CIRCUIT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF MASSACHUSETTS.

NOVEMBER, 1851.

UNITED STATES *v.* ROBERT MORRIS.

The right of the jury to judge of the law.

WHILE one of the counsel for the defendant was addressing the jury, he stated the proposition, that, this being a criminal case, the jury were rightfully the judges of the law as well as the fact; and if any of them conscientiously believed the act of 1850, commonly called the "Fugitive Slave Act," to be unconstitutional, they were bound by their oaths to disregard any direction to the contrary which the court might give them; and he was about to address the jury in support of this assertion, when he was stopped by the court, and informed that he could not be permitted to argue this proposition to the jury; that the court would hear him, and if they should arrive at an opinion that the proposition was true, the jury would be so informed by the court; and the counsel then addressed the court in support of the position. The opinion of the court thereon was delivered by Judge CURTIS, as follows:

The Constitution of the United States, article 3, section 2, provides that "the trial of all crimes, except in cases of impeachment, shall be by jury." The counsel for the defendant maintains that, in every such trial of a crime, the jury are the judges of the law as well as of the fact; that they have not only the power, but the right, to decide the law; that though the court may give its opinion to the jury respecting any matter of law involved in the issue, yet the jury may and should allow to that opinion only just such weight as they may think it deserves; that if it does not agree with their own convictions they are bound to disregard it, the responsibility of deciding rightly all questions, both of law and fact, involved in the general issue, resting upon them under the sanction of their oaths.

This is an important question, and it has been pressed upon the attention of the court with great earnestness, and much power of language, by one of the defendant's counsel. I have no right to avoid a decision of it. I certainly should have preferred to have a question of so much importance, respecting which so deep an interest is felt, such strong convictions entertained, and, I may add, respecting which there has not been an entire uniformity of opinion, go to the highest tribunal for a decision; but it is not practicable in this case. I proceed, therefore, to state the opinion which I hold concerning it. The true question is, what is meant by that clause of the Constitution, "the trial of crimes shall be by jury?"

Assuming, what no one will controvert, that the tribunals for the trial of crimes were intended to be constituted, as all common-law tribunals in which trial by jury was practised were constituted, having one or more judges, who were to preside at the trials and form one part of the tribunal, and a jury of twelve men, who were to form the other part, and that one or the other must authoritatively and finally determine the law, was it the meaning of the Constitution that to the jury and not to the judges this power should be intrusted?

There is no sounder rule than that which requires us to look at the whole of an instrument before we determine a question of construction of any particular part; and this rule is of the utmost importance when applied to an instrument the object of which was to create a government for a great country, working harmoniously and efficiently through its several executive, legislative, and judicial departments. It is needful, therefore, before determining this question upon a critical examination of the particular phrase in question, to examine some other provisions of the Constitution, which are parts of the same great whole to which the clause in question belongs. We find in article VI: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land." Nothing can be clearer than the intention to have the Constitution, laws, and treaties of the United States in equal force throughout every part of the territory of the United States, alike in all places and at all times. To secure this necessary end a judicial department was created, whose officers were to be appointed by the President, paid from the national treasury, responsible through the House of Representatives, to the Senate of the United States, and so organized by means of the Supreme Court, established by the Constitution, and such inferior

courts as Congress might establish, as to secure a uniform and consistent interpretation of the laws, and an unvarying enforcement of them according to their just meaning and effect. That whatever was done by the Government of the United States should be by standing laws, operating equally in all parts of the country, binding on all citizens alike, and binding to the same extent and with precisely the same effect on all, was undoubtedly intended by the Constitution; and any construction of a particular clause of the Constitution which would tend to defeat this essential end is, to say the least, open to very serious objection.

