatiating upon the peculiar circumstances of the case. Upon one side,

it is contended, that the person alluded to by the publication must be the *Lord Lieutenant*:—and on the other side, a witness has been examined, for the purpose of satisfying you, that it is pointed at Lord Norbury, and not at the *Lord Lieutenant*.——Whether it will so satisfy you, is for yourselves to determine:—But I must remark, that it is not a very gracious defence, to say, it is true, that imputations of a very horrible nature were made, but they were not intended against the individual named in the information—but against another. But, I must at the same time add, that however atrocious the publication may be, if the defendant has satisfied you, that it was not intended to calumniate the *Lord Lieutenant*, but another person, you must find a verdict of *Not Guilty*, because the charge on the record is, that the matter was directed against the *Lord Lieutenant*.

It has been strongly observed upon, that if this story was told from the information given by Mr. *Campbell*, such story was infamously false; because he expressly told you, that from the beginning to the end, he never imputed to the *Lord Lieutenant*, or the *Attorney General*, or any Minister of the Government any blame in the transaction. And therefore, if you shall believe, that it was not levied solely at the Judge, it is a false accusation against the *Lord Lieutenant*.

Gentlemen, In general, with respect to the intent, with which any writing is published, it is to be collected from the writing itself;—unless some other intent be clearly established. If this work does attack the Government of the Country, you may then see from the book itself, with what intent it was published, and whether — it be not in its nature calculated to create discontents of the greatest possible magnitude among the Roman Catholics of Ireland. If it does impute to the *Duke of Richmond*, and those acting under his authority, that they withheld the mercy of the Crown from a man, who was entitled to receive it, on account of his innocence being established, and that merely and solely, because he was of the Roman Catholic Religion—If you believe, that the publication was so designed—that its object was thus to misrepresent the Chief Governor of Ireland, and thereby to excite discontent among so large a portion of his Majesty's subjects in this country, it is, in that case

impossible for you to doubt, that it is a most atrocious Libel indeed.

Gentlemen, Whether it be relative to the *Duke* of RICHMOND, or, as is alleged by the defence, to Lord *Norbury*, the context of the paper itself will perhaps furnish you with sufficient ground for your satisfaction one way, or other. If it was intended as an attack upon the Judge, you would naturally expect to see it contain something relative to the Judicial Character alluded to—there is nothing stated respecting the trial, or what preceded it—nothing relative to the application to postpone the trial. But it refers to a refusal of mercy—to an abuse of the Prerogative of the Crown—to the execution of a person after his innocence was established; and it is accompanied with a further observation, “that there were some shocking circumstances attending the case, which the *Duke* of RICHMOND’s administration may be invited to explain to Parliament.” You will consider, whether this paragraph shews the preceding imputations to be a charge against the Judge, or against the *Duke* of RICHMOND, and his administration.

I mention this as internal evidence, which may enable you to determine, whether or no, this publication is of and concerning the *Duke* of *Richmond* and his Majesty’s Ministers in Ireland, acting under the authority of the *Lord Lieutenant*, as stated in the Information:—Or, whether it be “of and concerning the Judge,” who tried the man.

With respect to this being a charge against Lord *Norbury*, and the conduct imputed to him, I must observe, that he is not upon his defence:—He is no party in this cause. He is not here to state the circumstances, which governed his conduct. It is immaterial to this case, whether he was right or wrong, in the conduct of the Trial of *Barry*; but it cannot be for a moment doubted, that upon a proper opportunity, he can sufficiently justify himself. Upon applications to postpone the trials of accused persons, the conscience of the Judge is to be satisfied, from all the circumstances which appear before him—he is to decide whether upon those circumstances, justice will, or will not be advanced by postponing the Trial, and we are now to presume, that upon the application made to the Judge in the case alluded to, the facts were not so laid before him, as to satisfy him that justice required him to postpone the trial.

