

No 8.

mitted to appear in that form and manner which are suited to their nature, and annexed or subjoined to the text which they are intended to illustrate.

It is no doubt true, that an appearance of a commentary may be assumed for the unlawful purpose of evading an exclusive right of publication; but such a fallacy cannot escape detection. By that standard, the present parties are willing to be tried.

The LORD ORDINARY on the bills reported the cause upon memorials; when

The Court seemed to entertain no doubt, on the one hand, of the patentee's right to the sole printing of Bibles, nor, on the other, with respect to the liberty of publishing commentaries on the scriptures in conjunction with the sacred text. At the same time, it was thought necessary to guard against devices for evading that illegal privilege. In this view, a distinction was made between Henry's Commentary, where the annotations are about five times the bulk of the text, and the work of Ostervald, whose notes are so inconsiderable in quantity, that they might, without much difficulty, be employed as a subterfuge.

THE LORDS, therefore, refused the bill so far as it concerned Henry's Commentary, and allowed expenses; but passed it with respect to that of Ostervald.

Reporter, *Lord Gardenston.*

For the Complainer, *Solicitor-General.*

*Alt. Roland, Fraser-Tyler, Dickson.*

*Fol. Dic. v. 3. p. 390. Fac. Col. No 131. p. 256.*

1793. March 18.

HIS MAJESTY'S ADVOCATE *against* JAMES ROBERTSON & WALTER BERRY.

No 9.  
Publisher responsible for what he publishes.

JAMES ROBERTSON and WALTER BERRY were charged with having wickedly and feloniously printed and published a seditious pamphlet entitled, "The Political Progress of Britain," &c. and containing among others, certain seditious passages, which were inserted in the criminal letters.

The Court found the libel relevant to infer the pains of law.

The jury found it proved, "That the said James Robertson did print and publish, and that the said Walter Berry did publish only the pamphlet libelled on."

The pannels contended, That no punishment could follow on this verdict; because it neither found that there was any thing seditious in the pamphlet, nor that they had acted with a wicked and felonious intention, both of which were essential ingredients in the crime charged against them.

Upon advising minutes of debate, it was

*Observed* on the Bench, The jury might, if they pleased, have returned a general verdict of guilty or not guilty. For although in trials for libel be-

fore the Courts of England, this has only of late, and by express statute, been made the lawful privilege of juries, yet, in our practice, no distinction was ever understood to take place in that respect between cases of libel and any other, but the whole ingredients of the offence were always held to be remitted, as under the common rule, to the knowledge of the assize. The jury here have however chosen to return a special verdict, wherein certain facts are found, leaving the inference in law which thence arises to be settled by the Court. Now, to ascertain the nature of the pamphlet, and the character in which it was viewed by the jury, recourse must be had to the criminal letters themselves. For to these, and the account which is there given of the pamphlet, the verdict plainly refers, when it finds the pannels guilty of publishing the pamphlet libelled; that is, it finds them guilty of publishing this pamphlet, as qualified and characterised in the libel, and as containing the various passages which are there inserted at length. These passages, or rather the whole pamphlet itself, which contains them, are therefore to be held as engrossed in the verdict; and these passages, the Court have already, by their interlocutor on the relevancy, found, and must still hold to be inflammatory and seditious. The jury, therefore, by this reference to the libel on which that judgment went, and which describes the composition as of a wicked and seditious kind, plainly acquiesce in and adopt that judgment and description; as, indeed, if they had not adopted them, it would then have lain on them to have declared their own opinion to the contrary, either by finding that this was an innocent pamphlet, or at least by a general verdict of acquittal.

With respect again to the intention of the pannels, it is not in any case essential that the jury find that the pannels acted from a criminal purpose; it is sufficient that they find facts from which in law and sound construction the Court are bound to infer it. The inference of guilt from the facts found against the pannels in the present case, is as easy and direct as from any other criminal or forbidden act, unless proof were offered in exculpation. A contrary opinion would be both dangerous in its consequences, and unreasonable in itself. The pannels must be supposed to be endowed with a common degree of capacity, to understand what others understand, and consequently to have viewed the work in question in the same light in which it has been viewed by a jury of their peers: Robertson both printed and published it; and cannot therefore be presumed to be ignorant of the contents, nor of the nature and tendency of a pamphlet which passed in detail through his hands. Nor is Berry, who only published it, less responsible. It was his duty to have perused and approved of it before publication, and to have satisfied himself that it contained nothing which was not innocent and wholesome. His neglecting to do so could only proceed from a criminal indifference to the interest of the public. Like the vender of drugs, he was bound to know the quality of what he exposed, and liable to punishment, if, instead of remedies, he dealt in poisons. It will not excuse him that he only published in the

No 9.

view of profit; for he is not to sport with the public safety by means of his trade; nor will it afford him any defence, that he could not estimate with certainty the precise extent of the operation of such a work; on the contrary, so much the more was he bound, for that very reason, to be cautious of what he published. Nay, it might even be held, that it would make no alteration in his favour, though the book were written in a language which he did not understand, since he ought to have submitted it to the inspection of persons skilled in that language, and capable to judge of the contents. Besides, in every case of libel, it is in reality the act of publication chiefly that constitutes the guilt, and to this we must resort, even for conviction of the printer; for, if he only print without publishing, he is no more guilty of a cognizable crime, than if one forge a writing, and keep it carefully locked up in his own possession. But in either case, if the thing be uttered, though by another person, as this cannot ordinarily happen without the knowledge of the printer or fabricator, he will be held to have concurred.

At the same time, circumstances may be conceived, sufficient to elide the presumption against the publisher, and free him of any blame; but these it is his part to allege in exculpation, and to prove.

Two of the Judges who concurred with the others, (all the ordinary Judges were present,) both as to the nature of the verdict, and its effect as to Robertson, had some doubts how far, in all the circumstances of the case, it warranted the inflicting a punishment on Berry. One of them would have concurred with the rest, if the jury had found Berry guilty of publishing, instead of finding it proved, that he had published the pamphlet libelled on, and the other came in the end to be of the same opinion with his brethren.

THE LORDS repelled the objections offered in arrest of judgment, and adjudged Berry to be imprisoned for three, and Robertson for six months, and thereafter until they should find caution to the extent of L. 100 Sterling each, for their good behaviour for three years after their liberation.

For the Prosecutor, *Crown Council.*  
D. D.

For the Pannels, *Dean of Faculty, Wight, Fletcher.*  
*Fac. Col. (APPENDIX.) No 2. p. 7.*

Action on the penalties for importing books, Stat. 12. Geo. II. See PRESCRIPTION; Limitation of Penal Statutes.

See APPENDIX.