It seems to me that what is contended for by the defendant's counsel would have something more than a mere tendency of this kind. The *Federalist*, in discussing the judicial power, remarks: "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." Federalist, No. 80. But what is here insisted on is that every jury impanneled in every court of the United States is the rightful and final judge of the existence, construction and effect of every law which may be material in the trial of any criminal case; and not only this, but that every such jury may, and if it does its duty must, decide finally, and without any possibility of a revision, upon the constitutional power of Congress to enact any statute of the United States which, on such a trial, may be brought in question. So that we should have not thirteen, but an innumerable number of courts having final jurisdiction over the same causes arising under the same laws, and these courts chosen by lot among us, and selected by the marshal elsewhere out of the body of the people, with no reference to their qualifications to decide questions of law; not allowed to give any reasons for their decisions, as will be presently shown; not sworn to decide the law, nor even to support the Constitution of the United States, and yet possessing complete authority to determine that an act passed by the legislative department, with all the forms of legislation, is inoperative and invalid. The practical consequences of such a state of things are too serious to be lightly encountered, and in my opinion the Coustitution did not design to create or recognize any such power by the clause in question.

Some light as to its meaning may be derived from other provisions in the same instrument. The sixth article, after declaring that the Constitution, laws, and treaties of the United States shall be

the supreme law of the land, proceeds, "and the *judges* in every State shall be bound thereby."

But was it not intended that the Constitution, laws and treaties of the United States should be the supreme law in *criminal* as well as in *civil* cases? If a State law should make it penal for an officer of the United States to do what an act of Congress commands him to do, was not the latter to be supreme over the former? And if so, and in such cases juries finally and rightfully determine the law, and the Constitution so means when it speaks of a trial by jury, why was this command laid on the judges alone, who are thus mere advisers of the jury, and may be bound to give sound advice, but have no real power in the matter?

It was apparently the intention of the Constitution, that all persons engaged in making, expounding, and executing the laws, not only of the United States, but of the several States, should be bound by oath or affirmation to support the Constitution of the United States. But no such oath or affirmation is required of jurors, to whom it is alleged the Constitution confides the power of expounding that instrument, and not only construing but holding invalid any law which may come in question on a criminal trial.

This may all be true, but strong reasons should be shown before it can be admitted.

I have considered with much care the reasons assigned and the authorities cited by the defendant's counsel, and have examined others which he did not cite; and the result is, that his position, both upon authority and reason, is not tenable. I will first state what is my own view of the rightful powers and duties of the jury and the court in criminal cases, and then see how far they are in conformity with the authorities and consistent with what is admitted by all to be settled law.

In my opinion, then, it is the duty of the court to decide every question of law which arises in a criminal trial. If the question touches any matter affecting the course of the trial, such as the competency of a witness, the admissibility of evidence, and the like, the jury receive no direction concerning it; it affects the materials out of which they are to form their verdict, but they have no more concern with it than they would have had if the question had arisen in some other trial. If the question of law enters into the issue, and forms part of it, the jury are to be told what the law is, and they are bound to consider that they are told truly; that law they are to apply to the facts as they find them, and, thus passing both on the law

and the fact, they, from both, frame their general verdict of guilty or not guilty.

Such is my view of the respective duties of the different parts of this tribunal in the trial of criminal cases; and I have not found a single decision of any court in England, prior to the formation of the Constitution, which conflicts with it. It was suggested at the bar that Chief Justice Vaughn's opinion in *Bushwell's case*, 5 State Trials, 99, was in support of the right of juries to determine the law in a criminal case; but it will be found that he confines himself to a narrow, though, for the case, a conclusive line of argument, that the general issue, embracing fact as well as law, it can never be proved that the jury believed the testimony on which the fact depended, and in reference to which the direction was given, and so they can not be guilty of any legal misdemeanor in returning a verdict, though apparently against the direction of the court in matter of law.

Considering the intense interest excited, the talent and learning employed, and consequently the careful researches made, in England, near the close of the last century, when the law of libel was under discussion in the courts and in Parliament, it can not be doubted that if any decision, having the least weight, could have been produced in support of this general proposition, that juries are judges of the law in criminal cases, it would then have been brought forward. I am not aware that any such was produced. And the decision of the King's Bench, in *Rex* v. *the Dean of St. Asaph*, 3 T. R. 428, and the answers of the twelve judges to the questions propounded by the House of Lords, assume as a necessary postulate what Lord Mansfield so clearly declares in terms, that by the law of England juries can not rightfully decide a question of law. Passing over what was asserted by ardent partisans and eloquent counsel, it will be found that the great contest concerning what is known in history as Mr. Fox's Libel Bill, was carried on upon quite a different ground by its leading friends—a ground which, while it admits that the jury are not to decide the law, denies that the libellous intent is matter of law, and asserts that it is so mixed with the fact, that under the general issue it is for the jury to find it as a fact. Annual Register, vol. 34, p. 170, 29 Par. His. Debates in the Lords, and particularly L. Camden's Speeches. Such I understand to be the effect of that famous declaratory law. (St. 32, Geo. 3, c. 60.) The defendant's counsel argued that this law had declared, that on trials for libel the jury should be allowed to pass on

law and fact, *as in other criminal cases*. But this is clearly erroneous. Language somewhat like this occurs in the statute, but in quite a different connection, and, as I think, with just the opposite meaning.