Gentlemen, You will take this book with you. Several parts of it have been read by the gentlemen on both sides, with a view, on one side, to satisfy you, that the general tenor of it, so far as it touches upon the subject of mercy, was to create an opinion, in the mind of the public, that the Prerogative of Mercy was abused in the most abominable manner. On the other side, passages were read, to shew, that the object of the writer was to lay before the Public certain grievances, complained of by, and affecting his Majesty's Roman Catholic Subjects. Gentlemen, any man, who feels a genuine impression, that the people are aggrieved by any existing laws, may fairly and honourably discuss the subject, and state the reasons why the laws should be altered. But if, in doing so, he thinks proper to make a specific charge of a criminal offence against a person of high responsibility, not being at the trouble of enquiring into the truth or falsehood of it, he does so, at his peril, and must be answerable to the person, whom he has injured by the defamation of his character, and to public justice. The writer, in such case, cannot defend himself, by merely alleging that it was not intended for that person, but for another:—if on the face of the publication it appears levelled at the person, whom the information charges the defendant with intending to calumniate by it, there must be clear evidence to enable you to apply it to another.

Gentlemen, You will judge from the nature of the charge, whether it was intended against the other person alluded to upon this trial, or against the *Lord Lieutenant*. If you believe, that the publication does convey the sense, which is put upon it by the Prosecutor, and that it meant to charge the *Lord Lieutenant* in the manner stated in the Information, then it will be your duty to say, that the defendant is guilty. On the other hand, if you believe, that it does not impute such a charge to the *Lord Lieutenant*—but, whether true, or false, applies it to another person, then the offence charged by the information is not proved, and you must find for the defendant.

Gentlemen, In looking at the Book, to which your attention has been directed, you see, that the paragraphs which have been read by the Counsel for the Crown, relate to the administration of Justice, and that branch of it, which is vested in the King, or his Representative—the dispensation of mercy: and after describing the si-

tuation of the Catholics of *Ireland*, with regard to the administration of Justice—as a situation, such as I hope no inhabitants in any part of the globe are to be found in,—the writer proceeds to give the instance, in the passage which has been read.

Gentlemen, There is another circumstance, which I shall mention, with regard to the application of this charge, as against the *Lord Lieutenant*, and also with regard to the motives of the party. It has been proved by the witness for the defendant, that he did not know, of what religion the man was, and yet the charge in the publication is, that mercy was refused to be extended to him, because he was a Roman Catholic. The witness for the defendant was ignorant of the man's religion, and had not communicated to government any thing about his religion. There is no evidence to shew, that his religion was at any time known to the government.—These are strong grounds for discovering the motive of the writer—but the motive and meaning are matter entirely for your consideration.

If you believe, that this part of the work was published with the intention, which has been imputed to it by the information, of charging the *Lord Lieutenant* with a gross abuse of the prerogative of mercy, and from a motive so base, that it was merely because the man was a Roman Catholic, you will find the defendant guilty.—But be it ever so gross—and whether true, or false, if you believe,—that it was not intended against the *Lord Lieutenant*, but against the Judge, you ought to acquit.

The information, and the Book given in evidence were delivered to the *Jury*—who retired.

Mr. BURROWES. My Lords, if we shall deem it right to make an application hereafter; it will be necessary to understand, exactly, the charge of the learned Judge.—There can be no bill of exceptions in a criminal case. But if there be a mistake, in point of law, there may be an application to set aside the verdict.—I think your Lordship left it to the *Jury*:—probably you were right in doing so—that it was for them to try the truth of the innuendoes, as stated in the information.

Lord Chief Justice DOWNES—Yes, I did so.

Mr. BURROWES. With great respect, I think, that

your Lordship should have told the Jury, that the innuendo, not being supported by averments, there was no evidence—and there could be no evidence—to support the information.

Lord Chief Justice DOWNES. That question is still open to you, upon the record.—

Mr. Justice DALY. I also think, that you have the benefit of this objection, at a subsequent period.

After a few minutes, the Jury returned, finding the defendant—GUILTY.

11th. February, 1813.

Mr. O'CONNELL, for the defendant, moved to set aside the verdict, on account of the misdirection of the learned Judge, in charging the Jury, and inasmuch as the same was against law and evidence.

The ATTORNEY GENERAL required, that the defendant should appear in custody; upon which he surrendered himself to the Sheriff.

This motion was argued by *Mr. O'CONNELL* and *Mr. BURROWES*, for the defendant.—The counsel for the Crown, not being called upon:—The reporter was occupied in another Court, during the greater part of this argument:—he is informed, however, that the other Judges of the Court declared, that the charge, given by the *Chief Justice*, was to be considered, not merely, as the charge of the Chief Justice, but as the charge of all the Court,—all the Judges being present, and occasionally suggesting matters, in the progress of the charge.

