THE CRAFTSMANSHIP OF BIAS: SEDITION AND THE WINNIPEG STRIKE TRIAL 1919

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The Russell Case

On November 26, 1919, five months after the Winnipeg General Strike came to its bitter and inconclusive end, Mr. Justice Metcalfe[1] of the Manitoba Court of King's Bench began to hear the state trial of Robert Boyd Russell[2] who had been one of the strike leaders.[3] The accused was charged with, *inter alia*, six counts of seditious conspiracy. Among other items, the long and verbose indictment alleged that he had conspired with others to bring on "unlawful general strikes," by causing "workers to break [their] contracts and desert from their service and duties"; but the most serious accusation was that the strike was intended "to be a step in a revolution against the constituted form of government in Canada."[4] Essentially, Russell's defence was that when the employers of the striking Winnipeg metal workers had refused to deal with the Metal Trades Council, which claimed to be the bargaining agency for the workers, the general strike had been called for the purpose of enforcing the principle of collective bargaining.[5] Hence, stripped of all the verbiage of the indictment and the trial, the question at issue was the intent of the accused.[6]

The trial was a long and gruelling contest which was marked by many acrimonious exchanges between opposing counsel. Often the Judge became involved, and at one point sent for the sheriff to restore order in the court

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1. Thomas Llewellin Metcalfe (1870-1922): educ. in local Manitoba schools; articled with various Winnipeg and Portage law firms; called to Manitoba Bar 1894; partner in several Winnipeg law firms; appointed member of Dominion Statute Law Revision Commission 1902; appointed to King's Bench in 1909 and in 1921 elevated to Manitoba Court of Appeal. Metcalfe was a senior official of the Liberal Party in Manitoba and a skilled stump speaker in election campaigns prior to his appointment to the bench. This information was derived from the biographical file on Metcalfe in the Archive of Western Canadian Legal History, University of Manitoba, Faculty of Law, Winnipeg.

2. (1888-1964): educ. as a machinist on the Clydeside; emigrated to Canada in 1911 and settled in Winnipeg where he became a labour politician and a member of the Socialist Party of Canada; a powerful and persuasive speaker and member of the Winnipeg Trades and Labour Council, he returned to the labour movement after release from prison. He had a long career as secretary of the One Big Union, a position he still held in 1948; a school in Winnipeg has been named in his honour. D. C. Masters, *The Winnipeg General Strike* (2d ed. 1973) 3-4, 8 N. Penner, *Winnipeg 1919* (2ed ed. 1975) 9.

3. Eight strike leaders were named in the indictment and were to have been tried jointly. However, the crown prosecutor decided to proceed against Russell first on the grounds that the jury panel might be exhausted before a jury was chosen if the eight were tried together, because of the number of challenges the defence would have had. *The Winnipeg Tribune*, November 27, 1919, at 3, col.2. The remaining seven defendents were tried together early in the new year. They comprised a distinguished group. One was to serve as an M.P. for fifteen years. Three were elected to the Manitoba Legislature, and one was to be elected Mayor of Winnipeg for seven terms of office. The remaining two men were to become senior civil servants. For a discussion of the careers of the seven see Masters, *ibid.*, at 146-150.

4. *The King vs. R.B. Russell*, Indictment, November 4, 1919, Counts 2, 3 and 4. Case No. 3/2171-8, Prothonotary's Office, Manitoba Law Courts, Winnipeg.

5. *The Winnipeg Tribune*, December 19, 1919, at 2, col.2 and 3.

6. Although Russell and six of his co-defendents were found guilty, two eminent historians, after an exhaustive analysis of the strike and its antecedents have concluded that its purpose was indeed "what it purported to be, an effort to secure the principle of collective bargaining." Masters, *Winnipeg General Strike*, p. 134; David J. Bercuson, *Confrontation at Winnipeg* (Montreal: McGill-Queen's University Press, 1974), p.178. It is also of interest to note that both during and after the strike many Dominion M.P.s believed that the question at issue was collective bargaining. See generally: Can. H. of C. Debates, 2nd. sess. 13th Parl., pp. 3004-65 (June 2, 1919), p.3845 (June 23, 1919). But see particularly the speech by Peter Heenan, Can. H. of C. Debates, 1st sess. 15th Parl., pp. 4004-12 (June 2, 1926). Heenan who was the Minister of Labour in the short-lived Mackenzie King administration of 1925-26 had become heir to the Departmental records covering the period of the strike, apparently through an oversight on the part of the (then) Minister of Labour, Gideon Robertson (*Ibid.*, at 4004). Having such sensitive internal evidence to work with, Heenan blew away much of the case against the strikers and repeatedly made the point that collective bargaining had been their main objective.

and to enforce his demand that Robert Cassidy, K.C.,[7] leading counsel for the defence, apologize for conduct unbecoming an officer of the court.[8] At the conclusion of the case for the defence, in the afternoon of December 22, Cassidy addressed the jury for three hours and fifteen minutes. When the court sat the following morning, the crown prosecutor began his summation, which lasted until 6 p.m..[9] Finally, at 8:15 p.m. that evening, Mr. Justice Metcalfe began his charge:

> "Gentlemen of the Jury: After twenty-three days actual sitting, day and night, after the filing of 703 exhibits and the taking of voluminous evidence, I hope you will believe me when I say that I am almost physically unfit to complete my part of this trial".[10]

Notwithstanding the Judge's modesty, his address was in many ways a *tour de force*. The verbal presentation lasted three hours and twenty minutes, and the transcript consists of forty-eight single-spaced typed pages. In turn, the speech was based on Metcalfe's brief of 329 pages of typed notes, many of which are copiously annotated in his hand, and are often supplemented by pages of handwritten addenda.[11] Both documents demonstrate amply his ability both as a learned antiquarian and as a jurist. For example, when discussing the concept of strikes he delivered what was, in effect, an interesting and informative dissertation on the history of labour disputes. Beginning with the Great Plague and Edward IIIs subsequent *Statute of Labourers* of 1349,[12] he went on to review later statutes and case law, down to the most recent Canadian legislation. All this ran to eight pages of the charge.[13] It was rendered down from seventy pages in his brief,[14] which displayed an impressive command of ancient and obscure sources. In a similar exercise the Judge reviewed twenty-one cases heard over the period 1629 to 1909 in his search for definitions of sedition and seditious words.[15] Metcalfe displayed his juristic talent, in a different vein, by threading his way through a series of conspiracy cases to demonstrate that in trade disputes in Canada in 1919 the common law definition of "conspiracy" was the one enunciated by Bramwell, B., in *R. v. Druitt* (1867)[16] which the case reports summarized as follows:

> No right of property or capital, about which there had been so much declamation, was so sacred or so carefully guarded by the law of this land as that of personal liberty... But that

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7. Robert Cassidy (1857-1947); educ. Queen's College, Belfast (emigrated to Canada 1875); articled with various Ontario law firms; called to Ontario Bar 1881. Went to Winnipeg and called to Manitoba Bar 1882; became member of law firm and practiced in Winnipeg until 1892. In that year went to Victoria and was called to B.C. Bar; practiced in B.C. thereafter. *Who's Who and Why 1917-18* (Toronto: International Press Ltd., 1918), p. 1135.

8. *The Winnipeg Tribune*, December 3, 1919, at 1, col.2.

9. *The Manitoba Free Press*, December 24, 1919, at 9, col.2.

10. Judge's charge, official report, December 23, 1919, p.1. *R.* v. *Russell*, case 3/2171-8. This document, hereafter referred to as "Metcalfe, Charge," is paginated in the usual manner up to and including p.11, after which each page has a double number: e.g. p.12 is paginated 23 & 24, p.13 as 25 & 26 and so on. Notes in this essay will use the original pagination.

11. Mr. Justice Metcalfe, "Brief, Russell Case," hereafter referred to as "Metcalfe, Brief." *Archive of Western Canadian Legal History*, Accession No. 49-A 2052, University of Manitoba, Faculty of Law, Winnipeg. The document is undated but was evidently compiled during the latter months of 1919.

12. 23 Edw. 3.

13. Metcalfe, Charge, at 45 & 46 to 61 & 62.

14. Metcalfe, Brief, at 190-260.

15. *Ibid.*, at 62-92.

16. Metcalfe's words are: "It would therefore appear that, after this recognition of *Reg.* v. *Druitt* by the House of Lords, the dissenting opinion of Lord Coleridge would have very little effect, and that the law as ennunciated by Lord Bramwell is the law that obtains in Canada today." *Ibid.*, at 234. The argument to arrive at this position runs from p.227 to p.234 of the Brief. Summarized in the Charge it is at pp.53 & 54 and 55 & 56.

liberty was not liberty of the body only. It was also a liberty of the mind and will; and the liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry, was as much a subject of the law's protection as was that of his body. . . if any set of men agreed among themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves.[17]

Since the Canadian Parliament had codified the criminal law in 1892, it might well be asked why Metcalfe spent so much time and effort on these definitions. In fact, as he made clear to the jury, "sedition" had the distinction of being the only major crime in the Canadian Criminal Code for which there was no definition: "In the Code we find theft defined, murder defined, assault defined, etc. but not so seditious intention or sedition itself or seditious conspiracy other than we find them in Section 132 of the Code, . . ".[18] Hence the court was obliged to resort to the common law, to cases and precedents and to English legal texts in order to formulate definitions.[19] Because "Hardly any branch of the law has a longer or more interesting history than [sedition],"[20] there was a profusion of material to draw from, and Metcalfe threw his net wide; for seven pages he quoted definitions and descriptions from several sources, possibly to the bewilderment and confusion of the jurors.[21] In the main, however, he relied on an amplification of the discussion in *Archbold's Pleading, Evidence and Practice in Criminal Cases*,[22] which he paraphrased as follows:

Sedition whether by words written or spoken or by conduct was a misdemeanor indictable at common law, punishable by fine or imprisonment. It embraced all those practices, whether by word, deed or writing, which fall short of high treason, but directly tend or have for their object to excite discontent or dissatisfaction: to excite ill-will between different classes of the King's subjects; to create public disturbances, or lead to civil war; to bring into hatred or contempt the Sovereign or the government, the laws or constitution of the realm, and generally all endeavor to promote public disorder; to incite people to unlawful associations, assemblies, insurrections, breaches of the peace, or forcible obstruction of the execution of the law, or to use any form of physical force in any public matter connected with the State.[23]

Now this process is normal in many areas of common law where no legislative enactment governs the cases before the court and is, indeed, the traditional method of developing case law. But, over the years many legalists have been critical of a system which gives the bench a "quasi-legislative authority"[24] and have advocated parliamentary action to codify law, and particularly the criminal law. One of the most outspoken and articulate of such advocates was Mr. Justice Stephen, author of the *History of the Crim-*

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17. *R.* v. *Druitt* (1867), 10 Cox C.C. 592 at 600-601.

18. *Supra* n.13, at 9. Section 132 of the Code was as follows: "132. Seditious words are words expressive of a seditious intention. 2. A seditious libel is a libel expressive of a seditious intention. 3. A seditious conspiracy is an agreement between two or more persons to carry in execution a seditious intention. 55-56 Vic., c.29, s.123."

19. Metcalfe, Charge, *ibid.*.

20. 2 J.F. Stephen, *A History of the Criminal Law of England* (1883), 299.

21. See *supra* n.14, at 52-53, 56-92; *supra* n.13, at 7-9.

22. J. Jervis, (25th. ed. 1918) 1070-1071.

23. *Supra* n.13, at 7.