"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, *in like manner as in other criminal cases*."

This seems to me to carry the clearest implication that in this and all other criminal cases the jury may be *directed* by the judge; and that while the object of the statute was to declare that there was other matter of fact besides publication and the inuendoes to be decided by the jury, it was not intended to interfere with the proper province of the judge to decide all matters of law. That this is the received opinion in England, and that the general rule declared in *Rex* v. *Dean of St. Asaph*, that juries can not rightfully decide the law in criminal cases, is still the law of England, may be seen by reference to the opinion of Parke B., in *Parmiter* v. *Copeland*, 6 Meeson & Welsby, 105; and of Best, C. J., in *Levi* v. *Milne*, 4 Bing. R. 195.

I conclude, then, that when the Constitution of the United States was formed it was a settled rule of the common law that in criminal as well as in civil cases, the court decided the law and the jury the facts, and it can not be doubted that this must have an important effect in determining what is meant by the Constitution when it adopts a trial by jury.

It is argued, however, that in passing the sedition law, St. 1798, c. 74, s. 3, Congress expressly provided that the jury should have the right to determine the law and the fact, under the direction of the court, as in other cases, and that this shows that in other cases juries may decide the law, contrary to the direction of the court.

I draw from this the opposite inference; for where was the necessity of this provision, if by force of the Constitution juries as such have both power and the right to determine all questions in criminal cases? And why are they to be directed by the court? In *Montgomery* v. *The State*, 11 Ohio R. 427, the Supreme Court of Ohio, in discussing the question whether juries are judges of the law, refer to an article in the Bill of Rights of that State, which is in the same words as this section of the sedition act, and the opinion of the court then proceeds: "It would seem from this that the framers

of our Bill of Rights did not imagine that juries were rightfully judges of law and fact in criminal cases, independently of the direction of courts. Their right to judge of the law is a right to be exercised only under the direction of the court; and if they go aside from that direction and determine the law incorrectly, they depart from their duty and commit a public wrong; and this in criminal as well as civil cases."

There is, however, another act of Congress which has a most important bearing on this question. The act of the 29th of April, 1802, in section 6th, after enacting that, in case of a division of opinion between the judges of the circuit court on any question, such question may be certified to the Supreme Court, proceeds: "And shall by the said court be finally decided; and the decision of the Supreme Court and their order in the premises shall be remitted to the circuit court, and be there entered of record, and have effect according to the nature of such judgment and order." The residue of this section proves that criminal as well as civil cases are embraced in it, and under it many questions arising in criminal cases have been certified to and decided by the Supreme Court, and persons have been executed by reason of such decisions.

Now, can it be that, after a question arising in a criminal trial has been certified to the Supreme Court, and there, in the language of this act, finally decided, and their order remitted here, and entered of record, when the trial comes on the jury may rightfully revise and reverse this final decision? Suppose, in the course of this trial, the judges had divided in opinion upon the question of the constitutionality of the act of 1850, and that, after a final decision thereon by the Supreme Court, and the receipt of its mandate here, the trial should come on before a jury, does the Constitution of the United States, which established that Supreme Court, intend that a jury may, as matter of right, revise and reverse that decision? And if not, what becomes of this supposed right? Are the decisions of the supreme court binding on juries, and not the decisions of inferior courts? This will hardly be pretended; and, if it were, how is it to be determined whether the Supreme Court has or has not, in some former case, in effect settled a particular question of law? In my judgment, this act of Congress is in accordance with the Constitution, and designed to effect one of its important and even necessary objects, a uniform exposition and interpretation of the law of the United States, by providing means for a final decision of any question of law—final as respects every tribunal and every part of any

tribunal in the country; and, if so, it is not only wholly inconsistent with the alleged power of juries to the extent of all questions so decided, but it tends strongly to prove that no such right as is claimed does or can exist.