The judgment of the court, upon the motion was as follows:—

Lord Chief Justice DOWNES. My Brethren are all satisfied, that the verdict ought not to be disturbed, on account of the objections, which have been made;—and for my part, I think, that the way, in which the case was put to the Jury, was conformable to the practice of all the Courts, and of all times, as far as I have been able to discover,—varying only as to cases, before the Libel act, by conforming to that statute. The case came before the Jury, upon an information for a libel,

and the issue before them was, whether the Defendant was guilty, or not guilty.—What was done?—Evidence of the publication of the matter charged to be a libel by the Defendant was laid before them:—the matter so proved, was read to them—and the book was also handed to them, upon their returning to their room. Several parts of the same book were read, on both sides, in the presence of the Jury, and they were told, they were to consider, as the law now requires they should, whether the matter charged in the information, and so proved to have been published by the Defendant was a libel, or not.—They were told, that they were to decide as to the truth, and the application of the *innuendoes*, and the averments, whatever they are.—An objection was taken at the trial, that there were not sufficient averments upon the record:—the answer to the objection was—not that the averments were sufficient, but that, that was not the proper time for making the objection—that, whether there were sufficient averments, or not, to maintain the publication to be a libel, was a subject, which might be enquired into more regularly, upon a future opportunity.—The Jury were told, that if they believed the matter complained of was published by Defendant, and was a libel, and that it was of the meaning imputed to it upon this record, they should find the Defendant guilty:—and although Mr. Burrows said, that the charge to the Jury went out of the record; I understand him to mean,—not that the Judge left to the Jury any thing absolutely extrinsic of the record,—any thing which did not appear in the record on some manner, or other or in the evidence,—but that the averments were not properly made upon the record,—so as to bring matters left to the Jury upon the record;—for I take for granted, that he never did mean to say, that the Judge put to the Jury any fact, or question which did not appear upon the record in some mode.

Mr. BURROWS. My Lord, I expressly said that the averments were insufficient; and I never meant to insinuate that any matter, not appearing in the record had been left to the Jury.

Lord Chief Justice DOWNES. Then it comes to this;—whether upon the trial of an issue joined upon a fact, which is for the Jury, absolutely, and exclusively to decide, it shall be discussed, whether the averments upon the record are sufficient to maintain the charge—

ments which cannot be varied, and which must appear upon a motion in arrest of judgment, as distinctly as in any court, trying the fact upon which the issue is joined---and at the proper time, when such question should be discussed, and according to all practice, examined after the trial;---the matter appearing fully, and at large upon the record. Should we tell the Jury---even if we had formed an opinion, decisively, upon the mode, in which the record was framed, that they had nothing to try?---That we should tell them, no matter what you think of the evidence, or its application to the facts, charged upon the Traverser, because those charges are irregularly, and clumsily framed.—We will decide upon it and prevent the Jury having cognizance of the cause.

Before the statute, so important in the law of libel; the original course upon a trial for a libel was this:—The Jury was called upon to decide the fact of publication—the truth and applicability of the averments and innuendoes, and if they believed the publication to have been the act of the defendant, and the innuendoes applicable, the law of the case was reserved to the Court to decide afterwards, whether the publication was a libel or not.—This mode of proceeding has been altered by the statute; and now, not only the fact of publication, and applicability of the innuendoes, but the question, whether the paper so published, and proved, be libellous, or not.... All that was done, in the present case, in precise conformity to the act of parliament, according to the best of my judgment, and my brethren concur with me, in that respect.

Now, If what is contended for by the Counsel for the Traverser be true (and which comprises the whole of this case necessary to advert to) the Judge at *Nisi Prius*, who if the case were tried on Circuit, might be a Judge of another Court, would have to decide upon the sufficiency of the averments, and could not permit the Jury to try the facts, until he had determined whether they were sufficiently spread upon the record;—and upon his opinion, if he thought the averments insufficient he must decide as on a demurer and the defendant would be discharged from all answer, in evidence, to the real issue, which was joined between the parties, and upon which both went to trial.—It is obvious, to what an enormous length of inconvenient and pre-