24. Great Britain, Select Committee of the Imperial Parliament (1874) 528.

inal Law of England, and many other books and articles on penal law.[25] His argument is nowhere better expressed than in the testimony he gave before the Select Committee of the Imperial Parliament on the Homicide Law Amendment Bill. In the early part of his deposition he made reference to the fact that two eminent jurists who had preceded him before the Commission, Bramwell B., and Blackburn J., had flatly contradicted each other on the disposition of an unreported case put to them by the Commission: one would have convicted whereas the other would have acquitted the accused. He went on:

> . . . [W]hen you find two learned judges of the highest eminence directly contradicting each other on matters of the first importance, matters on which the life and death of persons tried before them might depend, and one of them praising that state of things as a proof of the elasticity of the common law, I can only say I feel surprised, and cannot agree with that learned judge's praise of its elasticity. Baron Bramwell speaks quite in the opposite sense, and expresses entirely my own opinions on the matter; namely, that it is eminently desirable that you should have definitions, and that those definitions should state plainly what the law is.
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> I must add, with regard to a large part of Mr. Justice Blackburn's evidence on this subject, that it is impossible for any one who has had any experience of the administration of justice (as is the case with the members of the Committee), to be unaware of the fact that the *judges are under an irresistable temptation, if I may say so, to like a system in which they are not tied down by definite rules. When a man has acquired, by long experience, perfect familiarity with that unwritten understanding about the law which really constitutes the law for all practical purposes, when he feels himself in a position to say, 'That case is no longer law, although Hale said it was, and this case is no longer law, although it has been always considered to be so,' he occupies a position from which he does not like to be ousted.* Of course, if the judge, instead of having to hear a variety of arguments drawn from all sorts of sources, upon the effect of which he is to decide, is simply to refer to a few words in an Act of Parliament, the position which he occupies is, in every way, less agreeable to himself, and it cannot be otherwise. For my part, however that may be, *I think, for the public, it is very much better that the law should be distinct and certain, and that this quasi-legislative authority should not be left in the hands of the judges.*[26]

Obviously, Metcalfe did not hold with this view, because he told the jury that "English legislators could not bring themselves to adopt a criminal code. But others stepped in where angels fear to tread and every common law offence they could think of was made a statutory offence insofar as Canada is concerned."[27] Unfortunately for Russell, however, in this case the Judge was still able to exercise his "quasi-legislative authority" to the detriment of the accused, whom it was obvious he disliked, when he expounded at length upon the authorities he had reviewed in his brief.[28]

But, in the preparation of this document, Metcalfe had been very selective, for nowhere in his notes is there mention of *R.* v. *Burns*,[29] one of the

25. James Fitzjames Stephen (1829-1894): educ. Eton and Cambridge; admitted to Inner Temple and called to the bar in 1854; joined the Midland circuit and also began to write for learned journals; appointed Recorder of Newark 1859; appointed legal member of the Council in India 1869, returning to England in 1872; commissioned to draft criminal law legislation, including the draft criminal code of 1877, none of which was enacted; appointed Professor of Common Law at Inns of Court 1875; appointed to the Queen's Bench 1879 from which he retired in 1891. A complete list of his publications is appended to the essay by L. Radzinowicz, *Sir James Fitzjames Stephen* (1957) 49-66. For a more literary and comprehensive account of Stephen's life see the eminently readable biography by his brother, Sir Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895).

26. *Supra* n.24, at 527-28. Emphasis mine.

27. *Supra* n.13, at 41, 42

28. See his remarks *ibid.*, at 27-28, 29-30.

29. (1886), 16 Cox C.C. 355. It may be of interest to know that *R.* v. *Burns* is cited twice in Jervis, *supra* n.22, at 1071. And it will be recalled, it was this work from which Metcalfe derived a great deal of his information on sedition. For facts of *Burns*, see text at n.168, *infra*.

leading cases on sedition. However, during his summation for the accused, counsel for the defence did speak at length on the *Burns* case[30] and the question of intent which was its central issue. Evidently, the Court was not pleased that the case had been mentioned, and his remarks on it in the charge are somewhat contradictory.[31] Furthermore, considering the way he followed the outline of his brief, often quoting from it verbatim, it would appear that his comments on *Burns* were delivered extemporaneously. He dismissed the question of intent in one sentence, except to say that "in many cases of sedition, or at least in some, the parties may have conducted themselves so recklessly that the intent is so evident that it can hardly ever be excused."[32] Given the context in which he was speaking, this remark would seem to be most prejudicial to the accused. Again, when one considers the care with which the Judge had picked his way from case to case to arrive at a common law definition of "conspiracy" in respect of trade disputes, or strikes, as they would now be named, it is somewhat disconcerting to learn that "conspiracy" was defined in two contexts in the Criminal Code.[33] Furthermore, the *Code* also specified that acts performed by a trade union in restraint of trade were not unlawful, and thus not actionable as a conspiracy.[34]

While may legalists were disposed to adopt Mr. Justice Metcalfe's definitions and procedure, and others to argue to the contrary, there was no doubt that what was done was well within the purview of the bench. Furthermore, taking each item in isolation, the time and thought devoted to researching the issues is commendable. What is not commendable, is the picture which emerges when all the items are arranged in a coherent whole. For on a careful reading of the charge, as delivered, and notwithstanding his early admonition to the jury that: "In all matters of fact you are the sole judges,"[35] it becomes apparent that Metcalfe's charge is based on the premise that Russell's guilt was unquestionable. This is neither a new nor an isolated view: in a forceful and learned critique issued under the auspices of the Law Society of Manitoba in January, 1920, W.H. Trueman, K.C.[36] remarked that "I am bound to say that the charge is based on a complete conviction of Russell's guilt."[37] Furthermore, in an essay on the appeal which followed the trial, L. Katz[38] stated that: "They [the Justices of Appeal] merely imputed an intention to the accused and proceeded to convict him thereon."[39]

30. *The Manitoba Free Press*, December 23, 1919, at 6, col.3.

31. *Supra* n.13, at 2.

32. *Ibid.*

33. *Criminal Code*, R.S.C. 1906, c.146, ss.496, 573.

34. *Criminal Code*, R.S.C. 1906, c.146, s.497.

35. *Supra* n.14, at 1.

36. Walter Harley Trueman (1870-1951): educ. St. John Grammar School and Dalhousie; called to N.B. Bar 1892: lecturer King's College Law School; partner Winnipeg law firm 1908; appointed to Manitoba Court of Appeal 1923 from which he resigned in 1946. This information was derived from the biographical file on Trueman in the Archive of Western Canadian Legal History, University of Manitoba, Faculty of Law, Winnipeg.

37. W. H. Trueman, *Russell Trial and Labor's Right* (1920) 4. A copy of this document is in the Archive of Western Canadian Legal History, Accession No. 28-A298, University of Manitoba, Faculty of Law, Winnipeg.

38. Leslie Katz (1945): educ. University of Manitoba; B.A., 1969, LL.B. 1967; called to Manitoba Bar 1967; called to High Court of Australia Bar 1981; currently Senior Lecturer in Law, Faculty of Law, University of Sydney.

39. L. Katz, "Some Legal Consequences of the Winnipeg General Strike of 1919" (1970), 4 Man. L.J. 39 at 44.

On several occasions the Judge gave direction to the jury on matters of fact. For example, in discussing the context of certain articles which were published in the *Western Labour News*, the Court said: "Much of this has been put in evidence. And, gentlemen, speaking to you as the judge, if I were on a jury, there is much in that matter that I would find no difficulty in concluding was sedition."[40] Clearly the bench is instructing the jurors that certain matter is seditious, and it may well have been that what he said was true. But this is a question of fact and thus wholly within the province of the jury to determine. It is not a matter to be decided by the Court. While a judge is entitled to comment on facts if he makes it clear that the final determination is for the jury to make, this direction is on page 31 and 32 of the charge, and must have been separated by an hour or more from the time the jurors were told that they were the judges of fact.

Again, when Metcalfe launched into the discussion of socialism, which begins on page 59 and 60, he remarked:

> If a man's ideal is Socialism, that is not illegal. But perhaps you may think it is not to be nice. It is not illegal, but, gentlemen after hearing the evidence of what Socialism is, may we not remember the words of that illustrious countryman of Mr. Russell, and ask ourselves, 'Breathes there a man with soul so dead, who never to himself has said, this is my own, my native land.' What did our forefathers fight for at Queenstown [sic] Heights? For what did they fling back the Americans from the ramparts of the city of Quebec and roll them down the snow clad cliffs? What do you think of patriotism? What do you think of allegiance to your country? What do you think of allegiance to the brotherhood of the world, limiting the brotherhood of the world to the working class as indicated here. Well, I like my country. Do you? Are those sentiments, if kept to themselves, the base for the introduction of persuasive propaganda by the ballot. Perhaps. Even then, as Mr. Cassidy [Counsel for the defence] has suggested, they might lead to incidents that occurred quite frequently in Hyde Park and Trafalgar Square. If a man won't fight for his country, as our forefathers fought at Quebec and Queenstown Heights, will he fight for his fireside? *If such sentiments are to be brought about by illegal strikes, by force exercised thereby, by terror, by combinations of soldiers and workmen, by speeches at soldiers and workmens' [sic] councils, or by unlawful means it is a crime and it is seditious.*[41]

Apart from the patriotic but maudlin sentiments and *non sequiturs* which abound throughout the paragraph, the Judge makes a series of flat assertions that certain events at issue in the trial are seditious. One example will suffice to demonstrate the proposition: whether or not the strike was illegal was a matter for the jury to decide, not the Judge.[42]

History of Sedition Law: England

While it is a common law truism that questions of fact are for the jury to determine and questions of law are for the bench, it had become the rule in sedition cases only relatively recently because this branch of jurisprudence had not been originally developed in common law courts.

Sedition, used in the general sense since the beginning of the nineteenth century, is the crime of attacking a government, its institutions, or its officials, with words or writings, with the intent of bringing down the government

40. *Supra* n.14, at 32.
41. *Supra* n.14, at 59-60, 61-62. Emphasis mine.
42. See *supra* n.37, at 8-9 for a cogent argument on this point.

by unlawful means.[43] As such, it is a special form of libel, or defamation. These two concepts are at least as old as, if not older than, the primitive written law of the Germanic tribes which invaded and conquered England in the fifth century. At that time, the Salic law of the West Goths recognized libel as an offence,[44] and the oldest English law code, that of Kent in the seventh century, laid down a scale of fines for persons who were convicted of calling others bad names or "defaming" them.[45] In this era, when kingdoms changed sovereigns with each successive wave of invaders from the continent, there was only a rudimentary sense of the "king's peace" and little or no concept of a king's court which had overriding authority over all other tribunals in the realm.[46] Hence, cases of defamation, which would now be termed torts of libel and criminal libel, or sedition, were heard by territorial tribunals which included both laymen and clergy. These institutions developed subsequently into the county and hundred courts. Later, however, after it had been decreed the clergy were not to sit on secular benches but were to establish exclusively ecclesiastical tribunals, these courts increasingly assumed jurisdiction over the civil branch of defamation. This was so particularly when there was an element of blasphemy in the alleged libel.[47]

After the Conquest of 1066, county and hundred courts continued to function under the Norman kings, who changed very little in the way of law or judicial procedure when they assumed the regal power. There was one notable exception to this rule, however, and this was the practice of reserving certain pleas to their own court. That is to say, certain species of crime were either heard before the king and his council — the *Curia Regis* — or the sovereign would despatch a trusted member of the council to hear such pleas in a local court.[48] Gradually, the crown reserved more and more pleas to itself, and these eventually came to cover the whole spectrum of secular law — civil, criminal, and financial. With the increase in the number of cases heard and the diversification of the pleas, the need for experts in each type of jurisdiction arose. To meet the need, which came to be accentuated by the practice of hearing only one type of case in a particular chamber or hall,[49] various members of the *Curia Regis* became full-time judicial personnel with special experience in the law.[50] As the judiciary became more specialized, so did the process by which it administered the law; standardized procedures were adopted for hearing cases, and trial by jury became a feature of English legal practice.[51] In this way, the superior and appelate tribunals of England (which came to be known as the common law courts — Exchequer, Common Pleas and King's Bench), gradually evolved and assumed their final form by the end of the thirteenth century.[52]

43. *Supra* n.20, at 298.
44. 2 F. Pollock and F. W. Maitland, *The History of English Law* (2d ed. 1968) 537.
45. F.H. Attenbrough, (ed. and trans.), *The Laws of the Earliest English Kings*, (1963) 21.
46. *Supra* n.44, at 38-45.
47. *Ibid.*, at 40, 124, 538.
48. *Ibid.*, at 108 ff.
49. *Ibid.*, at 198.
50. *Ibid.*, at 191.
51. *Ibid.*, at 138-41.
52. *Ibid.*, at 190.

