

New York Jan 25th 1853

Messrs John Re Sewell & Co
Bostone
Gentlemen,

I pray you to accept my thanks for the copy of Mr Spooner's "Essay on Trial by Jury," which you have been kind enough to send me. In reply to your note asking my opinion of the work, I have no hesitation in saying after a careful perusal of it that while I deffer from the author in some of his views, I regard his exposition of the rights of Juries in Criminal Trials as able, sound & seasonable; & I think that it will awaken not only among the people at large, a more perfect understanding of our ancient Liberties & a more determined resolution to forbid their infringement

Mr Spooners main argument in the First Chapter strikes me as clear, logical & convincing. The historical sketch of Magna Carta & of the ancient Common law juries which he subsequently gives is not only interesting to the lovers of legal lore, but valuable as disclosing the original soundness of our judicial system, & the sentence of excommunication given by the Bishops against the ____ of the Charter in the thirteenth century might with great fitness be now revived & re-read in our American Churches "against all that secretly or openly by deed, word or counsel do make Statutes or observe their having made against the said liberties – the writers and Counsellors of said Statements & the Execution of them, & all that shall presume to judge according to them"

The array of great names hath in Great Britain & America that can be addressed in favor of the right of the Judge in criminal cases, to dictate the law to the jury, while it may excite our surprise, ought not to overwhelm our judgment. When in consequence of the decision of Mr Justice Buller & of Lord Mansfield in that celebrated case in which Erskine nobly distinguished himself of the Drau of St. Asapha against the right of the Jury in an indictment of Libel to judge the tendency of any writing, Mr Fine introduced his bill into Parliament declaring the right of Juries over the whole matter, it was warmly opposed by Lord Hurlow, by Lord B____ and Ex Chancellor, & by Lord Renyou the Chief Justice of the King's Bench, who, as Lord Campbell ____ asks "Combined to extinguish the rights of Juries;" & had it not been for the determination of Lord Camden, who declared he would contend for the truth of his position as to the right of juries in cases of libel to the last ____ of his existence "manibus pedibusque," the bill would have failed. Though the exertions of that great lawyer it became a law contrary to the unanimous opinion of the Judges, when asked their advice for the assistance of the house. And "now" says Lord Campbell "that the mist of prejudice has been cleaned away I believe that English lawyers almost unanimously believe that Lord Camden's view of the question was correct on legal principle, & that the act was properly made to declare the rights of the Jury to determine upon the Character of the alleged libel, instead of eradicating it as an innovation"

In this essay I rather regret that Me Spooner has included the discussion of the rights of juries in civil as well as in criminal cases. The two subjects are widely distinct & many will disagree with him in regard to the first, who must entirely accord with his exposition of the last. The law of property becomes more intricate & difficult with the progress of civilization, but crimes remain & ever must remain of easy investigation. "In all crimes" says Hale the intention is the principle consideration" actus non facit reum nisi mens sit rea." And hence it is that a man indicted for a crime when put upon his Trial has a right to submit to the Jury his whole defence whether it be a denial of the act charged, or a justification of it in law. Of the entire dafence the Jury have a right to take cognizance, they may either by a general verdict pass upon the whole case, or if they please they may by a special verdict find the facts & submit the law to the Court, when the Court will have the right to determine it, but this rests solely in their own discretion; the Court may recommend to them to do it, but they cannot compel them to do it, & while it is both the right & the duty of the Court to declare to the Jury its interpretation of the law, it is not the duty of the Jury to be governed by that exposition, unless they themselves approve of it. & it is both their right & their duty if they regard the accused as innocent of the crim alleged, to render a verdict of not guilty,

even in direct opposition to the charges of the Court.

Now in the cases cited by Mr Spooner as having occurred in the United States Circuit & District Courts of Massachusetts & believe the same thing was done in the recent trials for Treason in Pennsylvania, the Court questioned the Jury in advance & excluded from the panel all who responded unfavorable to the following question, “Do you hold any opinions upon the subject of the fugitive slave law so called which will induce you to refuse to convict a person indicted under it, if the facts set forth in the indictment & constituting the defense are proved against him & the court directs you that it is Constitutional?”

The Court will know that the defense of the accused was likely to consist, less in a negative of the acts charged, for they were to some extent a matter of public notoriety than in a justification of those acts in law, that such a justification involved the constitutionality of the act of Congress under which the prosecution was had – that when the Jury were empanelled the Court could not take from them the absolute right they would possess to pass upon that law, therefore it was that the Judges, as I believe without precedent, but certainly without law, deprived the Defendant of his rightful defense in a justification of his ___ in law by excluding from the panel every juror whose opinion did not square with their own. Such proceedings involves in my opinion so willful an infraction of the constitutional rights of the Defendant and an usurpation of the power by the Court, so dangerous to our constitutional liberties, & so subversive of all the benefits intended to be secured in a trial by the country, that I can only account for their having been passed over so lightly and with so little rebuke from the bar, or reproof from the press, by the fact that they occurred during a season of political excitement & were perpetrated against a class of individuals whom the two great parties of the country united to crush.

There have been times, and if the people are true to themselves they will again come, when such an infringement of the rights of Juries would have subjected a Judge bold enough to attempt it to impeachment for a plain violation of the Constitution. “Other reasons,” as was said in the impeachment of Stafford, “ are against the rule of the law, but this is against the very being of the law” striking down at one blow all the defences of popular liberty & placing the life & liberty of the citizen under the control of a single judge.

Mr Spooner’s Essay will, I trust, tend to prevent any future acquiescence in such tampering with the rights of justice, should it ever again be attempted. His clear argument shows that the doctrine contended for is, as Erskine expressed, “contraband in law, & can only be smuggled by the men who introduce it. It requires a great talent & great address to hide its deformity, in vulgar hands it becomes contemptible.:

The benefits of Trial by Jury in civil cases may be often very doubtful, & the verdict of twelve men may be deemed less valuable than the decision of one judge. But in criminal cases, “it is indeed the foundation of our free constitution, take it away & the whole fabric will moulder into dust.”

If Mr Spooner should publish another edition of his work, as he intimates, he might include perhaps with advantage in an appendix Erskine’s great speech on the Rights of Juries.

I am gentlemen Yours
Faithfully & obliged

John Jay