mature discussion, this would lead and how often real justice would be risked, by this mode of proceeding; instead of renewing, in the case of libel as in all others, all questions already completely on the record for the proper jurisdiction to discuss, in the proper season in arrest of judgment; or by writ of error—both of which modes of redress would become unnecessary for the defendant and impracticable to the prosecutor, after a general verdict of not Guilty so procured.... This is no new doctrine; it has been at all times the course to reserve questions, which are upon the record, for discussion after the trial; if the party has not thought fit previously to discuss them by demurrer, and not to argue, in the presence of the Jury, matters not within their province, and which with more propriety and in a more convenient course, can be afterwards discussed, before the proper jurisdiction.—This has been always the case in all other proceedings, and that it has been so, in the case of libel, we have the highest possible authority for saying.—When the libel act, of which ours is a transcript, was in progress through parliament in *England*, the Lords, desirous of minutely inquiring into the law, and cause of proceedings of the Judges, put various question to them;—to which they gave deliberate and solemn answers—which carry authority and respect as the answer of the twelve Judges of *England*.—

I will read to my Brethren the third question put by the Lords, with the Judges answer to it, and they will see, whether they do not bear strongly upon the present case. Every one of the cases imagined in the answers to those questions is infinitely stronger than the present.—The Third Question put to the Judges was, “ Upon
“ the trial of an indictment for a Libel, the publication
“ being clearly proved, and the innocence of the paper
“ being as clearly manifest, is it competent and legal
“ for the Judge, to direct or recommend to the Jury,
“ to give a verdict for the Defendant.” What is the answer? “ That upon the trial of an indictment for a
“ Libel, the publication being clearly proved, and the
“ innocence of the paper being as clearly manifest, it is
“ competent and legal for the Judge to direct or recom-
“ mend to the Jury to give a verdict for the Defendant.”
“ But we add, that no case has occurred in which it
“ would have been, in sound discretion, fit for a Judge.

“ sitting at *nisi prius*, to have given such a direction, or
 “ recommendation to the Jury.”

“ It is a term in the question, that the innocence shall
 “ be clearly manifest. This must be in the opinion of
 “ the Judge: but the ablest Judges have been sometimes
 “ decidedly of an opinion, which has, upon further in-
 “ vestigation, been discovered to be erroneous; and it is
 “ to be considered, that the effect of such a direction
 “ or recommendation would be *unnecessarily* to exclude
 “ all further discussion of the matter of law, in the court
 “ from which the record of *nisi prius* was sent, in courts
 “ of error, and before your Lordships, in the *dernier*
 “ resort.”

“ Very clear, indeed, therefore, ought to be the case,
 “ in which such a direction, or recommendation shall
 “ be given. In a criminal case, which is in any degree
 “ doubtful, it must be a very great relief to a Judge and
 “ Jury, and a great ease to them in the administration
 “ of criminal justice, to have the means of obtaining a
 “ better and fuller investigation of the doubt, upon the
 “ solution of which a right verdict, or a right judgment,
 “ is to depend.”

“ A special verdict would, in many cases, be the only
 “ means, where the offence is described by some one or
 “ two technical terms, comprehending the whole offence,
 “ the law and the fact combined: such as the words, ‘ fe-
 “ loniously did steal.’—The combination must be de-
 “ composed by a special verdict, separating the facts
 “ from the legal qualities ascribed to them, and pre-
 “ senting them in detail to the eye of the Judge, to ena-
 “ ble him to declare, whether the legal quality, ascribed
 “ to them, be well ascribed to them, or not.”

“ There may be a special verdict in cases where
 “ doubts arise on matter of law, but it is not *necessary*
 “ in all cases. In some criminal proceedings (the pro-
 “ ceedings in libel, and the publication of forged papers,
 “ for instance), some of the facts are detailed in the
 “ indictment; and if the doubt in law should happen to
 “ arise out of the fact so detailed, we say it is upon the
 “ record. The question might have been discussed upon
 “ demurrer, without going to a jury at all, and after
 “ verdict, it may be discussed on a motion in arrest of
 “ judgment. In such cases, a special verdict is not ne-
 “ cessary:—the verdict of ‘ Guilty,’ will have the effect
 “ of a special verdict, without the expence and delay of

“ it, establishing all the facts, and leaving the question of
 “ law open to discussion.”

