

FOX'S LIBEL ACT.

action. It was in the Dean of St. Asaph's case that Erskine first had occasion to contend for the principle, that it is the province of the jury, on an indictment for libel, as in other criminal cases, to bring in a verdict upon the whole matter in issue. Buller was the judge, whose pupil Erskine had been, and for whom he entertained a sincere feeling of reverence. This, however, did not prevent a fierce altercation between bench and bar, when the jury, eager to reward the eloquence of the advocate by a complete acquittal, brought in a verdict of guilty of publishing *only*. The last word Justice Buller refused to record, insisting that the jury did not understand their verdict.

Erskine: "The jury do understand their verdict."

Buller, J.: "Sir, I will not be interrupted."

Erskine: "I stand here as an advocate for a brother citizen, and I desire that the word '*only*' shall be recorded."

Buller, J.: "Sit down, sir; remember your duty, or I shall be obliged to proceed in another manner."

Erskine: "YOUR LORDSHIP MAY PROCEED IN WHAT MANNER YOU THINK FIT; I KNOW MY DUTY AS WELL AS YOUR LORDSHIP KNOWS YOURS. I SHALL NOT ALTER MY CONDUCT."

A verdict of "guilty of publishing, but whether a libel or not, we do not find," having been at length brought in, Erskine afterwards moved for a new trial on the ground of misdirection. This he did with no hope of success, but to resist what he thought to be an illegal and unjustifiable precedent, and to call public attention to it. Fox often declared his argument on this occasion to be, in his opinion, the finest piece of reasoning in the English language, though the judges of the King's Bench were unmoved by it, and Lord Mansfield dismissed the whole question with

a doggerel rhyme. The judgment was arrested on another ground, but the judges of England had, as far as lay in their power, placed the fatal doctrine that *libel or no libel* was a pure question of law, and one with which juries had no concern, beyond the reach of further danger. The result of the case was, however, far different to what it seemed likely to be. Instead of establishing a rule of law, which, like the rule in Shelley's case, would endure impregnable to all the assaults of reason, it caused so much alarm in the public mind that Fox's Act was called for, which forever subverted the doctrine by *declaring* the law to be the reverse of that doctrine. It fell to Erskine, who had made such a gallant and glorious struggle in the cause, to support the bill as Mr. Fox's seconder.

It will gratify equity lawyers to know that the clause in the act requiring the judge, according to his discretion, to give his opinion on the whole matter in issue, which has caused so much trouble, and in some cases has nullified the effect of the act, was the handiwork of Lord Eldon. "Mr. Fox's Act," says Lord Campbell, "only requires the judges to give their opinion on matters of law in libel cases as in other cases. But did any judge ever say, 'Gentlemen, I am of opinion that this is a wilful, malicious and atrocious murder!' For a considerable time after the Act passed against the unanimous opposition of the judges, they almost all spitefully followed this course. I myself heard one judge say, 'As the Legislature requires me to give my own opinion in the present case, I am of opinion that this is a diabolically atrocious libel.'"

In our own day judges are for the most part reconciled to the necessity of leaving the whole issue to the jury, and seldom attempt to diminish their privileges by such a direction as that just