An examination of judicial decisions of courts of the United States, since the organization of the government will show, as I think, that the weight of authority is against the position taken by the defendant's counsel.

The earliest case is 3 Dallas's R. 4. Chief Justice Jay is there reported to have said to a jury that on questions of fact, it is the province of the jury, on questions of law it is the province of the court to decide, and in the very next sentence he informs them that they have the *right* to take upon themselves to determine the law as well as the fact, and he concludes with the statement that both law and fact are lawfully within their power of decision.

I can not help feeling much doubt respecting the accuracy of this report, not only because the different parts of the charge are in conflict with each other, but because I can scarcely believe that the Chief Justice held the opinion that in civil cases—and this was a civil case—the jury had the right to decide the law. Indeed, the whole case is an anomaly. It purports to be a trial by jury in the Supreme Court of the United States, of certain issues out of chancery, and the Chief Justice begins by telling the jury that the facts are all agreed, and the only question is a matter of law, and upon that the whole court were agreed. If it be correctly reported, I can only say it is not in accordance with the views of any other court, so far as I know, in this country or in England, and is certainly not in accordance with the course of the supreme court for many years.

In the *United States* v. *Wilson et al.*, Bald. R. 78, which was an indictment for robbing the mail, the court instructed the jury explicitly that they had a right to judge of the law, and decide contrary to the opinion of the court; but in the *United States* v. *Shine*, Bald. R. 510, which was an indictment for passing a counterfeit note of the Bank of the United States, the defendant's counsel having insisted to the jury that the bank was unconstitutional, the court, with equal explicitness, told the jury they had no right to judge of the constitutionality of an act of Congress, and in the strongest terms declared that the exercise of such a power would leave us without a Constitution or laws. With great respect for both these able decisions, I can not but think that the criticism of Judge Conk-

ling (Conk., p. 426) is just, when he confesses his inability to discover any difference in principle between these two cases, with respect to the rights of juries to decide the law in criminal cases; and, if so, the later opinion of that court was entirely adverse to the right claimed.

It has been suggested that the articles of impeachment of Judge Chase, and the line of defense adopted by his counsel, has a tendency to support the views of the defendant's counsel. The first article of impeachment does speak of the undoubted right of juries to judge of the law in criminal cases; but I can allow no other force to this than that it proves that a majority of the then House of Representatives thought it fit to make that allegation in that proceeding. And although the counsel of the accused rested the defense of their client against this charge mainly on a denial of the facts, yet, in the argument of Mr. Martin, will be found a statement of his opinion on this question, and an argument in support of it, which is marked with that ability for which he was so highly distinguished, and which leaves no ground for the assertion that the right in question was conceded by him. Chase's Trial, p. 182.

In *United States* v. *Baptiste*, 2 Sumner, 240, Mr. Justice Story pronounced an opinion on this question during the trial of a capital indictment. He denied that this right existed, and gave reasons for the denial of exceeding weight and force. This decision was published more than sixteen years ago. It has been before the profession and within the knowledge of Congress. An act of ten lines would at any time have changed the rule which he laid down. No such act has been passed.

If we look to the decisions of the courts of the States, I think we shall find their weight in the same scale.

The earliest case is *People* v. *Croswell*, 3 John. Cas. 337. The question was as to the right of the jury to pass on and decide the intent under an indictment for libel. The court were equally divided. As has already been suggested, this is by no means the question raised here, and that by the law of the State of New York at this day, the jury are not judges of the law in the sense now contended for, I infer from the opinion of Judge Barculo, in *People* v. *Price*, 1 Barb. S. C. R. 556; for in the trial of an indictment for murder, he told the jury that it was their duty to receive the law from the court, and conform their decision to such instructions; and under this ruling the prisoner was convicted and executed.