“ There are three situations, in which a defendant,
 “ charged with a libel, may stand before a Judge and
 “ Jury in a court of *nisi prius*. First, the matter of law
 “ may be doubtful:—in that case there ought to be a
 “ special verdict, or a verdict, *which shall operate, as a*
 “ *special verdict*. Secondly, the case may, in the opi-
 “ nion of the Judge, be clear against the Defendant.—
 “ If the verdict is special, in form, or in effect, he has
 “ no reason to complain; his case comes before the
 “ Court, from which the record is sent, without the
 “ prejudice of an authority against him. The third si-
 “ tuation is, That the opinion of the Judge may be
 “ clear in favour of the Defendant. In that case,
 “ whenever it shall happen, we have offered it, as our
 “ opinion, that it will be competent and legal for the
 “ Judge to direct an acquittal.”

Now, I cannot conceive any doctrine more directly applicable to what passed upon the trial of the present Cause; or more clearly bearing upon the objection now before the Court, than what is to be collected from the answer of the Judges, which I have read. If the matter of law be doubtful, there ought to be a special verdict; or a verdict, operating as such—manifestly shewing, what ought to be the conduct of the Judge trying the cause; that he ought not to take upon him, at once, to decide the matter; but have it reserved for the opinion of the Court, from whence the record issued. Now, in the present case, this objection was made and questions raised at the Trial, which, at the Trial, we did not think necessary to decide, or to discuss; because, as we declared at the time, the questions remain on the record, and cannot be altered, or made to appear different to the Court, from whence the record issued, and therefore we thought, and declared, that the case should go to the Jury, to find a Verdict of Guilty, or Not Guilty, notwithstanding such objections, which to this moment, may be made in arrest of judgment.

The objections, urged upon this motion, amount to this, that we ought to have done, what the Judges of England declared---under circumstances much more favourable to the Defendant, would not be fit to do; and that in a case, where no man, who hears me, would say, it was a case in which the Judge ought

to pronounce, *conclusively*, that the defendant was manifestly and plainly innocent; and ought to take from the Jury all discretion and enquiry upon the subject:--- and that upon a matter of law,---possibly doubtful---but not discussed for the reasons given;---conceiving, that the proper time for such discussion would come thereafter.---And now, it is said, that we should have told the Jury, decidedly, and conclusively---in a way, which would preclude our own error from being again examined, if we were wrong;---and that we should have told the Jury, they had nothing to decide upon, for that sufficient averments were not made upon the record. Now, I must, further observe, that although the Judges of *England*, in their answers to the questions put by the House of Lords to them, and among others, the answer I have read, brought fully before Parliament, their whole course of proceeding, and among other circumstances, the very principle of their practice in not discussing at the trial questions already on the record,---Parliament never thought fit to direct any alteration in the conduct of the Judges in that respect,---all that Parliament thought fit by the Libel act to direct, is this, That the Judges should not require a verdict of guilty, or not guilty, upon the bare proof of the publication---but to leave it to the Jury to determine whether the paper, so published, is a libel, or not---making them Judges of the law---so far as that went, at the same time, directing the Judge to give his own opinion to them upon the question of whether the publication was a libel, or not, (which in this case was done). But Parliament never thought fit to require, or authorize a Judge, at *nisi prius*, to decide upon points of law, which were properly inquirable in another form, and did not interfere, so as to direct, that points of law should be discussed before a Jury---and which points remained upon the record for discussion at a subsequent opportunity.---The Judge is left to his ancient duties in that respect,---without condemning the mode, which had been exercised or the practice, which was founded upon it. Thus shewing, that Parliament did not disapprove of that course and that they left the law in the hands, in which the constitution had placed it---Recognizing, that there was a proper course, and time when all objections appearing on the record are

to be discussed :—this therefore may fairly be considered, as a parliamentary recognition of the convenience, propriety, and legality of the practice stated by the judges there and followed by us :—and in my apprehension, what I have stated, is sufficient to shew, that the trial was not the place to debate this question—whether the averments be or be not properly put upon this record, is to be examined and decided upon a motion in arrest of judgement, since the defendant did not earlier make the objection by demurring to the information.

The CHIEF JUSTICE concluded, by saying, that the whole Court were unanimous in opinion, that there was nothing, in what was urged, to impeach the verdict.