While these tribunals were in the process of formation, the *Curia Regis* continued to function as the monarch's chief adviser on all great matters. As its size diminished through loss of its members to permanent positions, it came to be called the "Council", and to act much as a cabinet does in a modern government; but a cabinet with extraordinary powers since it exercised judicial as well as executive functions.[53] When acting in its judicial capacity, and augmented by judges from the common law benches as and when required, the Council sat in the "Starred Chamber"[54] of Westminster Palace. Thus, it came to be known as the Court of Star Chamber. However, since it was not a court of common law, it could not, constitutionally, hear cases of treason, or other offences which involved loss of life or limb. But, its arm was long and it could and did give judicial direction to the common law courts, and generally concerned itself with: "Great transgressions against the public peace".[55] In the course of time, statutory misdemeanours such as maintenance, riot, forgery, fraud, and conspiracy came under its purview. All were prosecuted according to the special procedures of the Star Chamber, which differed greatly from those followed at common law in that the Court proceeded by inquisition and it did not hear cases before a jury.[56]

The establishment of these several courts was a concrete expression of the change in the concept of kingship which had occurred since the Conquest. When Edward I ascended the throne in 1272, a strong dynasty had been established and legitimized by over two centuries in power, and royal courts, to which lord and commoner alike were subject, enforced the king's peace throughout the realm.

Recognition of this fact was implicit in the extension made to the law of libel by a provision of the first *Statute of Westminster* in 1275, known as *Scandalum Magnatum*, which laid down that:

> Forasmuch as there have been oftentimes found in the Country Devisors of Tales, whereby discord or occasion of discord, hath many times arisen between the King and his People, or Great Men of this Realm; for the Damage that hath and may thereof ensue; It is commanded, That from henceforth none be so hardy to tell or publish any false News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm; and he that doth so, shall be taken and kept in Prison, until he hath brought him into the Court, which was the first Author of the Tale.[57]

In effect, this enactment created a new and separate offence; seditious libel, or that of broadcasting slanders or defamatory remarks which would endanger the peace of the realm.[58] Moreover, such a charge would be heard in the king's courts. The old branch of libel remained unchanged; i.e. all other defamation continued to be construed as a cause for action between principals.[59]

53. 1 Stephen, *supra* n.20, at 167.

54. *Ibid.*, at 168.

55. *Ibid.*, at 169.

56. 5 W. S. Holdsworth, *A History of English Law* (1945) 178-88. Holdsworth presents the received Whig view of the Star Chamber. For a more modern and balanced view of Star Chamber methods and procedures see T. G. Barns, "Star Chamber Mythology" (1961), 5 American Journal of Legal History 1-11; T. G. Barns, "Due Process and Slow Process in the Late Elizabethan — Early Stuart Star Chamber" (1962), 6 American Journal of Legal History 221-49, 315-46.

57. *Statute of Westminister, (1275)*, 3 Edw. 1, c. 34 (U.K.).

58. 3 Holdsworth, *supra* n.56, at 409.

59. *Ibid.*, at 410.

Although *Scandalum Magnatum* was twice re-enacted and amplified[60] to provide punishments for disseminators of libels, the statute could not have been very effective since Sir Edward Coke in his third *Institute* was able only to cite two rather obscure and unimportant medieval cases to illustrate his discussion of sedition. Both were prosecutions for written libel; the first in 1337 against Adam de Ravensworth for calling Richard Snowball "Roy de Raveners", and the other against John de Northampton for saying that Chief Justice, Sir William Scot, would not do the king's bidding. Coke remarked that these are "notable records", but, viewed against contemporary events, they seem very minor offences.[61]

For nearly two centuries thereafter — probably the most turbulent and unsettled centuries in the history of England — nothing can be found in the law reports relating to seditious libel. This may appear to indicate a gap in the records, but such is probably not the case because:

> . . . [F]or a long time the offences which were afterwards treated as seditious libels were dealt with in a different manner and with much greater severity, for though words were not regarded as an overt act of treason by themselves, writings were, if they were considered to display a treasonable intention, so that what would now be regarded at most as libels may in earlier time have been punished as treason.[62]

This view is supported by the fact that Henry VIII apparently saw fit to regularize the procedure in 1534 by enacting that "malicious publishing by express writing or words that the king [is] an heretic, schismatic, tyrant, infidel or usurper [is] . . . high treason."[63] Thereafter, a series of similar statutes, which remained in force only during the life of the enacting monarch, was given royal assent by his son and daughters. Thus, any written or spoken criticism of the sovereign or the institutions of government was likely to result in indictment under the statute in force at the time. A case in point was that of John Udall who was prosecuted in 1590 under an Act of Elizabeth I which laid down that it should be a felony to "devise, write, print or set forth any book . . . to the defamation of the queen of the stirring or moving or any rebellion."[64]

Udall, a Puritan divine, was indicted for being the alleged author of *Martin-Mar-Prelate*, a work which attacked the bishops of the established church.[65] While much of the evidence against the defendant was in the form of depositions, and much deposed to was hearsay, there can be little doubt that he was the author. On at least two occasions, the Trial Judge offered to free Udall if he would swear on oath that he had not written the book,[66] but Udall refused to say either that he was, or that he was not the author. He did so on the ground that if he denied authorship, his denial

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60. *Penalty for telling slanderous lyes, (1379)*, 2 Rich. 2, s.1, c.5 (U.K.); *Reporters of lies shall be punished by Council, (1389)*, 12 Rich. 2, c. 11 (U.K.).

61. Sir Edward Coke, *The Third part of the Institutes of the Laws of England*, (5th ed. 1671) 174.

62. *Supra* n.20, at 302.

63. *An Acte whereby divers offences may be made high treason, (1534), 26 Hen. 8, c.13 (U.K.). The paraphrase of this Act is from 1 M. Hale, History of the Pleas of the Crown* (1736) 112.

64. *An Acte against sedicious Words, (1581), 23 Eliz. 1, c. 2 (U.K.).*

65. (1590), 1 How. St. Tr. 1271.

66. *Ibid.*, at 1282.

would lead the authorities one step closer to the real author, with whose argument Udall agreed, since it did not attack the queen, but the bishops, and it was not written with a malicious intent. In what amounted to a rebuttal, the Judge said:

> . . . I will prove this Book to be against her majesty's person; for her majesty, being the supreme governor of all persons and causes in these her dominions, hath established this kind of government in the hands of the bishops, which thou and thy fellows so strive against; and they being set in authority for the exercising of this government by her majesty, thou dost not strive against them, but her majesty's person, seeing they cannot alter the government which the queen hath laid upon them.[67]

In addition to being a closely reasoned argument, this passage is a striking example of the prevailing political philosophy and of the relationship which existed between subject and sovereign. Earlier, in an address to the jurors, the Judge had remarked:

> You of the Jury have not to enquire whether he be guilty of the Felony, but whether he be the Author of the Book; for it is already set down by the Judgement of all the Judges in the land that whosoever was Author of that Book, was guilty by the statute of felony, . . .[68]

This judicial view of the function of the jury in a case of what is essentially seditious libel is typical of the time, and was probably greatly influenced by the rapid and comprehensive development of the law of sedition in the Court of Star Chamber under Henry VIII and his successors.

The interest of the Star Chamber in this branch of the law was caused, indirectly, by the development of the printing press, which gave a new importance to political writings. Prior to the middle of the sixteenth century, when cheap editions of books and pamphlets became available in England, a measure of control had been exercised over the written word by the associations of writers of court hand and illuminators antecedent to the Stationers Company. This organization, in which printers and publishers were joined, was incorporated by the crown in 1556[69] and given control of the trade with large powers to enforce its monopoly. It was expected, in return, to "assist the government in preventing the publication of treasonable, seditious, or heretical books . . ."[70] In spite of its powers, the Stationers Company was unable to suppress such literature completely. Therefore, the state assumed direct supervision of the trade through the instrument of the Court of Star Chamber. It exercised control by issuing detailed ordinances,[71] and by seeing to it that they were strictly enforced. To ensure enforcement, the Court developed the concept of defamation and assumed the right to prosecute in cases where its rules were defied. This was not primarily because of its interest in the printing trade, but because in its view the publishing of defamatory material "disturbed the security or the peace of the state".[72] In so doing, it came to treat libel as a crime and to punish it as such.[73]

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67. *Ibid.*, at 1286-87.
68. *Ibid.*, at 1283.
69. 6 Holdsworth, *supra* n.56, at 363.
70. *Ibid.*, at 364.
71. *Ibid.*, at 367.
72. *Supra* n.56, at 208.
73. 8 Holdsworth, *supra* n.56, at 336.

Star Chamber views on the matter were best expressed in Sir Edward Coke's report of *Pickering's case* or *The Case de Libellis Famosis*,[74] which he had prosecuted as Attorney General in Star Chamber when the Court was at the height of its power in 1605. His report distinguishes between written libels made against private persons, and those against magistrates or public figures. In the first case, libel deserved severe punishment because it would involve family and relations on both sides of the dispute, and thus tend to incite breaches of the peace. But, "*if it be against a magistrate, or other public person, it is a greater offence*; for it concerns not only the breach of the peace, but also the scandal of Government . . . "[75] In this section of the report, Coke has set down the essence of sedition; i.e. the uttering of written libels against public officials, or government. However, he has not defined what libel is, nor does such a definition appear elsewhere in the report, which continues:

> *Although the private man or magistrate be dead at the time of the making of the libel, yet it is punishable*; for in the one case it stirs up others of the same family, blood, or society, to revenge, and to break the peace, and in the other the libeller traduces and slanders the State and Government, which dies not.[76]

Finally, Coke said that:

> It is not material whether the libel be true, or whether the party against whom it is made, be of good or ill fame; for in a settled state of Government the party grieved ought to complain for every injury done him in an ordinary course of law, and not by any means to revenge himself, either by the odious course of libelling, or otherwise . . .[77]

While there is much to be said in favour of this latter provision from the point of view of the crown, Coke also makes the point, by implication, that a prime interest of the Star Chamber was to slow down or stop the public discussion that was to eventuate in civil war some twelve years after the Report was published.

Of course, the Court had a vested interest in smothering such discussion, because the Star Chamber, itself, and the judicial procedures it followed were a prime cause of discontent among members of Parliament and their supporters who opposed the Stuart kings and their governments. It will be recalled that cases in the Star Chamber were not heard before a jury, and that it proceeded by the inquisitorial method. Such practices, without any restraints, had caused the Court to degenerate and to become extremely arbitrary in its last days, and to inflict punishments on "gentlemen" that outraged Parliamentary supporters by their barbarity. One of the most prominent of these, William Prynn, was a barrister and learned antiquarian and, therefore, a valued opponent of the reforms introduced by Archbishop Laud. In 1632, he was charged with publishing the book *Histro-mastix*, or "Scourge for Stage Players". This was a polemic against "plays, masques, dancings, etc.," in which Prynn referred to actresses as "notorious who-

74. *The case of Scandalous Libels* (1605), 5 Coke's Rep. 125a, 77 E.R. 250.
75. *Ibid.*, at 125a (Coke's Rep.), 251 (E.R.).
76. *Ibid.* at 125b (Coke's Rep.), 251 (E.R.).
77. *Ibid.*. For a perceptive analysis of this case, and a thought-provoking discussion of the development of sedition during the Tudor-Stuart period, see R. B. Manning, "The Origins of the Doctrine of Sedition," in 12 *Albion* (1980), 99-101.

res".[78] Since Queen Henrietta Maria was known to have taken part in plays at the court, the Attorney General alleged, *inter alia*, that the defendant's remark was an innuendo that the Queen was a whore.[79] The Court found Prynn guilty and, in a long tirade, sentenced him to be disbarred, to lose his university degrees, to be fined 5,000 pounds, to be twice pilloried, and on each of these occasions to lose an ear. Finally, he was to be imprisoned for the rest of his life without pen, ink, paper, or books.[80]

Another result of Star Chamber procedure, which is not immediately apparent but which is of vital importance in the development of the law of sedition, is that, since there was no jury, the Court alone decided all questions of law and fact.[81] For example, in the case of William Prynn, the charge, shorn of verbiage, was that he published a book of seditious libel with a malicious intent. In this case, the Court decided as questions of fact that the book had been published with a malicious intent, and that the innuendoes therein meant what the prosecution alleged them to mean. In addition, it decided, as a question of law, that the book was a seditious libel. In all probability, it is this latter fact which explains why Coke's report of 1628 was silent on the definition of libel. If the judges, who were chosen agents of the crown, were to decide in each case of alleged seditious libel whether or not the writing complained of was seditious, then it would be wise to give them as much latitude as possible and not to circumscribe them with a set definition. In any event, this lack of circumscription was Star Chamber practice, and it had already been taken up by the common law judiciary, as evidenced by the direction of the bench to the jury in the case of *R.* v. *Udall.*[81a]