This question has been very carefully considered, and elaborate and extremely able opinions upon it delivered by the highest courts in Indiana, New Hampshire, and Massachusetts. *Townsend* vs. *The State*, 2 Blackf. (Ind.) R. 152; *Pierce* v. *The State*, 13 New Hamp. R. 536; *Commonwealth* v. *Porter*, 10 Metcalf, 12, 263. The reasoning of these opinions, so far as it is applicable to the questions before me, has my entire assent. The question is not necessarily the same in the courts of the several States, and of the United States, though many of the elements which enter into it are alike in all courts of common law, not bound by some statute or constitutional provision, and my judgment has been much influenced by these opinions.

It remains for me to notice briefly some of the arguments which are relied on by the defendant's counsel in support of his position. It is said that, in rendering a general verdict of guilty or not guilty, the jury have the power to pass, and do in fact pass, on every thing which enters into the crime. This is true; but it is just as true of a general verdict in trover or trespass; and yet I suppose the right of the jury to decide the law in those cases is not claimed. The jury have the power to go contrary to the law as decided by the court, but that the power is not the right is plain, when we consider that they have also the like power to go contrary to the evidence, which they are sworn not to do.

It is supposed that the old common law form of the oath of jurors in criminal cases indicates that they are not bound to take the law from the court. It does not so strike my mind. They are sworn to decide according to the evidence. This must mean that they are to decide the facts according to the evidence. But if they may also decide the law, they are wholly unsworn as to that, and act under no obligation of an oath at all in making such decisions. A passage in Littleton's Tenures (Lib. 3 s. 368), and the statute Westminster 2, c. 30 (13 Ed. I.) and the Commentary of Coke thereon, relating to an assize (2 Inst. 425), have been referred to as throwing light on this inquiry; but it seems to me enough to say that the assize was not a jury—that an assize was not a criminal case, but an action between party and party, and that if the statute intended to confer on the assize the right as well as the power to decide the law, it was a strange provision, which subjected them to punishment, if they decided the law wrong; for it would seem that what was right or what was wrong must be determined by the tribunal

having the rightful power to determine it, which is supposed to be the assize itself. For some able criticism on this statute, see the opinion of Gilchrist, J., in 13 N. H. R., 542; Worthington on Juries, 72–94.

That it has been a familiar saying among the profession in this country and an opinion entertained by highly respectable judges, that the jury are judges of the law as well as of the facts, I have no doubt. In some sense I believe it to be true, for they are the sole judges of the application of the law to the particular case. In this sense, theirs is the duty to pass on the law, a most important and often difficult duty, which, when discharged, makes the difference between a general and special verdict, which, although they may return, they are not bound to return. They are a co-ordinate branch of the tribunal, having their appropriate powers, and rights, and duties, with the proper discharge and exercise of which no court can, without usurpation, interpose; but it is not their province to decide any question of law in criminal any more than civil cases, and if they should intentionally fail to apply to the case the law given to them by the court, it would be, in my opioion, as much a violation of duty as if they were knowingly to return a verdict contrary to the evidence.

A strong appeal has been made to the court by one of the defendant's counsel, upon the ground that the exercise of this power by juries is important to the preservation of the rights and liberties of the citizen. If I thought so, I should pause long before I denied its existence. But a good deal of reflection has convinced me that the argument drawn from this quarter is really the other way. As long as the Judges of the United States are obliged to express their opinions publicly, to give their reasons for them when called upon in the usual mode, and to stand responsible for them, not only to public opinion, but to a court of impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice. But, on the other hand, I do consider that this power and corresponding duty of the court authoritatively to declare the law is one of the highest safeguards of the citizen. The final cause, indeed the sole end of courts of justice, is to enforce the laws uniformly and impartially, without respect to persons, or times, or the opinions of men. To enforce popular laws, to apply the laws to unpopular causes, is easy. When an unpopular cause is a just cause—when a law, unpopular in some locality, is to be enforced there—then comes the strain upon the administration of justice; and few unprejudiced men

will hesitate as to where that strain would be most firmly borne. I have entered thus at large into this important question, with unaffected reluctance. Having been directly and strongly appealed to, and finding that no judge of any court of the United States had in any published opinion, examined it upon such grounds that I could feel I had a right to repose on his decision, I knew not how to avoid the duty which was thus thrown upon me. My firm conviction is, that under the Constitution of the United States, juries in criminal trials have not the right to decide any question of law, and that, if they render a general verdict, their duty and their oath require them to apply to the facts as they may find them, the law given to them by the court.