Mr. Justice DAY. I am glad that this motion has been made, as it has produced the powerful and conclusive judgment, just delivered by my Lord Chief Justice, touching the law of the case, and which, it is hoped, will set all question upon the law in future at rest. It is objected, that no evidence ought to have been received to the matter of the innuendoes, as no averment appears upon the record introductory of that matter. But it is admitted expressly at the Bar, that nothing extrinsic of the record was given in charge to the Jury—nothing that is not clearly and distinctly alleged in the information; and in a motion to the discretion of Court, that admission of the Counsel is a full answer to his own objection. It is true that every man must be tried *secundum allegata et probata*.—No evidence can be received on the trial, to any fact, not alleged or implied by the pleadings: thus, in an indictment for High Treason, the overt acts must be distinctly set out and it would be perfectly competent to the Counsel for the prisoner to object to any evidence, going to an overt-act, not alleged in the indictment. But was it ever objected on such a trial, that the facts for the Jury to try, though plainly and intelligibly set out in the indictment, wanted, however, due technicality and strict legal form upon the face of the pleading?—Such objections plainly arise upon the face of the record, and, if well founded, the prisoner cannot fail, in proper season, to have the benefit of them. Mr. BURROWES, however, in a laudable zeal for the character of his client; not content with a motion for arresting the judgment, struggles to get rid of a verdict, which must brand him with indelible disgrace and shame. Every man, who knows the vir-

uous sensibilities of that gentleman, will do justice to his ardent appreciation of character. But does the learned Counsel, in a motion, where the prime question always is, whether the verdict be agreeable to justice, and to the merits of the case, expect the concurrent sympathy of this Court for his client, convicted as he now stands, with the full approbation of the Court, of publishing a libel, not more mischievous and malignant, than slanderous and false? Where his defence has been as wicked as his crime? Where he comes forward with brazen effrontery, and says, "No; I did not murder A. B.; it was C. D. whom I murdered! I did not utter a libel on the Duke of RICHMOND—it was a learned Judge of the land whom I intended to defame, in the solemn exercise of a judicial duty—in the painful discharge of the most painful functions of his situation." And this atrocious defence is gravely advanced in an open Court of Justice, by evidence the most presumptuous and disgusting, behind the back of the learned Lord, who is the object of it—and who, of course, had no means of repelling the foul slander, but the well-known benevolence of his nature, and the monstrous incredibility of the narrative! But it is material also to recollect, that this is a criminal case, in which applications for new trials are very sparingly countenanced; never, indeed, but where, if refused, there would be a manifest failure of justice. Such was the case of the *King v. Gough*, in *Douglas*. Taking this case, therefore, in all its bearings, whether in a legal point of view, or upon its merits, there never was an application less entitled to the favour or countenance of a Court of Justice.

Mr. O'CONNEL. I am now to resort to the alternative of my motion—that the judgment may be arrested.

Lord CHIEF JUSTICE. It is too late to enter upon the argument this day—and I fear, that it will injure the public convenience to proceed with it, to-morrow, being the the last day of the term.

Mr. BURROWES. My Lord, I feel the difficulty of arguing the case, this evening, or to-morrow—for the press of other business,—but the defendant is now in custody.

Lord CHIEF JUSTICE. He may be admitted to bail.

Mr. ATTORNEY GENERAL. My Lords, If it be at-

tended with any inconvenience to the public business of the court to debate this matter now, it must necessarily be postponed, and in that case, the Defendant must be admitted to bail.—But, notwithstanding what has been said, I have the most perfect confidence, that we can sustain this record in all its parts.—Where a doubt is suggested, it is quite sufficient to let the Defendant stand out upon bail.

Lord CHIEF JUSTICE DOWNES. Manifestly, this is a case deserving discussion:—In saying so, I do not mean to intimate that I have formed any opinion.

Mr. O'CONNELL. The application to amend the record disclosed its defects.

Mr. TOWNSEND. My Lords, I was the person, who made the motion to amend the record,—that motion was made in order to avoid the argument founded upon an allegation, that the innuendos are insufficient, I am not ashamed to avow, that I framed this information; and do aver, that it can be sufficiently sustained.

Mr. BURROWES. We have nothing to do with these assertions:—it is not denied, that such application was made.

Mr. ATTORNEY GENERAL. If the Defendant will give up the author of the publication, I will consent to his standing out upon his own recognizance. If that be not acceded to, I will propose that such security will be given as will compel the Defendant to answer the charge, and render him amenable to justice.—I propose, that he shall enter into a recognizance of £.1000 by himself, and two sureties of £.500, each.