When the civil war did come, one of the first actions of the Long Parliament was to abolish "the Court commonly called the Star Chamber."[82] With it went the Ordinances for regulating the press, and the Court's special judicial procedures. However, it was not long before the Ordinances appeared in a new guise as regulations of the Long Parliament, and after the Restoration, the *Licensing Act* of 1662 gagged the press "as it has never been gagged before or since."[83] In part, it provided that

> ... [N]o person or persons whatsoever shall presume to print ... any heretical seditious schismatical or offensive Bookes or Pamphlets wherein any Doctrine or Opinion shall be asserted or maintained which is contrary to Christian faith or the Doctrine or Discipline of the Church of England or which shall or may tend or be to the scandal of Religion or the Church or the Government or Governors of the Church State or Common wealth or of any Corporation or particular person or persons whatsoever ...[84]

The result of the Act was that seditious libel was now defined as an offense punishable by the common law, although no scale of punishment was laid

78. *R.* v. *Prynn* (1632), 3 How. St. Tr. 562.
79. *Ibid.*
80. *Ibid.*, at 576.
81. *Supra* n.73, at 342.
81a. *Supra* n.65.
82. *An Act for taking away the court commonly called the Star Chamber, 1640*, 16 Charles I, c. 10 (U. K.).
83. *Supra* n.69, at 373.
84. *An Act for regulating of Printing and Printing Presses, (1663)*, 14 Charles II, c.33 (U.K.).

down. This allowed judges to award severe and sometimes outrageous punishments.[85] Moreover, the act had an enforcer, one L'Estrange who, with the help of justices of the peace and others, licensed all publications before they were printed, which ensured that any such books or pamphlets were politically innocuous.[86] On the other hand, if a work containing seditious material had been printed illegally, its author, printer, and publisher were all placed in double jeopardy because the crown could proceed against them not only for illegal printing, but also for sedition.

Similarly, Charles II's common law judiciary took over the procedure of enforcing the law of seditious libel where the Star Chamber had left off in 1640. Coke's rules still applied: truth was no defence, and a libelled person's death was no bar to prosecution.[87] Star Chamber procedure still applied with the Court having the right to decide whether or not any writings complained of were seditious. Therefore, to all intents and purposes, it would appear that the law of seditious libel had been strengthened, and that it would be administered by common law judges in much the same manner as it had been before the Revolution. In general, such was the case, and trials for sedition became more frequent,[88] particularly during the reign of James II, when many offenders were unlucky enough to appear before the "hanging judge", Mr. Justice Jeffreys.

But, in fact, there was a fundamental difference: in the common law courts, all prosecutions had to be heard before a jury. Thus, in each and every action, the judge had to explain to the jurors that their function was to decide whether or not the words or writings complained of by the Attorney General had been published or spoken by the accused to some other person, and whether the alleged innuendoes meant what the prosecution said they meant. They were not to concern themselves with the question of whether or not the material was seditious, for only the bench could decide that.[89]

A typical case of the time occured when Henry Carr, a printer, was indicted in 1680 for publishing a book or a collection of broadsheets entitled *The Weekly Packet of Advice from Rome.*[90] It was alleged by the Attorney General that Carr attempted to scandalize and bring into contempt the government and the judiciary by accusing them of corruption, in the following words:

> There is lately found out by an experienced physician, an incomparable medicament, called 'The Wonder-Working Plaister,' truly Catholic in operation, somewhat of kin to the Jesuits Powder, but more effectual. The virtues of it are strange and various. It will make justice deaf as well as blind, takes out spots out of deepest treasons, more cleverly than Castile-soap does common stains. It alters a man's constitution in two or three days, more than the virtuosos [sic] transfusion of blood in seven years. Is a great alexipharmic, and helps poisons, and those that use them. It miraculously exalts and purifies the eye-sight, and makes people

85. *Supra* n.20, at 313-14.
86. *Supra* n.69, at 370-73.
87. *Supra* n.73, at 339.
88. *Supra* n.20, at 309, 311, 313.
89. *Ibid.*, at 312.
90. *R.* v. *Carr* (1680), 7 How. St. Tr. 1111.

> behold nothing but innocence in the blackest malefactors. It is a mighty cordial for a declining cause, stifles a plot as certainly as the itch is destroyed by butter and brimstone. In a word, it makes fools wise men, and wise men fools, and both of them knaves. The colour of this precious balm is bright and dazzling, and being applied privately to the fist in decent manner, and a competent dose, infallibly performs all the said cures, and many others not fit here to be mentioned.[91]

In his opening remarks, the Recorder, Judge Jeffreys, made it clear what he considered to be sedition, and the duties of the jury in the case before them:

> ... [I]t is the opinion of all the judges of England that it is the law of the land, that no person should offer to expose to public knowledge any thing that concerns the government, without the king's immediate licence. Now we are to try whether this person exposed this thing to public knowledge, and that is the matter, gentlemen, that you are to try. The other is the business of the court; we are to say whether if we prove the fact, this man is guilty of punishment . . . .[92]

Jeffreys' latter comment was re-asserted more fully by Chief Justice Scroggs in his charge to the jury:

> If you find him guilty, and say what he is guilty of, we will judge whether the thing imports malice or no. Sir Francis Winnington [Carr's Counsel] hath told you there are some things that do necessarily imply malice in them. If this thing doth not imply it, then the judges will go according to sentence: if it doth, so that it concerns not you one farthing, whether malicious or not malicious, that is plain.[93]

Needless to say, since all the jury had to decide was whether Carr actually published the book — and there was ample evidence of this — he was found guilty. Eight years later, the same point of view was expressed by the bench in *R.* v. *Samuel Johnson*.[94] When the accused, who was convicted of publishing two seditious libels, asked that the jury be allowed to consider if "the papers" were seditious, he was told, "the jury ought to consider it only as to the matter of fact, whether he was guilty of writing or publishing them, and that the rest lay in the breast of the court to consider."[94a] Johnson was sentenced to three appearances in the pillory, to be whipped from Newgate to Tyburn and to "pay 500 marks to the king, and to lie in prison till it was paid".[95]

Although the judiciary asserted its right to decide what was seditious, as time went by it tended to do so with less authority. One reason may have been because the same judges who presided at sedition trials also heard torts of written defamation as private actions.[96] It will be recalled that such actions had been common since the dawn of legal history, but that they had been heard in local courts, or, later, before ecclesiastical tribunals. In the early sixteenth century, common law courts began to offer redress for libel and immediately became the preferred tribunals in which to bring such actions because, unlike the bishops, who could only award spiritual penal-

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91. *Ibid.*, at 1112-13.
92. *Ibid.*, at 1115.
93. *Ibid.*, at 1128.
94. (1668), 11 How. St. Tr. 1339.
94a. *Ibid.*, at 1349-50.
95. *Ibid.*, at 1352.
96. *Supra* n.73, at 346.

ties, common law judges could award damages and enforce their judgement.[97] In fact, the remedy in secular courts became so popular that the judiciary quickly took to discouraging torts for libel by applying rigorous, legal, and strictly innocent interpretations to the words which a plaintiff alleged to be libellous, if the words would support such an interpretation. Therefore, if the words of a plea could be so construed, the court dismissed the action.[98] Thus, on the one hand, in the case of seditious libel, a judge exercised wide latitude in deciding what was seditious, while on the other hand, when hearing libel as a tort, he became bound to place an innocent interpretation on alleged defamation, if such an interpretation could be found. Moreover, unlike Coke's rules for seditious libel, truth was a defence in the tort of libel, and the death of the defamed person ended the action.[99] "Naturally", as W.S. Holdsworth observed, "these cognate bodies of law, being developed by the same tribunals, exercised a reciprocal influence on one another; and our modern law is the result."[100]

A second reason for the gradual change in judicial tone was that the (press) *Licensing Act* was allowed to expire in 1694.[101] The reasons for its demise are many and varied, but prime among them was the fact that the Whig opposition was adamantly opposed to any statute which, like the *Licensing Act*, gave substantial power to the crown and, at the same time, interfered with the freedom of the individual. Moreover, unlike the legislation which followed the expiration of the Star Chamber Ordinances in 1640, no law of censorship or libel was enacted to replace the *Licensing Act*. Consequently, any publication was legal unless the judgement of a court, after the fact of publication, declared it to be libel, seditious or otherwise. However, since the courts were guided by precedent, the situation was not materially altered in this respect.

Still another reason was the shift in public opinion regarding the relationship of the subject to the state that was beginning to gather force in the aftermath of the "Glorious Revolution" of 1688-9.[102] In the case of sedition, this came to be manifested by the reluctance of a jury, usually under the spell of a defence lawyer's eloquence, to accept judicial direction as to its function. Heretofore, the essence of the crime of sedition had been the act of publishing; i.e. so far as the jury was concerned. At the beginning of the eighteenth century, however, the idea began to be advanced that "the seditious, defamatory or otherwise malicious intention with which a libel was published, was the essence of the offence, and so a matter of fact for the jury."[103]

One of the first cases in which a change in judicial attitude is detectable occurred when John Tutchin was convicted in 1704 for seditious libel. He

97. *Ibid.*, at 335.
98. *Ibid.*
99. *Ibid.*, at 347.
100. *Ibid.*, at 336.
101. *Supra* n.69, at 375.
102. *Supra* n.73, at 345.
103. *Ibid.*

wrote a series of articles which charged that the government was corrupt and that the navy was mis-managed.[104] In contrast to his predecessors on the bench, the Trial Judge, in his charge to the jury, dwelt at length on what, in his opinion, constituted seditious libel, and then invited jurors to agree with his view.

> Now you are to consider, whether these words I have read to you, do not tend to beget an ill opinion of the administration of the government? To tell us, that those that are employed know nothing of the matter, and those that do know are not employed. Men are not adapted to offices, but offices to men, out of a particular regard to their interest, and not to their fitness for the places; this is the purport of these papers.[105]

However, having extended the invitation, and in duty bound, he concluded: "I must leave it to you; if you are satisfied that he is guilty of composing and publishing these papers . . . you are to find him guilty."[106]

The next trial of note occurred over a quarter of a century later, in 1731, when Richard Francklin was convicted of publishing "A letter from the Hague" in which the government was charged with incompetence and bad faith.[107] Francklin, who published the *Craftsman*, a Tory party journal, was a public figure of some note, and his trial was well attended by members of parliament.[108] In this case, as in all others before it, the judge re-affirmed his right to decide whether "defamatory expressions amount to libel or not" since:

> This does not belong to the office of the jury, but to the office of the Court; because it is a matter of law, and not of fact; and of which the Court are the only proper judges; and there is redress to be had at another place, if either of the parties are not satisfied . . .[109]

While the last phrase may have been aimed at the parliamentary spectators, it is not unreasonable to speculate that it expressed the judge's personal opinion, too, since recourse eventually had to be made to legislation to settle the matter.