This proposition was acceded to on the part of the Defendant.

APPENDIX.

Copy of Baron GEORGE'S Notes of Barry's Case.

No. 82. True Bill. Philip Barry, } Indictment. For
Cust. 5th July. } that the 4th July,
49, king at *Glan-*
bower, feloniously did assault *Patrick Codd*, and a cer-
tain pistol loaden with gun-powder and leaden bullet,
feloniously and maliciously did discharge at him, with
intent feloniously to murder him, against peace and
statute.

No. 83. True Bill. Philip Barry. } Indictment. For
} that he same day,
year and place, feloniously did demand money from
Patrick Codd, with intent to rob him, against peace
and statute.

First Witness, *Patrick Codd*.

He lives at *Carrick-on Suir*; on the 4th July, was going to *Callan*; the Post-boy conveying the mail was in company with him;—a man came over the ditch within half-a-mile of *Glanbower*, this was turned 11 o'clock, he seized his bridle, and stopped his horse, presented the pistol at him, and desired him to alight, and deliver;—points out prisoner,—says it was him,—he desired the Post-boy to stop also;—he bid witness again to alight, or he would blow his brains out.—Witness alighted,---he had £492 about him; the Post-boy was then for moving away. Prisoner turned to-

wards the Post-boy, witness attempted to seize him—witness rushed on him—he discharged the pistol, he thinks, at witness,---knocked him down and wrested a second pistol from him, witness snapped it, and threw it over the ditch---he struggled with witness till Post-boy returned in about five minutes, and they secured him;—he let off the pistol, he is satisfied voluntarily, and not merely with an intent to intimidate him, but with intent to wound him.

Cross-Examined.

He has heard, he was carrying home pistols, but has no reason to believe it.

Second Witness.

Mr. *James Bradstreet Elliott*,---he lives near---was called on, with the prisoner, when taken by first witness, and the pistols brought with him, (now produced) prisoner is the man: the pistols when brought to him had both of them been lately discharged.

For the Prisoner.

James Rogers,---Prisoner was once his servant, latterly his workman; witness got those pistols from a Mr. *Hearn*, his brother-in-law, to protect himself, as he lived in disturbed country, and had been attacked once or twice,---Mr. *Hearn* wrote to witness to return them, as he had borrowed them himself. Witness sent those arms back by the prisoner---the prisoner had the arms in his possession 4 or 5 days before he was taken up.---It was on the road between his house and Mr. *Hearn's*, he was taken up.

Cross-Examined.

The pistols were not loaden, when he gave them, and gave no ammunition; he had to go from 28 to 30 miles from his house to Mr. *Hearn's*.

The Jury acquitted him, in No. 82, and found him guilty in No. 83, upon which the prisoner was sentenced to be transported.

At the foot of the evidence is the following entry,

To be transmitted to *Kilkenny*,
to be tried for a Highway
Robbery. }

The following information was sworn on the same day when *Barry* was apprehended.

County of Tipperary } The information of *Patrick Walsh*,
to wit. } duly sworn deposeth, and saith,
that between the hours of ten and eleven o'Clock in the morning of the 4th of July, carrying the Carrick mail, in company with Mr. *Patrick Codd*, merchant of Carrick aforesaid, he was stopped by a man, now calling himself *Philip Barry*, on the road near the Bridge of Glanbower, that deponent rode off with the mail, and left him engaged with Mr. *Codd*, who made him a prisoner, and brought him, with this informant to Mr. *Elliott*.

Sworn 4th July, 1809
before

J. B. Elliott.

his
Patrick X Walsh.
mark.

On the 13th of the month of June, 1864, the witness was present at the trial of the prisoner, who was charged with the murder of John Brown. The witness was present at the trial of the prisoner, who was charged with the murder of John Brown. The witness was present at the trial of the prisoner, who was charged with the murder of John Brown.

At the foot of the evidence in the following entry, to be transmitted to the Court, to be used for the purpose of the case, the following information was given on the same day when the prisoner was apprehended.

The following information was given on the same day when the prisoner was apprehended. The witness was present at the trial of the prisoner, who was charged with the murder of John Brown. The witness was present at the trial of the prisoner, who was charged with the murder of John Brown. The witness was present at the trial of the prisoner, who was charged with the murder of John Brown.