While the trials of Tutchin and Francklin give some insight into the thinking of the judiciary, they are silent concerning the opinion of the jurors. In a case heard in 1752, the jury's opinion is unquestionable. That year, William Owen, a bookseller, was indicted for "Printing and Publishing a book titled 'The Case of Alexander Murray, esq.' "[110] for which it was alleged that Owen libelled the House of Commons. The gist of the article was that Murray had been unjustly imprisoned by the House of Commons for an alleged violation of electoral procedure. The first surprise in the case was the argument of the defence counsel who told the jurors that they should acquit Owen on the grounds that although he published the work, he did so without malicious intent: "there is no crime proved, no malicious intent, no seditious design; therefore [Owen is] not proved guilty of the

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104. *R. v. Tuchin* (1704), 14 How. St. Tr. 1095 at 1097.
105. *Ibid.*, at 1128.
106. *Ibid.*, at 1129.
107. *R. v. Francklin* (1731), 17 How. St. Tr. 625.
108. *Ibid.*, at 630.
109. *Ibid.*, at 672.
110. *R. v. Owen* (1752), 18 How. St. Tr. 1203.

crime laid against him."[111] In fact, the defence admitted publication which, under the rules then in effect, was an admission of guilt, but nevertheless urged acquittal because publication was not made with an evil intention. Of course the Judge directed the jury to find Owen guilty since "he thought the fact of publication was fully proved", after which

> The jury went out and stayed about two hours; when they came into the court, the foreman answered for the rest, and when the question was put, he said, Guilty; Not Guilty, Not Guilty my lord — the first word guilty being said by mistake; upon which there was a loud huzza; and the jury went away. But, at the desire of the attorney-general, they were called into court again, and asked this leading question, viz. 'Gentlemen of the Jury, do you think the evidence laid before you, of Owen's publishing the book by selling it, is not sufficient to convince you that the said Owen did sell this book?' At which the foreman appeared a good deal fluttered; and the judge repeated the question; upon which the foreman, without answering the question, said, 'Not Guilty, Not Guilty;' and several of the jurymen said, 'That is our verdict, my lord, and we abide by it.' Upon which the Court broke up; and there was a prodigious shout in the hall. The attorney-general desired more questions might be asked, but the judge would not, neither would the noise permit it.[112]

A somewhat different approach was taken by the Jury which heard *R.* v. *Woodfall*, in which the defendent was charged with publishing "Junius's Letter to the King" in 1770. As usual, the Trial Judge told the jurors that they must find Woodfall guilty of seditious libel if they were convinced he had published the letter. In fact, their verdict was "Guilty of printing and publishing only",[113] which was received in enigmatic silence by the Judge. No punishment was awarded and a second trial ordered by the court of King's Bench was not proceeded with.[114]

A similar verdict was brought in by the jury in the celebrated case of the Dean of St. Asaph's which led directly to the enactment of a statute which removed all doubt as to the duties of judge and jury in sedition trials. The Dean, William Shipley, published a pamphlet containing a fictitious dialogue between a farmer and a gentleman, in which the Attorney-General alleged that rebellion against the king was advocated.[115] (In fact, the pamphlet had been written by the Dean's brother-in-law, Sir William Jones, a respected lawyer, in order to advance the parliamentary reform movement. As such, the work had become well known and popular with the public.[116]) The defence counsel was the famous English advocate, Thomas Erskine, who argued that the writing was innocent of any seditious intent, and that the jury should decide the question.[117] The bench repeated the familiar formula to the jurors, but they brought in a verdict of: "Guilty of publishing *only*"[118] and thereby precipitated a scene unprecedented in English legal history. When the jury announces its finding in a criminal proceeding, it is usual for the judge to discharge the prisoner immediately, to pronounce sentence, or to remand the convicted person to another day for sentencing.

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111. *Ibid.*, at 1225.
112. *Ibid.*, at 1228.
113. *R.* v. *Woodfall* (1770), 20 How. St. Tr. 895, at 903.
114. *Ibid.*, at 921.
115. *R.* v. *Dean of St. Asaph* (1784), 21 How. St. Tr. 847.
116. *Supra* n.20, at 330.
117. *Supra* n.115, at 919.
118. *Ibid.*, at 950.

In this case, the judge, jury, and Erskine wrangled over the verdict for what must have been many minutes since the transcript covers four columns of print, in the course of which the following exchange took place:

> Mr. *Erskine*. Would you have the word *only* recorded?
>
> *One of the Jury*. Yes.
>
> Mr. *Erskine*. Then I insist that it shall be recorded.
>
> Mr. Justice *Buller*. Mr. Erskine, sit down, or I shall be obliged to interpose in some other way.
>
> Mr. *Erskine*. Your lordship may interpose in what manner you think fit.[119]

The upshot of all this was that Erskine moved for a new trial, and in so doing "occasioned the first and indeed the only solemn judicial discussion which ever took place on the doctrines connected with the old law of political libels."[120] In a speech, remarkable for its eloquence, the advocate argued that the gist of the crime of libel was the intent of the author. In any other criminal prosecution, a jury was empaneled to decide on all questions of fact in a trial, and a prime issue of fact, was the motivation or intent of the accused. Therefore, it followed that there was no question of law in a case of seditious libel, and that the jury alone should be charged with the responsibility of deciding whether or not a given writing was seditious.[121] The counter arguments of the crown law officers were predictable and were based wholly on precedent. In a further hearing, Erskine developed his argument before Lord Chief Justice Mansfield who later, with fellow members of the bench, reviewed the whole history of libel and came down squarely against Erskine's interpretation.[122] However, the court discharged the Dean on the grounds that his indictment had been improperly drawn.

In the bitter aftermath of the American Revolution, when king and government were at the nadir of their unpopularity, the Dean's discharge, after a court battle lasting almost two years, was greeted with acclaim by a public which had followed his trial with considerable interest. Both during and after the trial, this interest had been stimulated by the wide circulation of Erskine's speeches, which were distributed with the express intention of attracting the public attention to the libel bill then in preparation. "Fox's *Libel Act*", as the bill became known, was enacted in 1792, after a prolonged delay particularly in the House of Lords where, although the Law Lords unanimously upheld the existing state of the law during the debate on the bill, the House passed it nevertheless.[123] The Act overruled all previous common law precedents and established the principles advocated by Erskine in the following words:

> Whereas Doubts have arisen whether, on the Trial of an Indictment . . . for the making or publishing any Libel, where an issue [is] joined between the King and the Defendant . . . on

119. *Ibid.*, at 954.
120. *Supra* n.20, at 333.
121. *Supra* n.115, at 756-70.
122. *Ibid.*, at 1033-41.
123. See the appendix to *R.* v. *Stockdale* [(1798), 22 How. St. Tr. 237 at 294-305] which is an extract from the *Journal* of the House of Lords and which records the debate and vote on the *Libel Act*.

the Plea of Not Guilty pleaded, it be competent to the Jury impanneled to try the same to give their verdict upon the whole Matter in Issue: Be it therefore declared and enacted . . . That, on every such Trial the Jury sworn to try the Issue may give a general Verdict Indictment and Information; and shall not be required or directed by the Court or Judge before whom such Indictment or Information shall be tried to find the Defendant or Defendants Guilty merely on the Proof of the Publication by such Defendant or Defendants of the Paper charged to be a Libel, and of the sense ascribed to the same in such Indictment or Information.

Provided always, That, on every such Trial the court or judge before whom such Indictment or Information shall be tried shall, according to their or his Discretion, give their or his Opinion and Directions to the Jury on the Matter in Issue between the King and the Defendant or Defendants in like Manner as in other Criminal Cases.[124]

Taken at face value, Fox's *Libel Act* merely removes responsibility for a specific decision from judge to jury. Fundamentally, however, it has much greater significance because it articulated the major shift in the relationship between the state and the subject which had been evolving over the centuries. As Mr. Justice Stephen has pointed out, two different views may be taken of this relationship:

If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken his mistakes should be pointed out with the utmost respect, and that whether mistaken or not no censure should be cast upon him likely or designed to diminish his authority.

If on the other hand the ruler is regarded as the agent and servant, and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because being a multitude he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms a part. He is finding fault with his servant. If others think differently they can take the other side of the dispute, and the utmost that can happen is that the servant will be dismissed and another put in his place, or perhaps that the arrangements of the household will be modified. To those who hold this view fully and carry it out to all its consequences there can be no such offence as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitements to such offences, but no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal.[125]

From what has gone before, it is obvious that from the conception of the idea of sedition, the law was framed according to the first of these two views. Indeed, in early times, treason and sedition tended to be synonomous. But, with the advent of absolute monarchs and the work of the Star Chamber, the latter became clearly differentiated from the former and, to paraphrase Coke, was defined as written condemnation of a public official, the laws, or the government. Thereafter, the ideas of the government changed very little, and very slowly. On the contrary, the attitude of the public at large, who could carry on no meaningful public discussion of political questions in safety, underwent a radical change. Eventually, in 1792, the public view prevailed.

From that time on, Stephen's second view has been increasingly accepted by a large section of the public, both legal and private, as the proper rela-

124. *An Act to Remove Doubts respecting the Functions of Juries in Cases of Libel, 1792*, 32 Geo. 3, c.60 (U.K.).

125. *Supra* n.20, at 299.

tionship between the state and its subjects. In terms of sedition trials, this was not immediately apparent however, because Britain became embroiled in war with revolutionary France soon after the *Libel Act* became law. Moreover, by an ironic twist, the conviction rate rose also. But, this was due to the actions of juries, not judges. Although many of the indictments were for "excusable squibs",[126] the tenor of the times was such that juries almost always brought in verdicts of guilty in sedition cases. And this, in spite of the fact that the majority of the judiciary not only observed the letter of the law by emphasizing the fact that the jurors were to convict only if they found the words or writings complained of to be illegal incitements to violence and thus published with a seditious intent, but who often leaned over backwards, as it were, and urged the jury to acquit.[127]

One of the manifestations of the freer political atmosphere, as the eighteenth century progressed, was the development of organized, voluntary, political societies, whose purpose was to effect political change by legal and constitutional means. There was no precedent for these organizations because, as Stephen points out, in former times "the great questions which agitated the country hardly admitted of such associations."[128] One can imagine, for example, the reaction which would have greeted an organized group in 1700, which publicly advocated the peaceful reinstatement of James II. In any event, such societies began to flourish and to be legitimized by attracting some of the great men of the day to their ranks. Inevitably, as the excesses of the French Revolution were reported, some groups began to advocate more sophisticated and forceful means for constitutional change. The government responded by becoming increasingly repressive and proceeded against the offenders in the conventional way — by laying charges of treason against them. These failed, because the accused were obviously not advocating treason in the usual sense (i.e. by betraying their country, or assisting its enemies), but were only urging a change in government by means alleged to be unconstitutional by crown prosecutors.[129] Perhaps the most famous case of this nature is *R.* v. *Horne Tooke* (1794).[130] To cope with this unprecedented situation, the crown law officers developed the modern crime of seditious conspiracy.[131] In general, the offence was laid down by quasi-judicial legislation as an agreement between persons to bring about a change in government by unlawful means, and to propogate their view to others by means of speeches and writings.[132] The first trial for seditious conspiracy was heard in 1795,[133] and the accused were convicted on evidence similar to that which had earned earlier defendants acquittal on charges of treason.[134] Hence, since it was obviously a specific for a new

126. *Ibid.*, at 363.

127. See for example, *R.* v. *Dufferin and Lloyd* (1792), 22 How. St. Tr. 317 at 366; and *R.* v. *Winterbotham* (1792), 22 How. St. Tr. 823 at 875.

128. *Supra* n.20, at 377.

129. *Ibid.*, at 274-77.

130. (1794), 25 How. St. Tr. 1. But see generally: the treason trials in 25 How. St. Tr., to see how public opinion had swung against charges of treason.

131. *Supra* n.20, at 298, 277.

132. *Ibid.*, at 377.

133. *R.* v. *Henry Redhead* (1795), 25 How. St. Tr. 1003.

134. *Supra* n.20, at 378.

category of offence, the law of seditious conspiracy was rapidly developed and, towards the end of the nineteenth century, became of more practical importance than that of seditious libel.[135]

While the *Libel Act* had caused a radical change in the prosecution of sedition, it had not defined the crime. In fact, indictments were still drawn up, more or less, under Coke's rules, but with an added proviso; i.e. seditious libel was defined as "blame of public men, laws or institutions, published with an illegal intention on the part of the publisher."[136] This was changed and made more specific by an enactment of 1819[137] which, in a roundabout way, gave the crime a statutory definition similar to that in effect today. In part, it provided that a judge could, after convicting a person, seize all copies of the offending publications, and it describes such writings as being:

> ... [A]ny seditious Libel, tending to bring into Hatred or Contempt the Person of His Majesty... or the Government ... by Law established ... or to excite His Majesty's Subjects to attempt the Alteration of any Matter in Church or State ... otherwise than by lawful Means ...[138]

While, in general, the judges had hewed to the letter of the law of the *Libel Act* during the Napoleonic Wars, and it had been for the most part juries which had become "*ex post facto* censors of the press",[139] the situation began to change early in the post war period. In the new conditions of peace, Britain lost many of her markets to Continental entrepeneurs. In turn, this exacerbated the situation caused by the Luddite mobs destroying new machinery and by rising prices of food during the latter years of the war which, of course, put many more Britons out of work.[140] Their numbers were considerably augmented by thousands of demobilized servicemen. The consequent economic distress began to manifest itself as political unrest which was characterized in part by large rallies and meetings of the poor and unemployed at which they gave utterance to their discontent. In the face of such behaviour, the government took fright and prolonged and intensified the repressive measures instituted during the war. Among these was the practice of laying charges of seditious conspiracy against individuals who articulated the view of such assemblages.[141] But, in its fright, the government was undiscriminating in its view of the character of the meetings. Hence, those who had addressed peaceful assemblages in order to draw up a petition to Parliament for redress, were given the same treatment as those who had incited mobs to violence and riot.[142]

It is at this point that a divergence of view and behaviour began to be manifested between elements of the bench in their attitudes to seditious offences. By now the *Libel Act* had been in effect for a quarter of a century and, whether they were creatures of habit or genuinely believed that the

135. *Ibid.*, at 380.

136. *Ibid.*, at 359.

137. *An Act for the more effectual Prevention and Punishment of blasphemous Libels, 1819*, 60 Geo. 3, c.8 (U.K.).

138. *An Act for the more effectual Prevention and Punishment of blasphemous Libels, 1819*, 60 Geo. 3, c.8, s.1.

139. *Supra* n.20, at 366.

140. 12 J. Stephen Watson, "The Reign of George III 1760-1815", in *The Oxford History of England* (1960) 520ff.

141 13 E.L. Woodward, "The Age of Reform 1815-1870", in *The Oxford History of England* (1962) 60ff.

142. *Ibid.*, at 63.

new procedure was more liberal and humane, many legalists continued to apply the law impartially. On the other hand, there were those who did not, who saw themselves, perhaps, as patriots or defenders of the state — the *status quo* — and who went back to the old ways, albeit more circumspectly.

A case in point was *R.* v. *Hunt* in 1820.[143] Hunt,[144] a man of humane and advanced political views and a powerful orator, was invited to address a rally in St. Peter's Field, Manchester:

> On 16 August some 50,000-60,000 people assembled at the meeting-place, carrying banners with revolutionary inscriptions. There was no disorder; unfortunately, the magistrates, who had brought special constables and detachments of the Lancashire and Cheshire Yeomanry, lost their nerve, and ordered Hunt's arrest. The soldiers who tried to reach him were pressed by the mob and drew their sabres. A troop of hussars came to their rescue and caused a general panic, in which eleven people were killed (including two women) and about four hundred wounded.[145]

This was the infamous "Peterloo Massacre" for which Hunt was indicted for seditious conspiracy, convicted, and sentenced to two-and-a-half years imprisonment.[146] Evidence was given to show that Hunt urged the assembly to be peaceful;[147] nevertheless, Bayley J.,[148] refused to admit evidence to show that the military contingent began the bloodletting.[149] While the Judge's action may have been technically correct, the irony of the situation is apparent: the man who was advocating redress of grievances by constitutional means was put in the dock, while the officials responsible for the riot were congratulated by the crown.[150] On appeal, King's Bench was hostile to Hunt, and in the course of his remarks, Abbott C.J.K.B., who delivered the unanimous judgement of the court, upholding the conviction, said that:

> Having disposed of these objections as matters of law, I shall take no further notice of the observations addressed to us upon what has been called misdirection in the effect given to this or that particular point, either of proof adduced or of proof supposed to be deficient, than to say generally, that it appears to me that no observation was made to the Jury unsuitable to the matter to which it was applied; that the whole effect of the evidence was most properly left to them, and that they were not desired or directed to draw, nor have in fact drawn, any presumption or conclusion against the defendants, which was not well warranted by the evidence adduced against them.[151]

While the Chief Justice, no doubt, felt justified in refusing to consider possible misdirection by the Trial Judge, there were many people in and out

143. (1820), 1 St. Tr. (N.S.) 171.

144. Henry Hunt (1773-1835): son of wealthy farmer; sent to local school from which he absconded; led an adventurous life, joined the army in which he was imprisoned in 1800 for challenging his colonel to a duel; imbibed his political view from Horne Tooke and William Cobbet; after his release from imprisonment in 1820, he continued active in politics; elected M.P. in 1830.

145. *Supra* n.141, at 62.

146. *Supra* n.143, at 176, 488, 494.

147. *Ibid.*, at 232-33.

148. John Bayley (1763-1841): educ. Eton, Cambridge, and Gray's Inn (1783); called to bar 1792; wrote legal texts and law reports; appointed to King's Bench, 1808; appointed Baron of Exchequer 1830, resigning in 1834 after which he was knighted. Bayley was impartial and had no political bias, according to Edward Foss, *Judges of England 1066-1870* (1870) 63.

149. *Supra* n.143, at 201, 230-31.

150. *Supra* n.145.

151. *Supra* n.143, at 493-94.

of Parliament who disagreed with him and who said so in no uncertain manner.[152]

Similarly, in a case which arose from the Peterloo Massacre, Sir Francis Burdett, a radical M.P., was indicted, tried and found guilty of publishing a seditious libel. The material in question was a pamphlet in which Burdett criticized the authorities for their conduct at St. Peter's Field, and it was alleged that the opinions expressed in the pamphlet constituted an incitement to riot. He was fined two thousand pounds and sentenced to imprisonment for three months.[153] At the trial in the court of first instance, the judge, Mr. Justice Best,[154] told the jury on at least two occasions that the document in question was a seditious libel; but then sitting as a member of King's Bench, to which the case was appealed, he elaborated on his remarks to the jury and in so doing demonstrated how warped the judicial view was with respect to the *Libel Act.*

> It must not be supposed that the Statute of George the Third made the question of libel a question of fact. If it had, instead of removing an anomaly, it would have created one. Libel is a question of law, and the Judge is the judge of the law in libel as in all other cases, the jury having the power of acting agreeably to his statement of the law or not. All that the statute does is to prevent the question from being left to the jury in the narrow way in which it was left before that time.[155]

On the other hand the charge to the jury in *R.* v. *Collins* (1836) was characterized by a much broader and more tolerant outlook. At this time there was a severe economic depression, and a crowd of 10,000 or more gathered in the Bull-Ring in Birmingham to protest the new poor law, which had prohibited outdoor relief (i.e., subsidization of sub-standard wages by local authorities).[156] A riot ensued which was put down, in part, by London policemen who had been taken to Birmingham and sworn in as special constables. After the riot, an otherwise obscure individual named John Collins was indicted for seditious libel in which it was alleged that he published a broadsheet which described the police as "a bloodthirsty and unconstitutional force," and went on to say that "the people . . . are the best judges of their own power and resources to obtain justice."[157] At the conclusion of his charge, Littledale J.,[158] told the jury:

> . . . [I]f the object of it [the broadsheet] were merely to shew that the conduct of the police was improper, that would not be illegal, because every man has a right to give every public matter a candid, full, and free discussion. If the language of this paper was intended to find

152. R. Walmsley, *Peterloo: the Case Reopened* (1969). See especially Chapter XXI, "A Clamourous Parliament and the Trial of Hunt," pp.334-59, for an analysis of aspects of the trial.

153. *R.* v. *Burdett (1820)*, 1 St. Tr. (N.S.) 1 at 170.

154. William Draper Best (1767-1845): educ. Oxford and Middle Temple; called to the bar 1789; able and eloquent but flawed barrister; favourite of Prince of Wales, later George IV; appointed to King's Bench in 1818; promoted C.J.C.P. 1824 and raised to the peerage as Baron Wynford in 1829. Foss says of Best that he was "superficial in legal knowledge . . . [and] was a zealous supporter of conservative principles [who] strenuously opposed the Reform Bill [1832] through all its stages. As a judge he was apt to form hasty and questionable opinions, and when presiding at Nisi Prius to lean in his summing up so much to one side that he was nicknamed the 'judge advocate.' " *Judges of England*, pp.87-88.

155. *Supra* n.153, at 51, 55, 119.

156. *Supra* n.20, at 374.

157. *R.* v. *Collins* (1839), 9 Car. & P. 456 at 457; 173 E.R. 910 at 911.

158. Joseph Littledale (1767-1842): educ. Cambridge and Gray's Inn where he practiced as a special pleader; admitted to the bar 1798; practiced as a barrister until 1824; that year knighted and appointed to King's Bench; resigned 1841. Littledale was a lawyer without political ambition or influence, but was a most able judge, highly respected in the profession. Foss, *Judges of England*, p.410.

> great fault with the police force, even that might not go beyond the bounds of fair discussion; and you have to say, looking at the whole of this paper, whether or not it does so. With respect to the first resolution, if it contains no more than a calm and quiet discussion, allowing something for a little feeling in men's minds (for you cannot suppose that persons in an excited state will discuss subjects in as calm a manner as if they were discussing matters on which they felt no interest), that would be no libel; but you will consider whether the kind of terms made use of in this paper have not exceeded the reasonable bounds of comment on the conduct of the London police. With respect to the second resolution . . . you are to consider . . . whether they meant . . . to excite the people to take the power into their own hands, and meant to excite them to tumult and disorder . . . the people have a right to discuss any grievances that they have to complain of, but they must not do it in a way to excite tumult.[159]

However, there was not much evidence of this humane and reasonable approach in the treatment meted out to Daniel O'Connell in 1843 by the Court of the Queen's Bench in Dublin. He was charged, *inter alia*, with seditious conspiracy.[160] The accused, who was opposed to the legislative union of Great Britain and Ireland in 1801 had, over the years, made numerous attempts to have the Union repealed by constitutional means similar to those by which he had been largely responsible for the enactment of the *Catholic Emancipation Act* of 1829.[161] His latest and most successful plan was to politicize the Catholic population of Ireland in a succession of monster rallies at which he explained to them the strictly constitutional means by which repeal might be effected. Prime Minister Peel grew alarmed at O'Connell's successful agitation and, in October 1843, when he called a mass meeting at Clontarf:

> . . . [T]he meeting was forbidden, and O'Connell told his followers to obey orders . . . Peel took a second step. O'Connell was arrested and brought to trial on a long count. The jury was packed [i.e., in Dublin, in 1843, there was not a single Roman Catholic on the jury[162]], and although there were technical faults in the indictment the verdict went in favour of the government."[163]

The convicted prisoner was sentenced to one year in prison and was ordered to pay a fine of two thousand pounds. He appealed in 1844 and the verdict of the Law Lords, of whom the Whigs were in the majority, was in his favour.[164] In his judgement, Lord Campbell, at length, and in the most graceful language, laid the blame on the Court of Queen's Bench for the packing of the jury.[165] In any case, the government had won: O'Connell's campaign was halted with dire effects for the Irish problem, and his health was impaired by the long trial. He died in 1847.

Thirty years later, what is perhaps the leading case in common law on the definition of sedition was heard before Cave J.,[166] in 1886. John Burns[167]

159. *Supra* n.157, at 460-61 (Car. & P.), 912 (E.R.).
160. *R.* v. *O'Connell* (1843), 5 St. Tr. (N.S.) 2 at 14.
161. *Roman Catholic Relief Act*, (1829), 10 Geo. 4, c. 7 (U.K.).
162. 14 *Dictionary of National Biography* (1909) 831.
163. *Supra* n.141, at 335-36.
164. *Ibid.*, at 336.
165. *R.* v. *O'Connell* (1839), 5 St. Tr. (N.S.) 2 at 901-903.
166. Lewis William Cave (1832-1897); educ. Rugby, Oxford and Inner Temple; called to bar 1859; practiced as barrister; Bencher 1877; Q.C. 1875; justice, High Court Queen's Bench division, and knighted 1881; prolific legal writer. Considered to have "unusual vigour and soundness of judgement."
167. John Elliot Burns (1858-1943): educ. finished local school age ten; apprentice engineer age fourteen; attended night schools; became strong trade unionist; worked as foreman engineer; became ardent socialist and strong speaker; often arrested and imprisoned; defeated in parliamentary election 1885; elected M.P. for Battersea 1892 and won the seat in succeeding elections; appointed to Liberal Cabinet 1905; resigned his portfolio 1914; retired from Parliament 1918.

and others were indicted, *inter alia*, "for unlawfully and maliciously uttering seditious words . . . with intent to riot, and . . . for conspiring together to effect the said objects",[168] which was much the same offence for which the strike leaders in Winnipeg were tried in 1919. There were other similarities between the two cases. As a result of the Peterloo massacre and the general labour unrest of the early 1820's, legislation was enacted in 1825 to enable workmen to combine for their own benefit, and through an accretion of case law, the advanced legislation of the 1870's was the eventual result.[169] Ironically, it was at this time that a severe economic slump occurred in Britain, which was compounded by a parallel agricultural depression and the need of the Gladstone administration to raise funds for its punitive expedition in Egypt. In many cases, while wages remained static or actually declined, prices rose.[170] All of this caused severe unemployment in large industrial centres, and much labour unrest, which was organized and channeled by "Social Democratic Foundation leaders [who] organized meetings and marches of the unemployed."[171] Often, these meetings were large gatherings and, on one occasion in February 1886, "a monster concourse of 50,000 in Hyde Park was broken up by the police."[172] It was for planning, addressing and then leading one such group of about 20,000 on a march ending in a riot in London's West End, that Burns and three other men were arrested and charged. All four men were as notable in later British political and labour life as were to be the leaders of the Winnipeg Strike in Canada.[173] While there is no doubt that the accused had addressed the crowd, it was also proved that, as in Winnipeg,[174] they had urged the assemblage to keep the peace and, later, when violence had broken out, that they had urged the marchers to disperse.[175]

Thus, the causes of labour unrest in Britain which preceeded the riots of 1886 were not dissimilar to those which brought on the Winnipeg Strike. Nor was the response of the Gladstone administration dissimilar to that of the Canadian Government in 1919, in that both resorted to indictments for seditious conspiracy.

In the course of his remarks during the *Burns* trial, Cave J., defined sedition using a definition of Stephen's which had been freely adopted from the Statute of 1819. In addition, he also specified what was not sedition and, again, he was quoting Stephen.[176] He then reviewed the evidence, and went on to remark that there was:

> . . . [C]onsiderable difficulty in separating and apportioning the different elements which contributed to the riots . . . and that it was impossible to say that any disorder that arose was

168. *Supra* n.29, at 356.
169. See J. Jervis (ed.), *Archbold's Pleading, Evidence and practice* (24th ed. 1910), I at 278-82, for a succinct summary of this process.
170. 14 R. C.K. Ensor, "England 1870-1914" in *The Oxford History of England* (1968) 77-84, 134.
171. *Ibid.*, at 100.
172. *Ibid.*, at 101.
173. *Ibid.*, at 100; and see also *supra* n.3.
174. Masters, *supra* n.6, at 106-7.
175. *Supra* n.29, at 358.
176. *Ibid.*, at 360.

> necessarily due to speeches made by persons who were themselves orderly, because of the presence of the disorderly elements of the crowd. . .[177]

But it is in his charge to the jury that he demonstrated that his view of sedition was much the same as that of Littledale J. in *R.* v. *Collins* and how it diverged from that of Best J. in *R.* v. *Burdett* and the Queen's Bench in *R.* v. *O'Connell*:

> I have already told you that you must take a broad and even a generous view of the whole of the case presented to you. You must not attach too much importance to isolated phrases, but you must look at the general gist of the matter. You must consider the object which took them there, the way they set about attaining it, and you must also consider to some extent, as throwing some light upon your decision, whether the riots which actually took place were the natural consequences of speeches delivered on that occasion.[178]

Moreover, the Judge went right to the heart of the matter when he uttered the short, concise, phrase which made *R.* v. *Burns* a leading case: "In order to make out the offence of speaking seditious words there must be a criminal intent upon the part of the accused, they must be words spoken with seditious intent; . . ."[179]

It is not recorded how long the jury was out, but they returned a verdict of "not guilty" for each of the four defendants.

In this case, the law of sedition and its application by the judiciary had essentially reached the point where it was in 1919. Generally speaking, a seditious intention was defined as an intent to alter the ruling institutions by unlawful means; seditious words and writings were those which would bring about the seditious intention and, a seditious conspiracy was one in which two or more persons agreed to commit acts in furtherance of a seditious intention.[180] Since intention was the essential element of the crime, truth was no defence.[181] However, because the state was seen as the extension of the individual, and thus the servant of the people, the right of the subject to criticize the government freely and without restraint was recognized, so long as such criticism did not incite people to commit unlawful acts. This, then, was the definition of sedition and the way it was interpreted in *Archbold's Criminal Practice* the authority quoted by Metcalfe J. in his charge to the Winnipeg jury in 1919. That many of the English judiciary had come to accept a reasonable and humane view is obvious from the remarks of Mr. Justice Cave, and from an item on page 423 of *The Law Times* of April 17, 1886:

> The result of the Socialists' trial [*R.* v. *Burns*] was not a surprise to us, nor we should imagine to any of our readers. There was a half-heartedness about the prosecution which became painfully apparent, while the judge plainly, at an early period, showed that he did not think much of the case for the Crown. There can be little doubt that panic was the origin of the proceedings.

177. *Ibid.*, at 366.
178. *Ibid.*, at 367.
179. *Ibid.*, at 364.
180. *Supra* n.20, at 298.
181. *Ibid.*, at 381. For example, to paraphrase Stephen, a person may say that the income tax law is unjust, and may have good reason for so saying. But, if he incites people to riot to effect tax reform, he will be convicted because his intent is to start a riot, regardless of his motivation for doing so.

But the divergence in the profession over the role of the bench is again made apparent, for *The Law Journal* of April 17, 1886, published a much longer editorial on page 217 which was most critical of Cave, and in which there is a clear inference that the state or bench, rather than the jury, shall decide what utterances constitute sedition:

> It is impossible to agree with the summing-up of Mr. Justice Cave in *Regina* v. *Hyndman* [i.e. *R.* v. *Burns*] as reported in the daily papers. The questions for the jury in a prosecution for seditious words, as in a case of defamatory words or writings, are-first, were the words charged spoken? and, secondly, had they the tendency alleged? The learned judge's summing-up was, however, concerned almost entirely with the question of malice, as inference which the law presumes against the utterer of words with a seditious tendency. The only reference to the presumption of law upon which the whole case turned seems to have been in the words: "The Attorney-General had said that inciting to disorder was the natural consequence of the words the defendants used, and, therefore, they were responsible for it. He could not agree entirely as to that. There must be, in order to make out the offence of speaking seditious words, a criminal intent. The words must be seditious and spoken with a seditious intent. Although it was a good working rule to say that a man must be taken to intend the natural consequences of his acts, it was very proper to ask the jury if there was anything to show to the contrary." In some reports Mr. Justice Cave is made to say of this fundamental rule of law that it is a legal fiction, . . .

Sedition Law in Canada

In Canada, just as in England, there was a divergence of opinion in the legal profession on the question of sedition. This was apparent from the fact that the latter article was reproduced in full, with obvious approbation, as an editorial in *The Canada Law Journal* less than a month after its publication in London.[182] But this was not an unexpected reaction, since one of the main issues which concerned Canadian legalists at the turn of the century was the challenge to the sanctity of contract by various groups in society.[183] Of course, trade unions were seen as especially dangerous to this cornerstone of the business world because of the ability of union executives to channel the efforts of workers and to make unified demands on their behalf — demands which if not met, could result in long and costly strikes.

Hence, a continuing debate was carried on in the pages of Canadian legal periodicals of the time. On the whole, the weight of opinion was heavily on the side of sanctity of contract. For example, in 1883 a correspondent of *The Canadian Law Times* commenting on a strike by telegraph operators said:

> [T]he claim of the hirer of labour to do what he will with his own, so long as he fulfils legal contracts and does nothing unlawful, has been accepted as just, and as supporting a truth which has become an axiom both of political economy and of law. Yet the telegraph operators, who, at this writing, are obstructing for their own purposes a most important channel of business communication, and subjecting the citizens of this country and the United States to the inconvenience and loss entailed by a general strike, seem not to be of this opinion. "The companies are paying large dividends," say the strikers, "let them therefore pay us higher wages, or we will ruin their business."[184]

Ten years later, in the same journal, an article entitled "Breach of Contract by Strikes," was even more uncompromising: "Nearly all strikes of the

182. (1886), 22 Can. L.J. 175-6.

183. J. F. Newman, "Reaction and Change: A Study of the Ontario Bar, 1880-1920," (1974), 32 U. of T.L.R. 51, at 62-3.

184. W. S. Gordon, "Strikes and Strikers in their Legal Aspect," (1883), 3 C.L.T. 367.

present day constitute a grievous breach of contract. There may be fault on the part of the employer, but if he has committed no breach of his agreement or implied relation with his employees, there can exist no lawful reason for quitting his employ in this manner.[185] But an event which probably loomed larger in Mr. Justice Metcalfe's thinking, and which was much more immediate, was the opening address of Sir James Aikins, K.C., to the 1919 annual meeting of the Canadian Bar Association. Sir James was not only founder and President of the Association, but was a leading member of the Manitoba Bar, and his speech was delivered in Winnipeg, August 27, 1919, a few days after the strike leaders were committed for trial, and presumably about the time Metcalfe began to compile his brief.[186]

Aikins' address is a period piece, and should really be read in full to savour the strong reactionary feeling of the legal profession at that time and place. However, a few excerpts germane to the topic under discussion will suffice to give some idea of the feeling. After a properly patriotic opening, Sir James began a survey of the condition of the Arts and the professions, and went on:

> In politics strong agitation is made for collectivism and enslavement to system in substitution of individual liberty, and for group or class control in lieu of popular democracy, and for Bolshevism instead of settled national government by the people, of the people, for the people.
>
> Bolshevism is a new name and a recrudescence of an old disease, a frequent consequence of war. For instance the Jacquerie in 1358, 15 years after the commencement of the One Hundred Years' War, was the same thing under a different name; so also was the Jack Cade rising in 1450 at the close of the One Hundred Years' War. A similar spirit of turbulence was exhibited when the American War of Independence was over in Shay's Rebellion and the Whiskey War. The same thing is seen in the Reign of Terror after the fall of the Bastile in France, and later after the Franco-Prussian War, but under the name of communism.
>
> These and other similar anarchistic uprisings were suppressed and will continue to be overcome by the strong arm of authority, and the good sense and sturdy spirit of the people.[187]

In effect, what was good for the government was right and proper for the people, regardless of the oppression they were subjected to and the economic degradation to which they were reduced. But, the passage which best represents the distorted view of a large segment of the legal profession was his statement "that what gives sanctity to law in a democratic country is not the passing of it by a legislature but the fact that it represents the calm judgement of right minded citizens."[188] It is hard to believe that Sir James could say this in all seriousness when he was well aware that a major amendment to the *Immigration Act* had been given three readings and passed in the Commons in twenty minutes, on July 6, less than two months before he spoke. On the same day, the Bill passed the Senate and received the royal assent. It provided that any non-Canadian born citizen could be deported on conviction of any one of a list of actions declared to be seditious offences.[189] However, as was mandatory for such an oration, Sir James

185. P. Edwards, "Breach of Contract by Strikes" (1893), 13 C.L.T. 290.
186. Canadian Bar Association, *Proceedings, 1919* (Aug. 27, 1919) 10.
187. *Ibid.*, at 81.
188. *Ibid.*, at 82.
189. See the discussion on this topic in Masters, *Supra* n.6, at 103-4.

finished this portion of his speech with a ringing paean of praise for the sanctity of contract. "That fundamental to our civilization and that for which our laws exist is individual liberty and included in it freedom of contract and the right to possess property legitimately acquired."[190] Seen in this context, it is not surprising that Russell's indictment, which was drawn up a few weeks later, alleged that the workers had broken their contracts, express or implied, with their employers. All in all, the speech must have given Mr. Justice Metcalfe much food for thought.

His reasons for being obliged to have recourse to English common law definitions of sedition have their roots in a movement which got under way in sixteenth-century Germany and culminated on the Continent during the first half of the nineteenth century. At that time, many European nations were seized with the desire, if not the necessity, of bringing some order to their antiquated systems of law. Revolutionary France led the way in the 1790's. This law, and much else, was given order and clarity in the *Code Civil*, which was supplemented six years later by the *Code Penal* in 1810. These were followed by similar codifications of law in Austria, Germany, Italy, Holland and many South American nations. Across the Channel, the urge for reform was no less strong although its progress and form were more tortuous. There was first a good deal of consolidation particularly of the criminal law under Peel in the 1820's.[191] Further changes were made in the criminal law consolidation acts of 1861.[192] Finally, in November 1877, Sir James Fitzjames Stephen was commissioned by the Lord Chancellor to prepare a bill for the codification of indictable offences and criminal procedure for submission to Parliament.[193] The draft code was, in fact, an expanded version of his *Digest of the Criminal Law*.[194] As such, it was not a completely new set of provisions worked out from first principles, but rather a concise restatement of the existing law, both statute and common.[195] Too late for full consideration by Parliament, it was left on the order paper in 1878. Since there had been criticism of Stephen's Bill in the House, the Lord Chancellor struck a commission of eminent jurists to revise the Bill for submission in 1879.[196] The committee, of which Stephen was a member, deliberated for five months and while it did make a few changes it left untouched the whole section on sedition from Stephen's Code.[197] But since the committee took so long, it was found to be too late to pass the Bill in 1879. It was again introduced early in 1880,[198] but sank without trace when Disraeli's administration foundered on the rock of the Irish Question a few days after first reading.

190. *Supra* n.187, at 82.

191. C. S. Greaves, *The Criminal Law Consolidation and Amendment Acts*, (2nd ed. 1862) 5.

192. See *ibid.*, at 24-31, for an explanation of the drafting and passage of these Acts: 24 & 25 Vic., c. 94-100 (U.K.).

193. Letter, Stephen to Lord Lytton, November 9, 1877. Cambridge University, West Library, Stephen Papers, ADD. 7349, collection 14/1.

194. L. Stephen, *The Life of Sir James Fitzjames Stephen* (1894) 379-80.

195. 6 Great Britain, Parliament, Sessional papers, House of Commons, *Report of the Royal Commission on the Law Relating to Indictable Offences*, (London: The Commission, 1879) 175.

196. *Supra* n.194, at 380.

197. *Supra* n.195, at 188.

198. U.K. Parl., Hansard's Parliamentary Debates, col. 244 (Feb. 6, 1880).

Meanwhile, the Canadian Government had been seized with a similar urge for reform. But its task was made easy, relative to the English experience, because the Department of Justice simply took the draft English Code, amended it to comply with Canadian statute law, added all the Canadian substantive and procedural summary conviction law, and introduced the result to Parliament in the Session of 1891 as a draft criminal code of the statute law only. All recipients of the bill, who included not only members of Parliament but also judges and eminent members of the bar, were asked to read it and suggest amendments.[199] The definitive version was introduced to the House April 12, 1892 as Bill No. 7 by Sir John Thompson, the Minister of Justice. "As originally drawn . . . [it] contained a clause defining a seditious intention in terms similar to s. 102 of the English Draft Code . . ."[200] However, this clause so roused the ire of some members that, after a lengthy debate in the joint Commons-Senate Committee and further debate in the Committee of the Whole, "it was ultimately decided to strike out the clause and leave the definition to common law."[201]

All the members who took part in the debate in the Committee of the Whole, with the exception of Thompson, were Liberals, and all were eminent lawyers who were destined to hold high judicial office. Perhaps, more importantly, they were all imbued with the Whig interpretation of history, and argued their case as though the Minister were trying to undermine the Whig shibboleth of parliamentary supremacy. The bone of contention was section 102, the first part of which defined a seditious intention as an intention:

(a) To bring into hatred or contempt, or to excite disaffection against, the person of Her Majesty, or the Government and Constitution of the United Kingdom or any part of it, or of Canada or any Province thereof, or either House of Parliament of the United Kingdom, or of Canada or any Legislature, or the administration of justice; or

(b) To excite Her Majesty's subjects to attempt to procure, otherwise than by lawful means, the alteration of any matter in the State; or

(c) To raise discontent or disaffection amongst Her majesty's subjects; or

(d) To promote feelings of ill-will and hostility between different classes of such subjects.[202]

Thompson, who had been a judge of the Supreme Court of Nova Scotia, had obviously had experience searching out obscure statutes and in dealing with the exasperating problems caused by the archaic procedures specified in such enactments. As Minister of Justice, he now had the opportunity of remedying the situation and he made the most of it. His objective, he said, was to simplify the law, to get rid of the now meaningless distinction between felony and misdemeanour, and to put all the criminal statutes between two covers.[203] In his reasoned argument, he made the point that the distinguished jurists who had revised Stephen's Draft Code of 1878 had declared that "this [definition of sedition] is as exact an application as we can make

199. Can. H. of C. Debates, col. 156-57 (May 12, 1891).

200. J. Crankshaw, *The Criminal Code of Canada* (1st ed. 1894) 67.

201. *Ibid.*

202. Canada, House of Commons, Criminal Law Bill, No.7, c.122.

203. Can. H. of C. Debates, col. 1313-14 (April 12, 1892).

of the existing law."[204] As we have seen, they had even gone farther and, in addition, had stated: "On this very delicate subject we do not undertake to suggest any alteration of the law."[205] An examination of the twenty-fifth (1918) edition of *Archbold*, where the words of the definition are repeated almost verbatim, bears out the truth of their assertion.[206]

On the other hand, Mr. Mills,[207] a future Minister of Justice, insisted that the contentious section "would alter the constitutional law as set out in the trial of Sacheverall,"[208] and would thus make any criticism of the Queen or her governments or ministers, seditious offences.[209] Mr. Davies[210] also harked back to the Glorious Revolution, and held that the liberty of the subject was inextricably bound up with the common law which "is elastic and justly elastic. It is made by the prudence and wisdom of the judges . . . to suit the development of the people and the constitution."[211] Mr. Mulock[212] thought that the section would impair freedom of speech and, in the most reasoned argument of Thompson's opponents, gave what he considered to be examples where free speech would be restricted or forbidden. But, more to the point, he said, "I trust that the section will be so modified as to put that right beyond all question of controversy. If the Minister will not yield the point now, I give him notice that when the Bill is reported I will move to cut down that clause."[213]

In succeeding days, the remainder of the Bill's 981 sections were discussed, amended or otherwise dealt with and no more really contentious issues arose. By June 28, the last clauses were up for debate. Now, Parliament was to be prorogued July 9, which only left eleven days for the Bill to pass the Senate and receive the royal assent. Probably for this reason, and because there was agreement as to the disposition of all the other sections, Thompson acceded to Mulock's request and deleted the offending passage, rather than risk an acrimonious debate over it in the House.[214]

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204. Can. H. of C. Debates, col. 2831 (May 19, 1892).

205. *Supra* n.198.

206. *Supra* n.22, at 1070-71.

207. David Mills (1831-1903): educ. local schools and University of Michigan; called to Ontario Bar 1883; Q.C. 1890; Professor of constitutional and international law at University of Toronto, 1888; Canadian representative on reorganization of Judicial Committee, 1901; Liberal M.P. and justice critic, 1878; Minister of Justice in Laurier Government 1897; appointed to Supreme Court of Canada, 1902.

208. Henry Sacheverall (1674-1724): educ. for the Church at Oxford; B.A., 1693, M.A., 1695; elected fellow of Magdalen College 1701; D.D. conferred 1708 when he was senior dean of arts. Sacheverall was a high Anglican, a Tory and was considered by the Whig dominated government to be a Jacobite. In 1709 he preached a sermon at St. Paul's Cathedral which was bitterly critical of the Glorious Revolution of 1689 and in which he advocated a) passive obedience to the crown, b) non-resistance, or the obligation (to a high Anglican) to eschew resistance to the lawful sovereign and, c) the theory of the divine right of kings [G. Holmes, *The Trial of Dr. Sacheverall* (1973) 62-68]. Not content with this he published his sermon in an edition which sold out in hours. Eventually, eleven English editions were brought out and Holmes estimates that there were over 100,000 copies in circulation before the end of the trial, to say nothing of the French, German and Dutch translations, *ibid.*, pp.75-5. This incurred the wrath of the government party, which impeached Sacheverall and tried and convicted him of "High Crimes and Misdemeanours," *R.* v. *Sacheverall* (1710), 15 How. St. Tr. 2.

209. *Supra* n. 204, at 2830.

210. Louis Henry Davies (1845-1924): educ. Prince of Wales Academy, P.E.I.; admitted to Inner Temple and called to English Bar 1866; called to P.E.I. bar 1867, Q.C. 1880; counsel for Fisheries Treaty Commission 1875-76; Liberal M.P. 1882-1901; appointed to Supreme Court of Canada 1901; Chief Justice of Canada 1918.

211. *Supra* n.204, at 2834.

212. William Mulock (1844-1944): educ. local schools and University of Toronto; called to Ontario bar 1868; Q.C. 1890; Liberal M.P. 1882; cabinet minister 1896; C.J. Exchequer Division, High Court of Ontario, 1905; Chief Justice of Ontario, 1923.

213. *Supra* n.204, at 2831-33.

214. Can. H. of C. Debates, col. 4344 (June 28, 1892).

Conclusion

This is why there was no definition of sedition in the Criminal Code and why Mr. Justice Metcalfe was able to exercise quasi-judicial authority in the Russell case. And there is little doubt that he intended to use his authority. In the short "Note E" of his brief he says: "See Cran[k]shaw's notes to section 134, based on the *Hunt* (1820) and *O'Connell* cases (1844). This statement E. is my idea of the law, after extensive reading of the cases."[215] The trial of Russell was not exactly a re-run of these two cases, but, like Best J., Metcalfe did tell the jury in no uncertain terms what he thought to be seditious in the evidence before them and, like Bayley J., he was partial to the prosecution and refused to entertain objections to questionable prosecution evidence.

The question arises: what motivated Metcalfe to do what he did? The Judge did not like trade unions in general or R.B. Russell in particular. Joseph Thorsen,[216] later President of the Exchequer Court of Canada, claimed that Metcalfe "could be very biased", and cited as an example "his very partisan handling of the Winnipeg General Strike Trial."[217] But, if he was biased, then so was most of the Manitoba bench and the majority of the legal profession. So were most of the legislators of the provinces and the Dominion, the business community, and many of the people of the upper and middle classes. All of these constituted a small, but nevertheless influential, minority whose views were faithfully echoed by the majority of newspaper editorialists in Canada.[218]

Then, there was the fact that Metcalfe was obviously well read in Canadian history and saw himself as a Canadian patriot. This gave his appeal to the patriotism of the jurors a very authentic ring when he encouraged them to help him to stem the tide of red revolution, which he believed was sweeping down to inundate Canada, with Russell and his co-defendants on the crest of the wave. That his belief was wrong is beside the point; it was the view of the majority, and he reflected it faithfully.

Finally, Metcalfe was in the conservative legal tradition, and believed, along with Mr. Justice Best, that it was his duty to point out what he regarded as seditious material in a manner the jurymen could not ignore. Moreover, he used his considerable talent as an antiquarian to paint a picture of strikes and sedition which was at variance with the liberal English practice. But, it was perhaps his skillful manipulation of cases, to arrive at a pernicious definition of conspiracy, that was repugnant to the provisions of the Criminal Code, which best displayed his juristic talents. It is a fact

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215. *Supra* n.14, at 65.

216. Joseph Thorarinn Thorson (1889-1978): educ. Winnipeg Collegiate, Manitoba College; Oxford as Rhodes Scholar; called to bar of Middle Temple, 1913; called to Manitoba Bar 1913, Dean, Manitoba Law School 1921-26; K.C. 1930; elected to House of Commons 1926; cabinet minister and commissioner; President, Exchequer Court, 1942; President, International Commission of Jurists 1952-59. This information was derived from the biographical file on Thorson in the Archive of Western Canadian Legal history, University of Manitoba, Faculty of Law, Winnipeg.

217. *Ibid.*, biographical file on Metcalfe. The information was given to Professor Dale Gibson of the University of Manitoba Faculty of Law at an informal interview in 1968.

218. See J.E. Rea, (ed.), *The Winnipeg General Strike*, in *Canadian History Through the Press Series* (1973).

that the jury could have found Russell not guilty, but Mr. Justice Metcalfe was a judicial craftsman of the first order, and the jury took his direction and pronounced the verdict he so obviously desired.